A Study on Impact of Current Laws on Parenting and Child Custody
This study is conducted with the support of UNICEF Nepal.
A Study on

IMPACT OF CURRENT LAWS ON PARENTING AND CHILD CUSTODY

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INTRODUCTION

1.1 Background

Children can be defined as the persons who have not completed the age of eighteen years. It is an essential responsibility of family, society and the State to maintain the best interest of children by respecting, preserving and fulfilling the rights of the children. These rights include right to live; right to name, nationality and identity; right against discrimination; right to live and meet with the parents; right to protection; right to participate; right to freedom of expression and information; right to open organization and assemble peacefully; right to privacy; special rights of children with disabilities; right to nutrition and health; right to sports, entertainment and culture and right to education. The United Nation's Convention on the Rights of the Child (CRC), 1989 has recognized family to be the best place for child for their protection, well-being, full development of their personality, enjoying happiness, love and understanding. The Convention mentions that the children have right to know and be cared for by their parents. Similarly, the State is also responsible to ensure the implementation of such rights of children in accordance with the national laws in relation to provide necessary assistance to parents and provide material assistance.

Rights of Children

- Right to live
- Right to name, nationality and identity
- Right against discrimination
- Right to live and meet with the parents
- Right to protection
- Right to participate
- Right to freedom of expression & information
- Right to open organization and assemble peacefully
- Right to privacy
- Special rights of children with disabilities
- Right to nutrition and health
- Right to sports, entertainment and culture
- Right to education

Source: The Act relating to Children, 2018

1. The Act Relating to Children, 2018, Section 2 (j)
assistance and support programs. The Act Relating to Children, 2018 states that every child has the right to obtain proper care, protection, maintenance, love and affection from his/her parents, family members or guardians and that the parents shall have equal responsibility in relation to care, protection and maintenance of their children. In cases where the parents are divorced or living separately due to any other reasons, the financial expenses for such maintenance of their children shall be done by both the parents as per their capacity. Each child shall be entitled to the right to appropriate protection from the State.

Moreover, National Civil Code, 2017 mentions about the child custody and parenting in Chapter 4 “Provisions Relating to Relationship of Parents and Children”, Chapter 5 “Provision Relating to Maternal and Paternal Authority”, Chapter 6 “Provisions Relating to Guardianship”, Chapter 7 “Provisions Relating to Curatorship”, Chapter 8 “Provisions Relating to Adoption” and Chapter 9 “Provisions Relating to Inter Country Adoption”. These provisions mention about who are entitled to take the responsibilities of their children, the duties of the parents or guardians or curator and the rights of children.

The data from Central Bureau of Statistics, Nepal Population Census National Report, 2021 on the state of living arrangement of Nepali children points out that 77.9% of children live with their biological parents. More than 17.1% of children live with their own mother and 1.03% of children live with their own father. Similarly, the census report has also shown that less than 1% of children are living either one of their biological parents, below 3% of children are living with other relatives, 0.03% with employers and less than 1% with others.

### Status of Children by their Living Arrangement

- **77.9%** biological parents
- **17.1%** biological mother
- **1.03%** biological father
- **0.5%** Others
- **3%** other relatives
- **0.03%** employer
- **0.1%** biological mother & step father
- **0.3%** biological father & step father
- **0.1%** not stated

*Source: CBS, Population Census 2021*

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4. The Act Relating to Children, 2018, Section 7  
Children in Nepal Experiencing Violent Discipline

Over 80 per cent of Nepali children, aged between one and 14, experience violent discipline. A significant number of toddlers, more than half, aged between one and two, are disciplined with the use of physical force. Most striking, the vast majority of children experience violence at the hands of those entrusted to take care of them. Almost every child in Nepal experiences some form of violent discipline by their parents, teachers or caregivers. Violent discipline affects children from rich and poor households alike. Psychological aggression accounts for over 70 per cent of children, over 50 per cent of children are subjected to general physical punishment and among them, 14 per cent face the more severe forms of physical punishment. The consequences of these forms of discipline are wide ranging and long term in nature, including: learning disabilities; behavioral disorders; and depression. In some instances, the physical harm inflicted on children have led tragically to death.\(^6\)

Nepal has a significant tendency of violence against children. With the global pandemic COVID-19, children have become one of the prominent targets for tremendous amount of mental and physical abuse within their household. Reports of domestic violence have gone up with 15% of households interviewed witnessing violence against women and children, including intimations, threats, insult and yelling.\(^7\) Although the State has propounded laws with the aim to protect the children, the evidence shows the contrasting impact on children. Therefore, this study juxtaposes the national laws against international laws relating to parenting and child custody to show whether national laws are adequate to confront the issues relating to children.

**1.2 Objectives of the Study**

This study is carried out with an objective to find out the followings:

1. The international standards in the area of parenting and child custody.
2. Identify the current national legal provisions on parenting and child custody.
3. Make a comparative analysis of international standards and foreign laws with the Nepalese legal provisions.

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1.3 Scope and Methodology

The scope of this study is limited to the Nepalese laws and comparisons are made between international legal standards practiced in United States of America, United Kingdom, Australia, India and South Africa in regards to parenting and child custody. The study relies both the primary and secondary sources of data. Various searches were made using the internet and books. Likewise systematic searches were made using the websites of UNICEF, Nepal Law Commission, Central Bureau of Statistics, United Nations as well as internet-based search engines. Likewise, information and documents were provided by the key informants during the interviews and discussions.

A total of 11 Key Informants Interviews and 2 Focus Group Discussions were made in Dhangadi Sub-metropolitan City, Kailali, Sudurpaschim Province and Butwal Sub-metropolitan City, Rupandehi, Lumbini Province regarding the legal provisions on parenting and child custody in Nepal. The participants of the Focus Group Discussions were lawyers, officers of Judicial Committee, representatives of Department of Women and Children, child rights organizations and foster parents. Since the main purpose of this research was to figure out the international standards in the areas of parenting and child custody, identify the current national legal provisions and make a comparative analysis of international standards with Nepalese legal provisions, the FGD and KII were conducted to identify an impact of the national legal provisions with practicalities in consideration. The information gathered from KII and FGD are used as a basis to provide recommendations on legal reforms to be made that are most likely to be beneficial in the laws of parenting and child custody. The interviews were conducted using a standard interview script that included the following subject matters;

a. National Laws regarding child custody and parenting
b. Implementation and effectiveness of national laws
c. Challenges faced in implementation of national laws
d. Opinions of parents about existing national laws
e. Situation of cases of child custody and parenting related issues
f. Compatibility of national laws with international standards and child right Conventions

The participants of Key Informant Interviews were;
Sudurpaschim Province

<table>
<thead>
<tr>
<th>Informants</th>
<th>Office/ Location</th>
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<tbody>
<tr>
<td>Chief District Officer</td>
<td>District Administration Office, Kailali</td>
</tr>
<tr>
<td>Legal Officer</td>
<td>Ministry of Social Development, Sudurpaschim Province</td>
</tr>
<tr>
<td>Deputy Mayor</td>
<td>Dhangadi Sub-metropolitan City</td>
</tr>
<tr>
<td>Child Welfare Officer</td>
<td>Dhangadi Sub-metropolitan City</td>
</tr>
<tr>
<td>Department Head</td>
<td>Department of Women and Children, Kailari Rural Municipality</td>
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<tr>
<td>Mediator</td>
<td>Ward Level</td>
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Lumbini Province

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<th>Informants</th>
<th>Office/ Location</th>
</tr>
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<tbody>
<tr>
<td>Chief District Officer</td>
<td>District Administration Office, Bhairahawa, Rupandehi</td>
</tr>
<tr>
<td>Chief Child and Women Development Officer</td>
<td>Ministry of Women, Children and Senior Citizen, Lumbini Province</td>
</tr>
<tr>
<td>Deputy Mayor, Head of Judicial Committee</td>
<td>Butwal Sub-metropolitan City</td>
</tr>
<tr>
<td>Child Welfare Officer</td>
<td>Tilottama Municipality</td>
</tr>
<tr>
<td>Mediator</td>
<td>Ward Level, Butwal Sub-metropolitan City-11</td>
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The Lumbini Province and Sudurpaschim Province were selected for pilot sampling purpose in order to carry out the FGD and KII. These visits could only offer a snapshot of the lives of children in alternative care, and the efforts towards child care reforms that are underway in Nepal. However, significant efforts were made to meet with the most relevant stakeholders during the discussion and interviews, and each informant provided detailed and rich insights into the parenting and child custody context and current issues.

A normative approach has been used for the comparative study of Nepalese laws on parenting and child custody in line with the international standards of selected countries.
2.1 Universal Declaration of Human Rights (UDHR), 1948

The Universal Declaration of Human Rights is a landmark document which pronounces the basic fundamental rights and freedom for all. The General Assembly of the United Nations adopted the Declaration on 10th December, 1948 as a common standard of achievements for all peoples and all nations. UDHR has mentioned in its provision regarding right of child to live in a healthy environment where the family or the guardians are required to fulfil his/her necessities including food, clothing, housing and medical care, education and other necessary social services. The provision also specifically mentions about those children who are born out of wedlock and their rights to be protected similar to the ones born within wedlock by their family or guardians.

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<tr>
<th>Article</th>
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<tr>
<td>25</td>
<td>Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.</td>
</tr>
<tr>
<td>26</td>
<td>Parents have a prior right to choose the kind of education that shall be given to their children.</td>
</tr>
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</table>

2.2 Declaration of the Rights of the Child, 1959

The United Nations General Assembly adopted the Declaration of the Rights of the Child in 1959, the first major international consensus on the fundamental principles of children’s rights. The Declaration mentioned about special right of children with disability. The noteworthy provision mentioned in the Declaration is that the children will be one of the first to receive the relief in all circumstances. The declaration also recognized children’s rights to the means for material, moral

and spiritual development, freedom from economic exploitation, special help when starved, sick and disabled or orphaned and an upbringing that inculcates a sense of social responsibility. The Preamble of the Declaration highlights children’s need for special care and protection including appropriate legal protection before and after birth.

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<th>Article</th>
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<tr>
<td>2</td>
<td>Right to special protection for the child’s physical, mental and social development.</td>
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<td>4</td>
<td>Right to adequate nutrition, housing and medical services.</td>
</tr>
<tr>
<td>5</td>
<td>Right to special education and treatment when a child is physically or mentally handicapped.</td>
</tr>
<tr>
<td>6</td>
<td>Right to understanding and love by parents and society.</td>
</tr>
<tr>
<td>8</td>
<td>Right to be among the first to receive relief in all circumstances.</td>
</tr>
<tr>
<td>9</td>
<td>Right to protection against all forms of neglect, cruelty and exploitation.</td>
</tr>
<tr>
<td>10</td>
<td>Right to be brought up in a spirit of understanding, tolerance, friendship among peoples, and universal brotherhood.</td>
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### 2.3 Convention on Right of Child, 1989

The Convention on the Rights of the Child (CRC) is the first legally binding international instrument which incorporate the full range of human right including civil, cultural, economic, political and social rights. It was adopted and opened for signature on 20th November, 1989 and came into force since in 2nd September, 1990. The Convention has defined a child as a human being under the age of eighteen unless the age of majority is attained earlier under a State’s own domestic legislation.

Nepal ratified the CRC in 1990 without any reservation which has obligated Nepal to make the domestic laws regarding welfare of the children. The table shows various rights of children concerning parenting and of custody of child provisioned in the Convention on the Rights of the Child (CRC);

<table>
<thead>
<tr>
<th>Article</th>
<th>Provision</th>
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<tr>
<td>2</td>
<td>States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.</td>
</tr>
<tr>
<td>7</td>
<td>The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, and the right to know and be cared for by his or her parents.</td>
</tr>
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States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

18 States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

20 A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

States Parties shall in accordance with their national laws ensure alternative care for such a child.

Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.

21 States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.
States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.

States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

2.4 World Summit for Children, 1990

The World Summit for Children was held on 29th to 30th September, 1990 in New York, United States. The head of state and government representatives of various countries took part in this summit which exclusively covered the area of child rights like child survival, protection and development. The World Summit adopted a Declaration on the Survival, Protection and Development of Children and a Plan of Action for implementing the Declaration in the 1990s. One of the areas the declaration covered was role of family in the protection and development of child. Under the role of family, it states;

The family has the primary responsibility for the nurturing and protection of children from infancy to adolescence. Introduction of children to the culture, values and norms of their society begins in the family. For the full and harmonious development of their personality, children should grow up in a family environment, in an atmosphere of happiness, love and understanding. Accordingly, all institutions of society should respect and support the efforts of parents and other care-givers to nurture and care for children in a family environment.

Every effort should be made to prevent the separation of children from their families. Whenever children are separated from their family owing to force majeure or in their own best interest, arrangements should be made for appropriate alternative family care or institutional placement, due regard being paid to the desirability of continuity in a child's upbringing in his or her own cultural milieu. Extended families, relatives and community institutions should be given support to help to meet the special needs of orphaned, displaced and abandoned children. Efforts must be made to ensure that no child is treated as an outcast from the society.

2.5 Convention on the Rights of the Child (CRC) Concluding comments for Nepal

The Committee on Rights of child commented on the third to fifth periodic reports of Nepal at its 2100th and 2111th meetings which was held on 19 and 20 May 2016. It has recommended that the State party expeditiously amend its definition of the child to ensure that all of its laws comply with the Convention and ensure that all children under the age of 18 benefit from full protection under the Convention.12

The Committee on Rights of Child also recommends the state to support and facilitate family-based care for children, wherever possible, including for children in single-parent families, and establish a system of foster care for children who cannot stay with their families, with a view to reducing the institutionalization of children. When alternative care cannot be avoided, ensure adequate safeguards and clear criteria, based on the needs as well as best interests of the child, for determining whether a child should be placed in such care. Recommendation also includes to ensure periodic review of the placement of children in foster care and institutions, and monitor the quality of care therein, including by providing accessible channels for reporting, monitoring and remedying maltreatment of children as well as to ensure that adequate human, technical and financial resources are allocated to alternative care centers and relevant child protection services, in order to facilitate the rehabilitation and social reintegration of children resident therein to the greatest extent possible.13

The Committee urges the State party to expeditiously take measures to increase its budgetary allocations to its multi-sectoral nutrition plan and ensure equitable and non-discriminatory distribution of food pursuant to this plan, paying particular attention to children in vulnerable situations, including those of Dalit backgrounds, minorities and those living in rural areas. The Committee also recommends that the severely earthquake-affected districts of Dhading, Dolakha, Gorkha, Nuwakot, Rasuwa and Sindhupalchok be prioritized. The State party is also encouraged to seek international assistance in that regard.14

Reiterating its previous recommendation, the committee recommends to establish a social security policy, along with a clear and coherent family policy, as well as effective strategies for using social safety net benefits to further children’s rights and provide adequate financial resources to the social security system.15

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This study is focused and limited to the foreign legal provisions regarding parental rights and custody rights of India, United States of America (USA), United Kingdom (UK), Australia and South Africa.

### 3.1 India

Welfare of child includes, ethical upbringing of the child, safe-keeping of the child, access to a good education and economic well-being of the guardian. After a marriage breaks down or ends up in separation of spouses, the person who gets affected the most is the children who are born out of the marriage. Thus, while keeping in mind the right of parents to the custody of a child, the Indian Law, holds the child's welfare as the most crucial factor of consideration while deciding upon who gets the custody of a minor child.  

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The Guardian and Ward Act, 1890 holds the welfare of the child as the paramount importance. The courts in India make sure that the child gets the attention and affection of both the parents. The court gives the other parent visitation rights of which the conditions are determined by the court.

Custody of children are provided as physical custody, joint custody and legal custody. Physical custody implies that the minor will be under the guardianship of that parent with periodical interaction and visitation with the other parent. Joint custody means that both of the parents will take care of the child turn by turn keeping the child in their custody. Legal custody means that the parents are granted legal custody and they can make every decision for the child, such as education, medical treatment, etc.

Under Hindu law and as well as Secular law, the custody of the child under the age of five is usually awarded to the mother. In most of the cases fathers gets the custody of the older boys and mother of the older girls. Moreover, child's interest is the main criteria and the choice of the child above the age of nine is considered by the court. Wherein a mother if found to ill-treat and neglect the child is not given custody. In cases where a child's mother has a weaker financial situation but the father has remarried and has a new wife and children, the child's mother cannot be discarded as the guardian simply because she earns less than the father. In such a case, the father of the child has to provide for the child's maintenance.  

Under Section 10(3) of the Family Courts Act, the Court must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child. While determining the best interests of the child the primary considerations are:

a. Ensuring benefit to the child of having spent equal or substantial or significant time to develop a meaningful relationship with both the child’s parents and to ensure an implement of overnight access so that the child gets love and affection of not only both the parents but also of grandparents, uncles, aunties, cousins etc. thereby ensuring that the family heritage is maintained; and

b. Ensuring the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The laws under Hindu Law namely, Section 26 of Hindu Marriage Act 1955, Section 38 of Special Marriage Act 1954 and Hindu Minority and Guardianship Act 1956, mentions the rules and regulations set for seeking child custody. Section 26 of Hindu Marriage Act 1955 deals with the maintenance, caring and education of children and only when both the parents follow Hindu religion, the custody of child gets validated. Under this act, the court can pass orders, judgements, amendments, etc. at any point of time in respect to the maintenance of the child and dispose of the pending decree within the 60 days from the date of service of notice.

Section 38 of Special Marriage Act 1954 validates the custody of the child in case both the parents belong to different religions or have undertaken a court marriage. Under this act, the court can pass orders, judgements, amendments, etc. at any point of time in respect to the maintenance of the child and dispose of the pending decree within the 60 days from the date of service of notice.
Hindu Minority and Guardianship Act 1956 allows only biological parents to seek the custody of their minor child provided that he/she is a Hindu.

Under Islamic law, only the mother has the right to seek child custody as per Right of Hizanat until she is not found guilty of any misconduct. The custody of a child under Islamic law is with the mother until the child has attained the age of seven years for a boy and until she has attained the age of puberty or majority for a girl. The custody of the child remains with the father until the boy has attained the age of seven years and the girl has attained the age of majority or puberty as because the father is considered to be the natural guardian.

The Christian religion needs to follow the laws and reforms set under Section 41 of Divorce Act, 1869 for the child’s custody. Also, in addition to this law, Section 42 and 43 of the same holds the right to decide upon the child’s custody after the judgment with respect to separation has been passed. The child is given to a person who serves them better and is proven to be a better guardian for the child and the claim can even be denied if the court finds that both the parents are incapable of giving a proper atmosphere to the child.

The custody of a child under Parsi Law is dealt with by the provisions of the Guardians and Wards Act, 1890. Its main aim is the welfare of the child and can put anything to stake to make sure that the welfare of the child is confirmed.

### 3.2 United States of America (USA)

The federal laws and state laws determine parent rights and custody rights in United States of America. The States typically determine most laws related to parenting or custodial rights. The rights of a parent include: physical custody, legal custody, decisions about medical treatment, right to enter into a contract, right to pass property to a child, and right to child visitation.

Physical custody is the right a parent has to have their child live with them. In cases of divorce, this right is determined by a court of law. Legal custody involves the day-to-day decision a parent can make about their child’s wellbeing and upbringing. This includes, but is not limited to, choices about religion, education, and philosophical upbringing. Decisions about medical treatment is a parental right that ensures a parent has the ability to make decisions about their children’s health. A parent’s right to enter into a contract is important when a child has to enter into a contract, but they are not yet legally able to do so as a minor. For example, to attend an organized activity where there is a risk of injury, a contract will have to be signed by the parent of a minor. A right to pass property to a child refers to when a parent can pass property to their child via a legal inheritance, such as a will, or as a gift. Finally, a parent has the right to visit their child unless deemed otherwise by a court of law.

Parents have legal responsibilities to provide for their children in the United States. In most states, these responsibilities will end when their child turns eighteen years old and becomes a legal adult. Failure to provide basic needs for their children may result in legal penalties.

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physical needs are expected to be met by their parents. The parents are also expected to protect their children from harm or abuse. Parents must fulfil their child's financial needs until they cross the age of eighteen years old, or in some states until they graduate from high school.

There are some circumstances in which parental rights can be terminated, and though these circumstances vary from State to State, they typically include: severe or chronic abuse or neglect of the child, sexual abuse, abuse of other children in the household, abandonment, long term mental illnes of the parents, long term drug or alcohol induce incapacity of the parent, failure to support the child, failure to maintain contact with their child, some felonies that can lead to termination, an act of crime against the child or other family members, or long term incarceration coupled with long term foster care. If a child is removed from their parent's home, the parents still have certain responsibilities towards the child, this varies State by State.

In most schools in the United States, attendance is mandatory and failure to attend a sufficient amount of school can result in legal fines or penalties for the child's parent. Typically, when students fail to attend school, there are non-legal resources the school will take to reach out to the parents (such as meetings and outreach to local support agencies), but repeat offenses can result in local police authorities being called and legal action taken. Though this varies State by State, typically parents could be charged with a civil violation and their punishments can include paying a fine, taking parenting classes, attending counseling, or more.

Child abuse by parents is intolerable in United States. If a parent does so, it is often considered child abuse. Each State has its own child protection laws to prevent child abuse, which can include children being removed from a parent's home or the termination of parental rights. In cases of adoption, when a parent adopts a child, they have all parents' rights and responsibilities that a biological parent is granted. The only exception to this is in cases of open adoptions. In this circumstance, both biological and adoptive parents can enter into agreements that define the rights and responsibilities towards the child.

Child custody is the legal term used in most states (Texas refers to it as “managing conservatorship”) to identify the legal relationship between a parent or guardian and a minor child. There are two types of child custody:

- **Physical custody**: A grant of physical custody gives a parent or guardian the right to provide for and attend to the needs of the child in their home. Physical custody is more commonly awarded to one parent, with the other parent enjoying some level of visitation with the minor child. The trend over the past couple of decades, however, has been for courts to award parents some level of joint physical custody. In those situations, the intent is that the minor children spend approximately equal amounts of time in each parent's home.

- **Legal custody**: Legal custody refers to the right of a parent or guardian to participate in important decisions regarding the child's upbringing and development, including the choice of schools, religious practices, medical care, discipline, and extracurricular activities. The

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22. Ibid.
23. Ibid.
24. Ibid.
general preference in family law courts across the country is to encourage both parents to be regularly involved and engaged in the life of the child. Accordingly, most courts recommend joint legal custody.\(^{25}\)

Texas uses the term conservatorship to describe the rights, responsibilities and duties of parents in raising their children. This term also describes what most people think of as “custody.” Conservatorship or custody does not define the amount of time each parent will have with the child. It only addresses the legal rights and duties of the parents. In Texas there are two kinds of conservatorship: (1) **sole managing conservatorship**, and (2) **joint managing conservatorship**.

The presumption is that joint managing conservatorship is in the best interest of the child. However, the court will consider many factors in deciding which type of conservatorship is appropriate. The “best interest of the child” is always the court’s primary concern. The court is not allowed to discriminate against a parent because of sex or marital status. All factors surrounding the child’s life may be relevant to determine what is in the child’s best interest, including if there has been a history of violence between the parents or violence against the child. If the court finds credible evidence of a history or pattern of family violence, the court is not allowed to appoint the parent who committed the violence as a joint managing conservator, nor should the court appoint that parent as a sole managing conservator. Evidence of family violence may include testimony by the parent who was the victim, witnesses to the violence, pictures, doctors or hospital records, or counseling records or the issuance of a protective order against a parent.\(^{26}\)

Most laws regulating child custody is state law, and it is for the most part the same across the country, with the exception of Massachusetts and Puerto Rico. All other states have adopted provisions of the Uniform Child Custody Jurisdiction and Enforcement Act, a model code drafted in 1997.\(^{27}\)

United States of America is the one out of two countries in the world that has not ratified the Convention on the Rights of the Child. Generally speaking, American children’s rights are adequately protected, but considerable problems still exist regarding health care, child abuse, juvenile law, etc.\(^{28}\) The basic rights of Children are generally embodied by the Constitution, as enshrined by the Fourteenth Amendment to the United States Constitution. The Supreme Court of the United States ruled in the case of *Tinker v. Des Moines Independent Community School District* (1969) that students in school have Constitutional rights.\(^{29}\)

There are around 10,000 children in the United States who are being held in adult prisons and jails,\(^{30}\) violating Article 37 of Convention on the Right of Child, 1989, which states that children should not be kept in prisons with adults. This also includes violation of Article 34, which states that Governments should protect children from all forms of sexual exploitation and abuse. Children are five times more likely to experience sexual assault in adult prisons than juvenile detention centers. Children are 36 times more likely to commit suicide after being held in adult

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27. Ibid
facilities than those who have been held in juvenile facilities. This violates Article 27, which states that children have the right to a standard of living that is good enough to meet their physical and mental needs.

### 3.3 United Kingdom (UK)

Child is defined as anyone who has not yet reached their 18th birthday. Child protection guidance points out that even if a child has reached 16 years of age, if they are living independently, in further education, a member of the armed forces, in hospital or in custody in the secured estate are still legally children and should be given the same protection and entitlements as any other child.

In Northern Ireland the Children (Northern Ireland) Order 1995 defines a 'child' as a person under the age of 18.

In Scotland, the definition of a child varies in different legal contexts, but statutory guidance which supports the Children and Young People (Scotland) Act 2014, includes all children and young people up to the age of 18.

In Wales, Section 3 of the Social Services and Well-being (Wales) Act 2014 states that a child is a person who is aged under 18.

In the United Kingdom, parents' rights differ on the basis of a parent's gender. A mother automatically has parental responsibility for her child from the moment they are born. A father typically has parental rights if he meets one of the two conditions: he is married to the child's mother or he is listed on the birth certificate. However, the latter can also depend on if he was listed after a certain date, this is something that depends on the specific area within the UK. Also, if a parent is not automatically given parental responsibility, they can apply for it through the government of the United Kingdom.

Parental Responsibility is provided to both the mother and father from who's the child is born. Parental responsibility also forms if the couple adopts a child. If they later divorce, they are typically allowed to keep parental responsibility in usual cases. In the case of parents who are unmarried, an unmarried father can get parental responsibility for his child in one of three possible ways: jointly registering the birth of the child with the mother, establishing a parental responsibility agreement with the mother, or establishing a parental responsibility order from Court. If a child is born overseas and comes to live in the UK, parental responsibility depends on the UK country they're now living in.

The same sex partners, if they are civil partners during the treatment, for example, donor insemination or fertility treatment, then such partners are considered to have parental responsibility. However, if they are not civil partners, the second parent can get parental responsibility by either: applying for parental responsibility if a parental agreement was made or

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31. Ibid
32. Department for Education, 2018a
36. Government of United Kingdom, Parental Rights and Responsibilities, https://www.gov.uk/parental-rights-responsibilities/who-has-parental-responsibility#:~:text=A%20mother%20automatically%20has%20parental,the%20child%20was%20born%20in
37. Ibid
by becoming a civil partner of the other parent and making a parental responsibility agreement or jointly registering the birth.\textsuperscript{38}

Most child residency court cases end amicably with either agreed residency or joint residency as the outcome. Access and maintenance payments from the non-resident parent are also taken into consideration. In disputed cases each parent is individually assessed before a decision on which parent is given custody of the child, or children, is made.\textsuperscript{39}

Child custody law determines who should be responsible for the care and charge of a child, after divorce or separation. Parents mostly prefer for joint custody which enables the child to spend an equal amount of time with each parent. It allows both parents to participate in any decision making which may affect the child. However, if parents are unable to decide amicably on what living arrangement is best for their child, the Courts will decide on their behalf.\textsuperscript{40}

Separated parents have the opportunity to first decide the degree of access they will each have with their child, and if they can come to an agreement, the Courts will generally accept custody arrangements that parents submit as part of their separation agreement. To ensure these arrangements serve the child’s interests the Courts will review the plan. The role that grandparents, step-parents and other influential adults play in the child’s life may also be taken into consideration by the courts.\textsuperscript{41}

A non-resident parent will be expected to financially contribute towards the expense of raising their child. If a non-resident parent is also able to provide physical and emotional support, by sharing parenting responsibilities, the cost of maintenance they will be expected to pay will be reduced accordingly.

\subsection*{3.4 Australia}

Family Law Act was introduced on 13 December, 1973. The Act deals with children born or adopted within a marriage as well as ex-nuptial children. The 2006 amendments changed the way matters involving children are dealt with. These included:

- a progression towards compulsory mediation (before Court proceedings can be filed, in an effort to ensure matters do not reach litigation),
- greater examination of issues involving family violence, child abuse or neglect,
- more importance being placed on a child’s family and social connections, and
- a presumption that parents have equal parental responsibility - NOT equal parenting time.
- encouraging both parents to remain meaningfully involved in their children’s lives following separation, provided there is no risk of violence or abuse.

\textsuperscript{38} Ibid
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid.
Children’s matters are determined on the basis of who the child will 'live with' and 'spend time with'. The concept of custody gave much wider decision-making powers to the parent with whom children lived, than either the concept of 'residence' or 'live with'. Since 1995 both parents legally have the same (but not shared) parental responsibility for children, regardless of where and with whom the children live, until and unless a court makes a different order. The Family Law Act does not specify that the person with whom the child is to reside or spend time with must necessarily be their natural parent, and provision is made for anyone 'concerned with the care, welfare or development of the child' to apply to the Court for orders. In all proceedings, the paramount consideration is the 'best interests of the child', and the Court will not make an order that is contrary to these interests.

"If the parents would like to create a legal obligation to jointly make major long-term decisions relating to the child’s welfare and upbringing, they should make or request a Court order for Equal Shared Parental Responsibility'. 'Major long-term issues' includes things like where a child will go to school, major health decisions, and religious observance. Equal shared parental responsibility is not the same as equal time. A Court may decide it is in the best interests of the child to remove parental responsibility from one or both parents. A Court can also decide to assign parental responsibility to a legal guardian.

"The Court generally has jurisdiction to make orders for the care and welfare of children in all States and territories except Western Australia (where the Family Court of Western Australia has jurisdiction). If your child is in care under a child welfare law of a State or territory, the Court cannot make a parenting order about them, except with the consent of the relevant child welfare authority. This applies even if your child comes into care under a child welfare law after you already have proceedings in the Court about your child.

3.5 South Africa

According to the Children's Act, 2005 “parents have a responsibility to take care of and protect their children, keep contact and maintain relations, act as a guardian to minors, and pay child maintenance.

Natural guardians have a legal duty to support their children and must use their money to support the children. Legal guardians do not have to use their own money to support the children. A person who is not the parent of the child can also become a child’s guardian by a decision of the High Court acting as the 'supreme guardian' of all minors, or in a will that was written by a sole parent or sole caregiver who passed away. The person named in the will must be a fit and proper person. A caregiver is a third-party individual who can be other than a child’s mother or father to take care of the child and must provide financial support for the child and

A caregiver who takes care of a child occasionally or for a period of time, may not have any parental responsibilities over the child but he or she should still safeguard the child’s health, well-being and development. The caregiver should also protect the child from maltreatment, abuse, neglect, filth, discrimination, exploitation and any other physical, emotional or mental harm.

The Children’s Act states that the parent/s must take care of their child, maintain contact with the child, be a guardian to the child, and make sure that the child has financial support. Both parents must provide for the child’s needs. Parents or guardians are also expected to: look after the property of a child and give or refuse consent if the child wants to sell property like a house, act for the child when doing anything official like entering into a contract or when the child needs to go to the Court, say yes or no if a child asks for permission to: get married, be adopted, leave South Africa or get a passport.

The High Court is the only court that can give someone permission to become a guardian. The divorce court and the children’s court can give a person permission to take care of a child or just for visiting a child. The High Court is the supreme Guardian of all children. When deciding on which course of action to take, the court will consider one or more of the following: what would be in the child’s best interest; the relationship between the child and parent whose rights and duties could be affected; the commitment the parent has shown towards their child; any other factor the court needs to take into account. The person who is named as a guardian in a will can only become a guardian after the death of the parent and if he or she accepts the new responsibility. Both parents have equal guardianship over children that have been born during the marriage. Married biological mothers and fathers have full guardianship and have full financial support and maintenance responsibilities, care, and contact for the child. Divorced parents, unmarried biological mothers, and adoptive parents also have the same rights and responsibilities for the child. The mother of a child has ‘full parental responsibilities and rights’ for that child even if she is not married to the father. Unmarried biological fathers have a responsibility to financially support the child and care for the child, and a court can grant them full guardianship. When a biological father is not married to the mother, he loses his parental responsibilities and rights but he must still pay half of the maintenance for his child. Some unmarried fathers want to have a relationship with their child and the law says these fathers can claim some rights but they need to prove some things first. A biological father must prove that he: Was living with the child’s mother in a serious, long-term relationship at the time of the child’s birth, wants to claim paternity of the child, chooses to pay customary law damages, contributes to the child’s upbringing, or contributes or tries to contribute to the maintenance of the child.

An unwed dad can obtain parental rights if he was living with his child’s mother in a serious, long-term relationship when his child was born, claims paternity, contributes to his child’s upbringing, pays (or attempts to pay) child maintenance or damages in terms of customary laws. Other rights and responsibilities, such as care and guardianship, can only be obtained by applying to the Children’s Court or High Court, respectively. Even though a person has care and custody of a child, he or she cannot ignore a court order and cannot stop someone who has parental responsibilities and rights from exercising his or her rights to the child. If the person who has custody prevents someone from exercising his or her rights, then that person could be fined or even sent to prison for nearly a year.

47. Children’s Act, 2005, South Africa
Where a couple, in a marriage, decides to have a child through artificial insemination the child that is born is seen as being the couple’s biological child. This is the situation even if the child of a married couple was conceived with the gamete or gametes of another person, outside of the marriage. The Act insists that both parents must agree to the artificial fertilization. Additionally, The Act says that the child or the child’s guardian can have access to medical information about the genetic parents even though the identity of the genetic parents can be withheld.\textsuperscript{50}

The Act has some very strict requirements that need to be followed: there must be a legal agreement that is confirmed by the Court. At least one of the parents wanting the baby must have contributed either an ovum or sperm. This is to make sure the child born has a biological relationship with the parent. There must be a medical reason why the future parents cannot have a child of their own. The agreement between the surrogate mother and the future parent/s is not based on financial gain. The parents can offer the baby a good, stable home. The surrogate mother will not have any relationship with the child after its birth, unless there is an agreement.\textsuperscript{51}　

\textsuperscript{50} Children’s Act, 2005 South Africa
\textsuperscript{51} Children’s Act, 2005 South Africa
4.1 Constitution of Nepal

The Constitution has mentioned the Right of Child as a fundamental right.\textsuperscript{52} It focuses on development of a child and their right mentioning the right of a child to overall personality development from the families and the State, the interpretation of which not just talks about the responsibility of the family for the development of a child but also the responsibility of the State which ultimately can be referred to the parenting and custody-related rules and policies.\textsuperscript{53} Similarly, it speaks about the right to elementary child development which can be hindered in cases were the parenting and custody of the child is not in proper hands and under proper supervision.\textsuperscript{54} Likewise, it provides that no child shall be subjected to physical, mental or any other form of torture in home, school or other place and situation whatsoever, putting an emphasis on the importance of mental health as well.\textsuperscript{55} These provisions try to protect the development of a children from every possible way and while interpreting these articles it is always important to consider the toll taken by wrong parenting and child custody on their overall development.

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<tr>
<th>Article</th>
<th>Right</th>
<th>Provisions</th>
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<tbody>
<tr>
<td>39</td>
<td>Rights of the Child</td>
<td>1. Every child shall have the right to name and birth registration along with his or her identity.</td>
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<td>2. Every child shall have the right to education, health, maintenance, proper care, sports, entertainment and overall personality development from the families and the State.</td>
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<td>3. Every child shall have the right to elementary child development and child participation.</td>
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\textsuperscript{52} Article 39, The Constitution of Nepal
\textsuperscript{53} Article 39(2), The Constitution of Nepal
\textsuperscript{54} Article 39(3), The Constitution of Nepal
\textsuperscript{55} Article 39(7), The Constitution of Nepal
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<th>Article</th>
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<td>4.</td>
<td>No child shall be employed to work in any factory, mine or engaged in similar other hazardous work.</td>
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<td>5.</td>
<td>No child shall be subjected to child marriage, transported illegally, abducted/kidnapped or taken in hostage.</td>
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<td>6.</td>
<td>No child shall be recruited or used in army, police or any armed group, or be subjected, in the name of cultural or religious traditions, to abuse, 26 exclusion or physical, mental, sexual or other form of exploitation or improper use by any means or in any manner.</td>
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<td>7.</td>
<td>No child shall be subjected to physical, mental or any other form of torture in home, school or other place and situation whatsoever.</td>
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<td>8.</td>
<td>Every child shall have the right to juvenile friendly justice.</td>
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<td>9.</td>
<td>The child who is helpless, orphan, with disabilities, conflict victim, displaced or vulnerable shall have the right to special protection and facilities from the State.</td>
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<td>10.</td>
<td>Any act contrary to in clauses (4), (5), (6) and (7) shall be punishable by law, and a child who is the victim of such act shall have the right to obtain compensation from the perpetrator, in accordance with law.</td>
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The Constitution under policies of State has also included policies relating to social justice and inclusion which has given priority to maintenance of children and care of families along with consideration of best interest of children.\(^{56}\)

### 4.2 The Act relating to Children, 2018

This Act contours the rights relating to children in Nepal. It clearly includes the right of child to live with their parents and to meet them stating that no child shall be split or separated from his or her father or mother without his or her will.\(^{57}\) However, the Juvenile Court may issue an order to separate any child from his or her father or mother and entrust him or her to any guardian's custody for the best interests of the child if necessary. The Act has provisioned several arrangements regarding parenting and child custody.

While the overall Section 3 talks about the right of a child to live with dignity, it can be seen how the Sub-section 2 calls on the responsibility of the three tiers of government to protect children and prevent any sort of damages and risks that might occur to them in their development journey. Understanding that a family is the first environment that a child is exposed to, it is essential for them to be under the parenting and custody of people who do not hinder any possible development of a child.

The Act supports the upbringing of children in most favorable way as it not only restricts children to be separated from their parents but also provides possible grounds for them to meet their biological parents even after being separated from biological parents and living under the

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56. Article 51 (J) (4), (5), The Constitution of Nepal
57. Section 6, The Act relating to Children, 2018
custody of a guardian as per the decision of a Juvenile Court.\textsuperscript{58} Besides, this Section is flexible in case of best interest of children also because it prohibits any such meetings between the child and the biological parents if such meetings compromise the child's interest in any manner. Sub-sections 1, 3 and 5 of Section 7 talks about the emotional protection as well as prevention from any physical and mental harassment to a child by the parents or the guardian who are subjected to their protection. Besides this, Sub-section 2 also mentions about the economic support that a child ought to receive from their parents in cases where the parents are living separately. This ensures that a child is not exposed to any sort of physical, emotional or economic negligence by any of their caretaker, either biological or legal.

The Act provisions about the right to privacy of children regarding the subject of his/her body, residence, property, document, data, correspondence and character. Such details shall be kept confidential by the Juvenile Court, police office, guardian, caretaker or any other body.\textsuperscript{59} Likewise, it explains the responsibility of every child right related institution to keep the best interest of children in mind before taking any initiatives for them. It also demands that the determination of caretaker of a child during the separation of their parents should also be carried out considering what best interest that would serve to the particular child. Besides it demands for proper physical structures in social institutions that serves them so that the child can thrive.\textsuperscript{60}

The responsibility for physical, mental and overall maintenance including a child's education, treatment, personal development and the emotional support has been attributed to the parents as well as the guardian.\textsuperscript{61} It also restricts the engagement of children in any sort of labor activities that might hinder in their development and prohibits them to be left alone by any of the caretaker. The responsibility of development as well as the protection of children against any risks are credited not only to the parents but also to the guardian of a child.

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<th>Section</th>
<th>Rights</th>
<th>Provisions</th>
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<tr>
<td>3</td>
<td>Right to live</td>
<td>Every child shall have the right to live with dignity. The Government of Nepal, Province Government and Local Level shall take necessary measures required for preventive and security service including prevention of possible accidents, minimization of risks that may occur on the children, in order to protect the rights of the child to live and development.</td>
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<tr>
<td>6</td>
<td>Right to live and meet with the parents</td>
<td>No child shall be split or separated from his or her father or mother without his or her will. Notwithstanding anything contained in sub-section (1), the Juvenile Court may issue an order to separate any child from his or her father or mother and entrust him or her to any guardian’s custody for the best interests of the child, if necessary. Provided that the concerned party shall not be deprived of an opportunity to submit his or her explanation before issuing such an order. Except for the condition where the Juvenile Court has made a restriction stating that it would be not in the interests of a child, the child living separately from the father or mother or both shall have the right to make direct contact or meet with the father or mother regularly.</td>
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\textsuperscript{58} Section 6, The Act relating to Children, 2018
\textsuperscript{59} Section 11, The Act relating to Children, 2018
\textsuperscript{60} Section 16, The Act relating to Children, 2018
\textsuperscript{61} Section 17, The Act relating to Children, 2018
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<td>The person adopting a child shall allow the adopted child to meet, contact and make correspondence with his or her biological parents. Any person or institution responsible for alternate care shall allow the children under their care or guardianship to meet their biological parents or families.</td>
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<td>7</td>
<td>Right to Protection</td>
<td>Every child shall have the right to obtain proper care, protection, maintenance, love and affection from his or her father, mother, other member of family or guardian. The parents shall have equal responsibility in relation to care, protection and maintenance of their children. In cases where the parents are divorced or living separately due to any other reasons, financial expenses for the maintenance of their children shall be borne by both parents according to their capacity. No father, mother, other member of the family or guardian shall abandon or leave the child of their own or under his or her guardianship unattended. Children with disabilities, war victims, displaced, under vulnerable conditions, or living on street shall have the right to special protection as prescribed from the State for their secured future. Every child shall have the right to protection against any type of physical or mental violence and torture, hatred, inhuman treatment, gender or untouchability-based mistreatment, sexual harassment and exploitation that might be caused by his or her father, mother, other family member or guardian, teacher and other person. Every child shall have the right to protection from being exploited economically and shall also be entitled to be protected from any activity which may be harmful to him or her or be obstacle to his or her education or detrimental to his or her health, physical, mental, moral, social development.</td>
</tr>
<tr>
<td>11</td>
<td>Right to privacy</td>
<td>Every child shall have the right to privacy regarding the subject of his or her body, residence, property, document, data, correspondence and character.</td>
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<tr>
<td>16</td>
<td>Priority to be given for the best interests of children</td>
<td>It shall be the responsibility of everyone to instantly help children whose life is in risk</td>
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<td>Section</td>
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| 17      | Responsibility of the family or guardian | Both the father and mother shall have equal responsibility on the child’s care, maintenance and overall development. It shall be the responsibility of every father, mother, other members of the family or guardian to care, maintain and protect, to provide the opportunity for education, treatment, along with personality development of, to provide environment full of love and care and to guide properly for future certainty of the child. Father, mother, other family member or guardian shall provide suitable environment for acquiring education to every child of age to join school by admitting him or her to the school. Father, mother, other member of the family or guardian shall not engage the child on labor which may adversely affect his or her education, health and physical or mental development. Father, mother, other member of the family or guardian shall not leave the child below six years of age alone at home or any other place or send alone elsewhere, without being accompanied by an adult person. |}

4.3 Regulation relating to Children, 2022

The Regulation relating to Children, 2078 was published in the Nepal Gazette on 19th May, 2022. This Regulation was solely made to regulate the conduct mentioned in the Act. Therefore, Regulation Relating to Children, 2022 was prepared and promulgated in order to regulate the conduct mentioned in the Act Relating to Children, 2018. The Regulation Relating to Children, 2022 stands as an important law of the nation in regards to children’s rights.

The Regulation Relating to Children, 2022 states on focusing on alternative care. On the recommendation of the Child Welfare Authority, the Local Child Rights Committee must make arrangement for those children who requires alternative care for their education, health, care, protection and for the best interest of the children. The Section 49(2) of the Act Relating to the Children, 2018 mentions the order of priority for the children to provide them alternative care. Such priority order includes, relative from the side of the father or mother of the child; family or persons willing to provide care to the child; organization that provides foster (family- modelled) care; children’s home.

The Regulation Relating to Children, 2022 mentions that when relative from the side of the father or mother of the child are chosen for the alternative care the child welfare authority must understand the wish of the relatives, their financial condition, family cordiality and family condition. The child welfare authority must make further arrangement of alternative care if such make alternative arrangement as per the wish of children.

62. Rule 53, Regulation relating to Children, 2022
63. Regulations Relating to the Children, 2022 Rule 58 (2), (3)
The second priority order mentions family or person willing to provide care to the child. While choosing such family members, s/he must not have engaged in the domestic violence, crime against children, crimes causing damage to moral turpitude, s/he must be able to take care of the children both physically and mentally, must not have possess any form of transmitted diseases and must not be drug addict.\(^{64}\)

Alternative care must be provided as per the wish of children. If children do not want to get alternative care from their family members, the child welfare authority must make arrangement to for alternative care on organization that provides foster care. If Child Welfare Authority cannot make arrangement to those mentioned in the Section 53(a)(b)(c) then such children must be sent to Children's home.\(^{65}\)

Child Welfare Authority must follow up the condition of those children sent for alternative care on every four months and a report must be prepared and submit to the Local Child Right Committee, Province Child Right Committee, Council and Ministry. If these children lack care, then arrangement as per the Section 49 of the Act must be done for other alternative care.\(^{66}\)

**4.4 National (Muluki) Civil Code, 2017**

National (Muluki) Civil Code, 2017 is an inclusive codification of private law concerning property, family and obligations along with the code of procedures of Nepal. The Code was implemented from 17 August, 2018 replacing the older laws. There are several chapters under Part 3 i.e., of family law which are concerned with parenting, the relationship of parents and children, custody of children, guardianship, curatorship and adoption/ inter-country adoption.

Chapter 4 of the National Civil Code, 2017 deals with the provisions concerning the relationship of parents and children. It acknowledges the responsibility of both the parents to care for their child and provide for maintenance, health care, education, sports and entertainment and other necessary arrangements in accordance to their financial condition and capability.\(^{67}\) The Code not only mentions about the responsibility of a parents who has been entrusted with the legal custody of a child to take care of that child but also puts light on the responsibility of the other parent who does not have the custody but is in a better financial position than the one having custody.\(^{68}\) Such maintenance will be taken care of as per the agreement between parents or as specified by the court.\(^{69}\) In addition, the Code also includes requirement of consent from parents or the guardian in order for a minor of appropriate age to work as a labor.\(^{70}\)

In regards to the custody of a child, the code has provided criteria for which parent will hold the custody of the child after the parents have separated.\(^{71}\) Likewise, a child is provided with the liberty to visit or temporarily stay with other parent who does not have the child’s custody, unless such visit or stay seems to be harmful for the child.\(^{72}\) It further adds that the parent having the custody or the Court shall determine the nature and frequency of those visits. The right to

\(^{64}\) Regulations Relating to the Children, 2022 Rule 58 (5)
\(^{65}\) Regulations Relating to the Children, 2022 Rule 58 (12)
\(^{66}\) Regulations Relating to the Children, 2022 Rule 57
\(^{67}\) National Civil Code, 2017 Section 114
\(^{68}\) Ibid, Section116
\(^{69}\) Ibid.
\(^{70}\) Ibid, Section120
\(^{71}\) Ibid, Section 115
\(^{72}\) Ibid, Section 117
determine the best interest of a child, in case of dispute between the parents, is rested upon the parent having the custody of the child.73

Chapter 5 of National Civil Code, 2017 provides parental authority over their child. Minor children remain within the supervision of their parents obeying their lawful orders74 and that the parents are jointly responsible for rearing their child unless the custody of the child is provided to either one of the parent upon the termination of the marriage or upon them living separately.75 The Code extends the responsibility of parents to look after the physical, mental as well as the social upbringing and requirement of the children.76 Likewise, there should not be discrimination in any manner in the maintenance and upbringing of the children based on gender or any other pretext.77

The parents of a child, who is physically or mentally challenged or is diagnosed with a chronic disease, are entitled to provide special care and maintenance to the child. Based on the financial situation of the parents, they shall also provide special training or education to the child to help them sustain independently in the future.78 The parents can treat their children in ways deemed appropriate by them so as to improve the children's overall behavior. However, the physical and mental wellbeing should always be taken into account while conducting these actions. Such right conferred to the parents is provided to the teacher or the school where the child is admitted for education and upbringing.79

The guardian or curator can also exercise parental authority.80 If a child is living with a guardian or curator given that the parents of the child are unavailable or unable to look after the child, the responsibilities and duties of the parents will be carried out by the guardian or curator with whom the child is living.81

The parental authority of the parents is restricted if they are accused and proved to be guilty of committing actions that exploit the child in a physical and mental manner, engaging the child in sexual profession, exploiting their property right, making them leave family under various religious pretext and engaging them in begging. Under this circumstance, the court shall appoint a guardian to carry the parental authority of the child. However, if the accused parent makes a petition at the court regarding the non-repetition of any such wrongful acts, their parental authority can be reestablished.82 In conditions where the child attains eighteen years of age and is no longer a minor and when the child starts living separately after stating his/her employment,

73. Ibid, Section 121
74. Ibid, Section 124
75. National Civil Code, 2017, Section 125
76. Ibid, Section 126
77. Ibid, Section 127
78. Ibid, Section 128 (2)
79. Ibid, Section 129
80. Ibid, Section 131
81. Ibid.
82. National Civil Code, 2017 Section 132
such the parental authority is deemed to be terminated. However, this is not implied in case of physical and mentally challenged children, unless they are married and lives separately.\textsuperscript{83}

Chapter 6 of National Civil Code, 2017 deals with the provisions relating to the guardianship. It recognizes those as guardian who are appointed to protect the interest and right of people who are incompetent or quasi-competent. Children can be interpreted within both categories. Guardianship are provided to the family members on the basis of the priority order.\textsuperscript{84} Other than the priority order, the code also provides ground for appointing other guardian.\textsuperscript{85} If case where there is more than one member in the priority order, guardian can be selected as per the majority demand or as per the court’s order.\textsuperscript{86} Also, a guardian can be selected by a minor of sound mind who has attained ten years of age,\textsuperscript{87} either parents can be a guardian to a child in a family where the parents no longer share a matrimonial relationship parents\textsuperscript{88} and in case where the person on priority order is unwilling or unable to look after the child, then the person after them on the order will be levied with the responsibility.\textsuperscript{89} Besides these, other people can also be guardian given that the Court identifies them to be so.\textsuperscript{90} If a child is residing at any child welfare organization and has no other guardian, then that organization shall be deemed to be the guardian of the children it is looking after.\textsuperscript{91}

The Court can also appoint a guardian by itself if it receives a petition from the concerned local level authority and concerned stakeholder for such appointment and inform them after the appointment.\textsuperscript{92} The Court needs to be considerate about whether or not the chosen guardian will be able to look after the concerned person and should also obtain the consent of the person to be appointed as a guardian. The Court may also appoint a supervisor upon necessity to monitor the actions of the guardian and also calls upon such supervisor to make report of the acts of the guardian.\textsuperscript{93}

The incompetent and quasi-competent person, a person who has hampered the rights of such person and those who have been imprisoned by the Court for a term of three years or more cannot be a guardian.\textsuperscript{84} However, in the condition of three years imprisonment, those who fall under the priority order under Section 136 are not restricted by this clause to be a guardian.\textsuperscript{85} Besides these, person disqualified by the Court also cannot be eligible to be a guardian.\textsuperscript{94} Regarding the duties of guardian, it shall not be passed on to his/her successor after the death of such guardian.\textsuperscript{87} However, if another guardian is required to be appointed, then the successor shall look after that until a new guardian is appointed.\textsuperscript{98}

\begin{itemize}
\item \textsuperscript{83} Ibid, Section 133
\item \textsuperscript{84} Ibid, Section 136
\item \textsuperscript{85} Ibid Section 136 (2)
\item \textsuperscript{86} Ibid Section 136 (2)(a)
\item \textsuperscript{87} Ibid Section 136 (2)(b)
\item \textsuperscript{88} Ibid Section 136 (2)(c)
\item \textsuperscript{89} Ibid Section 136 (2)(d)
\item \textsuperscript{90} National Civil Code, 2017 Section 137
\item \textsuperscript{91} Ibid, Section 138
\item \textsuperscript{92} Ibid, Section 139
\item \textsuperscript{93} Ibid, Section 140
\item \textsuperscript{94} Ibid, Section 141
\item \textsuperscript{95} Ibid, Section 141(c)
\item \textsuperscript{96} Ibid, Section 141(d)
\item \textsuperscript{97} Ibid, Section 149
\item \textsuperscript{98} Ibid
\end{itemize}
Unless the guardian is a member from the priority order, the guardian who has spent their own money to cover the expenses of the care and maintenance of the person under their guardianship can recover all of their expenses form the property of the incompetent or quasi-competent person.99 If the guardian has caused any sort of loss or damage to the property of the person under their guardianship, then such person can claim the amount so lost from the guardian.100

Chapter 7 of National Civil Code, 2017 deals with the provisions relating to the guardianship which mentions that in case where a minor does not have a guardian as per Chapter 6, any person can be the curator of the minor for the purpose of their maintenance. Any person can appoint such curator for their minor to take care of their maintenance.101 In the case of person of unsound mind, if he/she does not have a guardian as per chapter 6, any person can be the curator of such person for the purpose of their maintenance. If a curator is unavailable or has not been assigned, then the person under whose supervision the person of unsound mind is living will be the curator of that person.102 Where the father of a minor below 10 years of age is unavailable or unable to take care of the child, the mother of such minor, regardless of concluding another marriage, will be the curator.103 In case a person does not have a guardian and is under the supervision of a body corporate, such body corporate will be liable to be the curator of the person and the chief of such corporate will carry out the authorities of a curator.104

Local level ward committee also has a role in appointing a curator for a child. If a person has no guardian and no other person to be their curator, then the local level ward committee cannot just file a petition at the Court for the appointment of a curator but also set out a list of potential curators along with their credentials in the petition.105 The curator in this case will be appointed by the Court among the people suggested by the local level ward committee. Anyone except those disqualified to become a guardian can be a curator. The responsibility of the property of a person under the curatorship will fall upon the curator through which the curator will arrange the overall maintenance of the person under his supervision106 and the curator has power to use all the return from the property under his supervision to take care of overall maintenance of the person under his curatorship which also includes covering educational expenses for minor.107

In case where the movable property belonging to the person under curatorship is inadequate for the maintenance of the person, then the curator can file a petition at the Court to sell the immovable property and will have the right to sell it after the Court permits to do so.108 The curator not only has the responsibility to look after the property of the person under his curatorship, but also is liable to pay for any sort of damage or loss caused to that property, unless the loss is inflicted by any disaster.109 The curator can also be removed from such duty if he has been

100. Ibid, Section 151
101. Ibid, Section 153
102. Ibid, Section 154
103. Ibid, Section 155
104. Ibid, Section 156
105. National Civil Code, 2017, Section 157
106. Ibid, Section 159
107. Ibid, Section 160
108. Ibid, Section 161
109. Ibid, Section 162
accused of not taking care of the said property. If the curator transfers the property of the person under his curatorship to himself or in the name of his family with the motive of diminishing the person’s right to that property, such transfer will, ipso facto, be void.110

The curatorship of a person is terminated when the person under curatorship attains majority of age, is no longer of unsound mind, comes under the custody of either of the parents, is appointed with a guardian, is removed by the court for not taking proper care of the property of the person under their curatorship, is not qualified to be a curator, or if he/she dies.111 After such termination, the property taken into the custody by the curator shall also be returned.112

Chapter 8 of National Civil Code, 2017 deals with the provisions relating to the adoption which mentions that if a person accepts other people’s children as own children, they are deemed to be the adopted son or daughter.113 The adoption of a child shall be carried out to protect the child’s best interest. However, people having either son or daughter cannot adopt the child of the same gender.114 However, if a man and a woman live separately and their child does not live with them, such man or woman can adopt a child.115 However, any person who has children but files a petition at the concerned District Court to adopt a child and proves that his financial capability to arrange for the overall maintenance of the child, the Court can grab permit upon inquiry of the capability.116

Those couples who do not have children after ten years of marriage and a man or a woman who have not been married until 45 years of age, or are a widow/widower, or have been divorced or judicially separated without children can adopt a child.117 On the other hand, there are some criteria for those who cannot conclude an adoption including those who are of unsound mind, were convicted in criminal offence involving moral turpitude and are financially unsound to carry and adoption.118 Besides this, importance is given to the consent of either husband or wife, living together, of the person who is looking for adoption.119

There are some conditions where the children cannot be adopted. Children who have crossed fourteen years of age, who are the only child, one who has already been adopted and such adoption is not annulled, is adoptee is in a higher degree that the adopter, and if the adoptee is not a Nepali citizen, except in case of a non-resident Nepali citizen holding a foreign citizenship cannot be adopted.120 Likewise, unless the adopter and the adoptee belong to the third generation of the same family, there should be 25 years of age gap between the two.121

While adopting a child a written consent of both the parents, in case both are alive and consent of either one of surviving parents is requited. However, if a child living with either parent after

110. Ibid, Section 163
111. National Civil Code, 2017 Section 164
112. Ibid.
113. Ibid, Section 169
114. Ibid, Section 171 (1)
115. Ibid, Section 171 (2)
116. Ibid, Section 171 (3)
117. Ibid, Section 172 (1)
118. Ibid, Section 172 (2)
119. Ibid, Section 172 (3)
120. National Civil Code, 2017 Section 173 (1)
121. Ibid, Section 174
their separation is to be adopted then the consent of the respective parent with whom the child is living shall be taken into account. Also, if a child who is to be adopted is living with people other than the parents or with any organization for reason, the consent shall be obtained from such person or organization. If a child to be adopted has attained the age of ten years, a written consent of the child shall also be obtained in the presence of either parent, or guardian or curator exercising maternal or paternal authority. Before obtaining the consent, the person who is putting their children for adoption, or the guardian or curator and the child should be informed about the meaning, legal status and the consequences of being an adopted child. Likewise, the code restricts any sort of financial influence in terms of obtaining consent. If the adoption was carried out by either husband of wife during the time of judicial separation, the then child is deemed to be adopted by both after they start living together.

In order to adopt a child, one should file a petition as per the legal requirement in the concerned District Court along with the deed of adoption. The inquiry of this deed by the Court will lead to either permission or obstruction for the petitioner to adopt a child.

The right of an adopted child is equal to that of a biological child, regardless of whether the child was adopted before or after the birth of the biological child. The adopted child has been provided with the liberty to use the surname of either of the adoptive parents or of the biological parents as well. However, if the adoption is annulled then the surname shall be that of the biological parents. In the case of partition claim, the adopted child has no claim over the property of his/her biological parents, except in case where the adoption has been annulled. If an adopted son or daughter has already obtained his or her partition share at the time of effecting adoption, he or she may receive such property as well.

The adoptive parents shall take care of overall maintenance of the adopted child as their own child as per their capacity and also protects their best interest and exercise the parental authority. In case where the adoptive parents cannot fulfill these requirements, the adopted child can remain separately by obtaining their partition share. Likewise, the adopted children shall also have the obligations similar to a biological child where the child is required to take care of the adoptive parent’s overall maintenance, management of their property and protection of their best interest. The right of an adopted child to meet and communicate with their biological parents is also protected.

The adoption is considered to be void if a person having his own son adopts a son or having his own daughter adopts a daughter, if the person is of unsound mind and was convicted for criminal offence of moral turpitude respectively, if the adoption cannot not be affected, or if any act relating to difference in age or the consent for adoption has been conducted. Also, if the adoptive parents fail to fulfill their obligation, then the adopted child can have the adoption annulled. However, if they had already received their partition share then they might not be entitled to have the adoption annulled. The adoptive person can have the adoption annulled if the adopted child does not fulfill their duty, or expels them from the home and causes them

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122. Ibid, Section 175  
123. Ibid, Section 176  
124. National Civil Code, 2017 Section 177  
125. Ibid, Section 178  
126. Ibid, Section 179  
127. Ibid, Section 180  
128. Ibid, Section 181  
129. Ibid, Section 182  
130. National Civil Code, 2017 Section 184
mental and physical harm, if they misuse their property, and if they live separately for 3 years, unless in case they are married.\textsuperscript{131}

In case where the adoption is annulled, the adoptive relationship between the adoptive parents and the adopted children will be terminated. After such termination, the adopted child will not be entitled to any rights or obligation vested on him as an adopted child. However, this does not affect the right, obligations and entitlements exercised during the period of adoption.\textsuperscript{132}

\section*{4.5 Cases/ Decisions}

\textbf{Atul Shah vs. Mallika Shah}

NKP 2068, Mangsir

Decision Number 8674, pg. 1412

Decision Date: 2068/05/28 (14th September, 2011)

Division Bench

\textbf{Case: Habeas Corpus}

\textbf{Facts}

Atul Shah and Mallika Shah were married in 2062 (2006) and had a child, Manasvi Shah, in 2063 (2007). Mallika filed for divorce along with property in Kathmandu District Court in 2067/10/26 (9th February, 2011). After their separation in 2067/10/28 (11th February, 2011) it was agreed that Manasvi would live with her mother, Mallika, but that Atul would be able to see her and she will not ask for her portion in his property. Immediately after their divorce, Atul got to know that Mallika left their daughter with Mallika’s step mother Pratima Shah and went to United Kingdom for her further studies. He tried to call his daughter multiple times, but was not allowed to speak with her. So, he decided to go the defendants house and visit Manasvi. When he went there, he saw that the main door was locked. When he tried to call his daughter from the compound, he saw that she was extremely sick and she couldn’t talk. When he requested Pratima Shah to let him take Manasvi to the doctor and meet her, his request was denied. Atul then filed a writ of habeas corpus against Mallika and claimed that she had been illegally detaining their daughter.

\textbf{Decision}

The decision was delivered by Honorable Judge of Supreme Court Awadhesh Kumar Yadav. It was determined that disputes of this nature in which parents and spouses are divorced have to be based on the basic values of child rights and juvenile justice, with a focus on building the future and interests of minor children who cannot think about the future. In this context, it was decided that a habeas corpus order should not be issued as per the petition. Instructions have been issued to both the parties to allow the father to see, meet and communicate with the minor under the custody of the mother:

Mallika Shah should allow Atul Shah to meet his daughter Manasvi Shah once a month for a period of three to four hours on average during festivals and family celebrations and to bring her to his house and take her for a walk. Candidates can make arrangements to keep records

\textsuperscript{131} Ibid, Section 185

\textsuperscript{132} Ibid, Section 186
of such meetings. Arrangements will be made by the candidates to meet the girl child once in a month without affecting her studies. When the petitioner Atul Shah calls for communication with the child, it should be done only on Saturdays and public holidays from 7:00 A.M. to 7:00 P.M. Mallika Shah herself should be especially active in taking care of the child's upbringing and health. Arrangements should be made for the education, health care and maintenance of the child under the leadership of Mallika Shah, the guardian of the child. Even Babu Atul Shah has to bear the financial burden in this work.

The best education, proper upbringing, and proper health care are the natural legal rights of any child. It is the legal duty of the family and ultimately the state to grant them these rights. The court should be equally sensitive in order to ensure that the concerned parties fulfill their duty towards these children. The court should always be ready to fully implement the declaration of rights guaranteed by Nepal law and the Convention on the Rights of the Child, 1989, which guarantees the best interests of children and those who are unable to express their will.

In cases of divorce or separation of the father and mother due to any reason, the child living with the father should be allowed to visit the mother from time to time and the child living with the mother should be allowed to visit the father from time to time or stay with him for some time. However, there is a provision that the court may prevent the father and mother from meeting or staying with the mother if there is any reasonable reason against the child’s interest, as noted in the Children’s Act of 2048.

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**Satyavati Chalise vs. Vivek Chalise**

NKP 2061 Ashoj Decision Number 7389, pg. 676

Decision Date: 2061/06/07 (23rd September, 2004)

Full Bench

**Case: Habeas Corpus**

**Facts**

Manju Chalise was married to Shashi Ram Chalise in 2045/10/21 (3rd February, 1989), and they had two children: Vivek Chalise in 2047 (1991) and Viveka Chalise 2049 (1993). Manju and Shashi Ram were granted a divorce by Kathmandu District Court in 2057 (2001) after it was discovered she was abused by him and she was not allowed to eat and she was kicked out of her house in 2054/01/10 (22nd April, 1997) she had to do labor in order to financially support her children. After divorce the children were under their mother's custody. On 2057/08/20 (5th December, 2000) Shashi Ram Chalise along with his family came and took the children to Basundhara Police station in order to meet them and do some necessary documents. Manju accused Satyavati of detaining her children and preventing them from seeing her, she also stated that the children were only allowed to leave the home for school but were otherwise confined to the house, so she filed a writ of habeas corpus against Shashi Ram Chalise and his mother, Satyavati Chalise.

**Decision**

It has been proven that the mother-in-law Satyavati did not allow the children to visit their mother. In the present case, Shashi Ram is suffering from mental illness and is unable to take care of the children, but Manju, who gave birth to the child, is not only mentally and physically fit, but also
mentally and financially capable and trying to take care of her two children. Due to the illegal deprivation of the legal right to education, the children were forcibly detained by the opposition without the consent of mother Manju Chalise. The right to liberty seems to have been usurped. It would be illegal for Grandmother Satyavati Chalise to take the minors to her home without even allowing them to visit their mothers. Therefore, the opinion of Honorable Judge Sushila Singh Shilu is that the decision of the Appellate Court, Patan will be reversed and the juveniles will be released from the control of the opposition and handed over to mother Manju Chalise.

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Sunita Bista on behalf of her minor daughter Siddhika K.C v. Samir K.C et.al.
NKP 2070, Decision Number 8979,
Decision Date: 2070/01/23 (6th May, 2013)

Case: Habeas Corpus

Facts

Sunita Bista was previously married to Sameer K.C. They were married in 2063 (2006) and had two children; their daughter, Siddhika, was born in 2064 (2007), and their son, Siddhanta, was born in 2068 (2011). As they had problems since the beginning, on 2069/03/22 (6th July, 2012) Sunita was kicked out from her house by her mother-in-law and husband. So, she then started living with her parents. As both children were living with Sameer. With the help of the police, Siddhanta went to live with Sunita, while Siddhika remained with her father. Siddhika was not allowed to meet Sunita. Sameer had been organizing Sunita's education, and she was enrolled in St. Mary's School. When Sunita went to meet her daughter in her school, Sameer got to know about it and she was abused along with that. Similarly, Siddhika was not safe in her own house as she did not get to eat on time. According to the neighbors when Sameer went out, he used to lock Siddhika in a room. A dispute over custody of Siddhika arose between Sunita and Sameer. Sunita filed a writ of habeas corpus in the court and sued Sameer, claiming that Siddhika had been illegally detained with him. Sameer denied such claims.

Decisions

Honorable Justice Prakash Vasti presided over the case and delivered his decision on April 23, 2070. In his holding, he noted that during the trial, Siddhika sat with her paternal grandmother and seemed comfortable with her father, Sameer, and distant with her mother, Sunita. The judge determined that Siddhika was happy staying with her father, and that she was in a stable environment with access to an education, and that should not be disrupted as it would negatively affect Siddhika.

The judge ruled that in this case, both the parents need to be careful not to create a negative attitude within Siddhika's home. The court recognized that family, parents and society impact the young mind of the minor. The judge ruled that while Siddhika may remain with her father, necessary arrangements must be made by Sameer so that Sunita can meet and call her daughter whenever she wants. Additionally, if Sunita wants to visit Siddhika at school, Sameer will coordinate with the school to facilitate such meetings according to the school's rules and without hindering Siddhika's education.
The case of Sunita Bista v. Sameer K.C. established important principles regarding the way legal systems will determine a child’s custody situation. This case determined that the court should be especially sensitive on the issue of habeas corpus related to children and the court should not be a patron of the ego of father or mother or anyone else.

In disputes between the parents of children, the court should make the best interest of the child on the basis of justice and in the context of child psychology. The basic values of the juvenile justice system must be followed in matters related to the interests of children. At the heart of the juvenile justice system is the search for ways to control and minimize the impact of marital problems on underage children. Problems arising from parent-child relationships should not be allowed to affect minor children.

There are important decisions to be made regarding a child's upbringing, such as healthcare and education, and it can be counterproductive for a child’s future when decisions are made unilaterally without evaluating who is most effective in making such decisions. Therefore, it is essential to look at the best interests of the children concerned in such matters from a holistic point of view.

Innocent children should not be abused for anyone’s personal selfishness, ego and self-satisfaction. Since the future of the nation is linked to the future of children, taking such a sensitive issue lightly and ignoring their interests can have dire consequences. Therefore, it would not be fair to dismiss this issue as just a problem of one person and one family.

The court should not be indifferent to the negative effects that a minor can have on his young brain when he is completely separated from his mother.

It would not be fair from the point of view of child psychology to assume that the girl did not feel the pain of being deprived of intimacy and closeness with her birth mother, even though she seemed to be happy with her parents.

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Nilam Subedi et. al. v. Shambhu Raut
Decision No: 165
Case No: 077-FJ-0042, High Court Patan

Facts:
This case is about the claim of custody of a child to the grand-mother. Nilam Subedi, applicant and mother of the child is living in Canada. Applicant has claimed that after the birth of her daughter in April, 2013, the relation with her husband was not that harmonious. Thus, she has been living with their parents and daughter was also being raised there. During this time, the father used to come to meet his daughter. When he visited her on 18th February, 2021, he took his daughter without notifying them and did not return her even when asked for several times. When Laxmi Subedi, the child's grandmother went to get her, he did not allow her to meet despite hearing the granddaughter's plea to meet her. When a police complaint was attempted to be filed, the police denied helping in family matters.

Applicant’s claims
Applicant claims that since father is unemployed and lives in a remote area, he is unable to provide the daughter with the nutritious food and quality education which is certain to push the
daughter's future to darkness. Thus, keeping in the best interest of the child, applicant claims the
daughter’s custody to be handed over to grandmother, who lives in Chitwan.

**Respondent's claim**

Respondent i.e., father claims that he was the one who financed Nilam's foreign arrangements.
He also denied that he is unemployed and claimed that he has been involved in the profession.
Furthermore, he claims that he has been providing the daughter with all the needs as per his
economic condition, which is in alignment to the obligations set out in Act relating to Children,
2018. Furthermore, he claims that since the child could not live with her mother since birth and
it would not be in the best interest of the child to separate her from father also. Thus, he claims
custody of the child to him.

In this case, applicants as well as respondents have rested their claims on 'best interest of the
child'. The difference is that applicants are inclined to the reasoning that since the father's
economic condition is not good, it would be in the best interest of the child to let her stay with
her grandmother. Whereas father claims that he has been fulfilling the needs as per his economic
condition. His main reasoning is that a child should not be deprived of father's love and care, and
thus, it is in the best interest of the child to be given custody to him.

The main concern that the court needed to decide on this case was to determine what is to be
considered as the best interest of the child.

**Decision**

The custody was handed over to the father of the child. Also, since the mother is in Canada, the
child’s grandmother can meet with the child and provide her with necessities without affecting
her interest and study, and in coordination with the teacher of the child.

**Reasons behind the decisions**

Respondent has been fulfilling all the needs of his daughter to ensure the overall development as
per his economic status. Thus, he has been fulfilling his responsibility. So, it is in the best interest
of the child to hand it over to her father. Child also gave a statement in the court stating that she
wants to live with her father.

**Analysis of the Case**

In this judgement, the court rested on the reasoning that since the mother was not present in
Nepal, she could not provide proper care to the child, the custody of the child was handed over to
the father. The court believed that at least the child should be with a parent and that is the best
interest of the child. Comparing this case with the case of *Shova Shrestha v Maya Tamang*, the
discrepancies of the court practice, is evident. In this case, the Supreme Court of Nepal had held
that even when the father had left the child with another person, the custody was not provided
to the mother who had promised to stay in Nepal. Rather child was asked who he was happy with
and if the education and health care was provided or not by the person who the father had trusted
the child with. However, in this case the court clearly stated that in the absence of the mother,
father shall have the right over the child. The court did not ask if the child was happy with the
grandmother and if the grandmother was doing the right job in ensuring the right to health and
education of the child. Thus, when diverting against the primary rule of 'presumption of mother's
custody', the court's practice is not consistent.

122. Dec No: 9219 NKP 2071 No-8
In this case, even though the court ensured based on the written statement of the respondent that he has been providing for the child as per his economic condition, other factors like child’s natural environment, school, relation with grandmother, who can better provide for the child was not assessed.

Furthermore, this case gives rise to a question on custody of the child. Can a mother who have the custody of the child leave the child under the care of parents or not? Shall it be considered as the negligence in the part of the mother? Does the general rule of ‘presumption of maternal custody’ not apply if the mother is not physically present with the child? As per this case, it says that mother shall not be given custody in case she is not present with the child. So, in her absence, father shall be given the custody.

This case also points to an issue with the ‘general presumption rule’ i.e., should the ‘best interest of the child’ not be assessed when the presumption is accepted. In the absence of the provision in the code, there is no any legitimate obligation to assess this. However, this might expose the child to less welfare by blindly following the ‘presumption rule’.

Furthermore, this case has affirmed that rather than higher economic condition, the need of parent’s care is important. As the court did not handover the custody to the grandmother, who could provide better care than the father, economically. It shows that the court does not rest completely on economic status of the custodian. However, the major factor that is considered is whether the custodian has provided for the child as per his economic condition or not.

Biraj Nagarkoti v Krishna Umari Shrestha
Case No: 077-WH-001
Decision NO: 20 Bhaktapur District Court

This is the writ filed by the father of the child against the child’s maternal uncle and grandmother for illegal detention of the child. This case represents the case where custody of the child has been discussed via the writ of habeas corpus.

Fact

In this case, the mother of the child lives in Australia. In the meantime, the applicant claims that the child has been living with him since then and he has been bearing all the responsibilities and expenses of the child. However, respondents claim that the child has been with them ever since mother went to Australia and father i.e., applicant has not covered any expenses of the child. So, there is a contention in the facts. Furthermore, the applicant claims that the child was sent to the maternal home after they asked for her, but they could not be contacted ever since then. Even when he went to get her back, he was abused physically. Thus, the applicant claims that the custody of the child should be handed to him because the child is being kept in illegal detention, depriving him of the education and against the interest of the child.

Respondent claims that the condition of the applicant was not good as there were ill grandparents in the home. Thus, the child has been in the maternal home and all the expenses have been carried out by the mother. Thus, they claim that there has not been any illegal detention as they have kept the child with them on instruction of the mother of the child.
**Decision**
The court held that the maternal side of the child did not hold the child in illegal detention. The writ was repealed.

**Reasons behind the decision**
The court considered the facts like the child stayed with them since her mother left, the child did not care for the father and stayed with the grandmother when the child was brought to the court, the child being provided with everything considering the best interest of the child, to reach to the conclusion that there has not been illegal detention of the child.

**Analysis**
This case is similar to the case of Nilam Subedi et. al. v. Shambhu Raut Decision No: 165 Case No: 077-FJ-0042, High Court Patan. However, the outcome of the case is clearly different. In the Nilam Subedi case, the court gave the custody to the father as mother was not present in Nepal and by default, the custody would be handed to the father. The facts are also similar in this case. The mother is in Australia and the child has been staying with the maternal grandparents. In this case, the court did not find problem with giving the custody to the mother, even when she was not present in Nepal. This shows that even when the mother is not physically present, the custody of the child can be handed over to her.

The court in this case determined the custody based on two aspects;

a) When child was brought to the court, the child went towards the grandmother and did not care for the father. This was taken as the expression of the child’s preference.

b) The court also considered if grandmother provided everything necessary for the best interest of the child or not.

This surely is against the judgement which believed that child needs to be in physical custody of at least one parent. This is also against the general rule as laid out in the Section 115 of the Muluki Civil Code, 2074 but the positive aspect about the judgement is that:

a) It considered the circumstance and desire of the child.

b) It also assessed if the custodian can provide the child with the necessities as per the Section 114(2) of the Code.

The ambiguity this case has shown is that the custody of the child is handed over to the mother or the grandparents. If it is grandparents, then can the custody of the child have handed over to the grandparents when father is present and is asking for the custody?

+++ Samundra Shrestha v Jamuna Kumari Shrestha Appeallate Court Baglung Case No: 072-DP-0032 Dec N: 127 +++

**Fact**
The case was filed by the father who claimed custody of the child. Applicant was an Indian army and he claims that he had been sending monthly expenses of Rs. 10,000 to the child. However, the child was taken away and the respondent i.e., mother of the wife was claimed to be staying in her parent’s home. The applicant has claimed that the respondent is unable
to give proper care to the children. Respondent has been alleged for the violation of basic child rights for depriving them from the physical, psychological, social and emotional development, as she deprived him of meeting them and is herself not capable of providing for children. Thus, the applicant claims custody of the children.

Respondent claims that she has not done anything against the interest of the child as claimed by the applicant and applicant have not been able to substantiate these claims as well. Furthermore, sending monthly expenses continuously is a lie as he had sent money only for 4 months. Since then, respondent had been raising the child by herself. Respondent claims that it was the stunt to deprive her of alimony and custody rights. Thus, she claims before the court that the custody of the children should be given to her.

Decision

The custody of children to be given to the mother.

Reasons behind the decision

Mothers have first right in the custody of the child. Thus, if the mother desires the custody of the child should be given to her as per the provision of Muluki Ain 2020 No 3 (1) of Chapter on Husband and Wife. Mother has been paying the fees for the school of the children based on witness statements.

Analysis

This also establishes the common statement in Nepal that the mother should have the first right over the child and in case she is willing, she should be provided with the custody. However, the court did not just hand the custody to the mother. The court also considered whether or not a mother can provide for her children. Thus, even though not explicitly, the best interest of a child has also been considered not only in terms of mother’s love but also in terms of her ability to provide for them.

This case shows that despite the general presumption rule of maternity in custody, the capability to ensure the best interest of the child also be checked. This also reflect that handing over the custody to the mother in itself cannot, ipso facto, be called as the best interest of the child as the court checked if the mother had paid the fee of the child or not.

Thus, despite the legal provision which has given the rule of general presumption of maternity and does not deal with the requirement of necessity, the practice shows the need of assessment of the ‘best interest’ of the child. This reflects the need in change in law as well.

Benu Kumar Basnet v. Sangita Dahal Bohora
Decision No: 224, Morang District Court
Case No: 074-CP-1851

Facts

The applicant is father of child who has claimed that after the divorce, respondent took the child with her without his notice. After that, she remarried twice and now has gone to Qatar, leaving the child alone. As per the applicant, he was also denied the right to visit, which is against the right ensured in Section 8 of Act relating to Children’s, Act, 1992. Later,
it was found that the name as well as surname of the child was changed by mother. The applicant claimed that this act has violated the right ensured under Convention relating to right of the child, 1989 which says that the best interest of the child should be considered. Thus, he claims the custody of the child.

Respondent argues that the allegations of remarriage are false and further claims that the applicant used to mistreat and threaten the respondent which is why they had to leave. Respondent has been covering the expenses of the child and in order to meet the expense she went to Qatar. This has been confirmed by the respondent’s witness as well. In regard to the allegation of not letting him meet the children, the respondent states that when he was allowed to meet with the child, he abused the child. Also, as there was an agreement between the parties during the divorce that the custody of child to remain with the mother and mother shall not receive alimony. Thus, the respondent pleads before the court to hand over the custody of the child to them.

**Decision:**

The custody of the child was handed over to the father.

**Reason**

Number 3(1) of Chapter on Husband and Wife, Muluki Ain 2020 states that after the mother, the father shall have the right to the child.

It is in the best interest of the child to hand over the custody to the father who is living in Nepal than to the mother who is outside the country.

**Analysis**

In this case, the court has approached the traditional and legal notion that in the case of absence of the mother, the custody shall be handed over to the child. However, current law does not mention that in the absence of the mother, the child can be handed over the father. Rather, it says that if the mother does not want the custody of the child, then father can have the custody of the child. Drawing from the legal provision, such interpretation which says that the custody to be given to father when mother is not present in the country is not possible. However, this can also be seen as the subtle practice of the ‘best interest’ standard when the custody is handed to the father to ensure that the child remain within the physical presence of at least one parent.

This case along with above mentioned case has shown that the court of Nepal has given importance to the need of ‘physical presence’ of the custodian with the child.

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**Amlesh Devi Sah v Upendra Yadav**

Dec. No: 172, Writ no: 06-069-01828 of 2069, Appellate Court Janakpur

In this case, writ of habeas corpus was issued in the context of custody of a child. After conclusion that writ of habeas corpus is to be issued, the court also dealt on the matter of who should be having the custody of the child.
Facts
Applicants and the respondents have children one of 7 years old and another of 2 years old. For 4 years, they did not have harmonious relations as claimed by the applicant and applicant further claims that she was not allowed proper food and also was subjected to assault many times. Then, they left the house being unable to leave and have been staying with the applicant’s parents. Applicants have been working to ensure the proper raising to the children. However, in Chaitra 7, 2069, when the applicant had gone to work, respondents came to the house and snatched the child away from her. They took away children without the notice of the applicant. Applicant filed the complaint to the police station in Dhangadi but the police was unable to find them yet. After that, the applicant filed the writ of habeas corpus and the court ordered the respondent to be present in the court with the children. Respondents were present in the court with children at the given time.

Decision
The court issued the writ of habeas corpus as it found the illegal detention based on following reasons and for the same reasons the custody of children was given to her.

Under the Act Relating to Children 2048, the right of children to nutritious food, basic health and social security has been ensured. This has been further ensured by the Interim Constitution 2063.

Not only the child but also the mother has the right to provide the child with proper nutrition, to breast feed her and also nutrition to her as per the Article 12(2) of Convention on Rights of Child.

Furthermore, No. 3 of Muluki Ain 2020 has laid down that the desire of mother shall be given priority in determination of the custody of the child.

Analysis
This case has added a new dimension to the custody of the child. The custody of the child is not only about the welfare of the child, but it also is associated with the right of mother to provide nutrition for the child and breastfeed them child, in case of infant child. This case has established that the infant child’s custody should be handed over to the mother. This aligns with the general rule.

Boudhman Khadka v Menuka Bhandari
Dec No: 244 Case No: 077-CP-0717
Morang District Court

Facts
Applicant and respondent got married with each other on 28th September, 2011 and a daughter was born on 25th November, 2012. After the fall down in the relationship, they got divorced on 16th September, 2019. Applicant claimed that before divorce even took place, the daughter was taken somewhere disregarding her studies as well and is not aware of where she was taken by the respondent. Later when the applicant found out that the respondent got married to another person and has been living in his house, but their daughter was not with her, he filed the case. The claim of the applicant was that the right of the child under the Constitution of Nepal to get all education, food, and overall
development from the family along with other rights have to be ensured. He claims that he as a father has the right to do that under Section 114, 115, 125 and 126. He further claimed that the respondent did not have the right to keep the child based on Section 115(1) (b) (c), 115(5) (b) and 155. For those reasons, he claimed that the custody of daughter has to be handed to him to ensure that all the familial, social, cultural aspects of life are taught to her.

Respondents did not come to the court on stipulated time. Later, it was found that the daughter was left with the respondent's parents. Respondent did not even submit the written statement.

**Decisions**

The court gave the decision that the daughter should be with the father.

**Reasons**

Section 115 (1) (a) (b) and (c) show that the daughter should be with the father as the respondent had remarried. Since respondent did not submit the written statement and was absent in the court, it was assumed that the claims made by the applicant was accepted by the respondent.

The respondent is remarried in a relation where there is already a child of her husband. In such a scenario, she would not be able to contribute fully for the overall development of the daughter and thus, it would not be in the best interest of the child to hand over the custody to her.

**Analysis**

This case shows that in case if the mother is remarried the legal provision points to the father and the reasons laid out is why the mother who remarried cannot be given custody has been dealt in this case. It is found in the court that the mother who is married to another person and has a child in that relation may not be able to contribute in the overall development of the child. Thus, it is not considered the best interest of the child to hand over the custody of the child to the mother.

The court assumed the disinterestedness of the mother towards the custody of the child from her absence in the court proceedings. However, had the mother wanted to meet the child, what would happen to the custody of the child? Would a mother's remarriage still be considered as against the best interest of the child?

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Sangrila Sapkota (Ghimire) v. Barun babu Ghimire et. al
Dec. No: 346, Case No: 075-CP-4841

**Facts**

Applicant and respondent got married on 6th February, 2013 and a daughter was born on 5th November, 2014. This case was filed by the applicant for the partition when she was mistreated by husband continuously in Nepal as well as Canada and even when she got back, her in-laws did not provide even her basic needs and did not let her stay in the house.

Respondents claimed that all the allegations made by the applicant were false and this case was filed after she got the permanent residence of Canada, to do whatever she pleases. Providing a partition share to her now would also undermine the child's right in future which is why respondents claimed the case to be dismissed.
Decision

The court in this case gave the decision of the joint custody as per the claims made by the respondent.

The court has not explicitly referred to any reasons for giving the joint custody but states that it was reasonable to do so. Also, since the applicant could do anything with the partition share, it was reasonable for the daughter's partition share to be separated and joint custody was given.

Analysis

This case shows that when there is a need to ensure that the child's partition share is not misused, the court provides joint custody considering the best interest of the child. There are no any legal provisions on what the joint custody means and when it shall be provided by the court. Furthermore, there is no clarity on whether these joint custodies are limited to legal custody of physical custody. If this joint custody order incorporates physical custody also, then there is not demarcation of the time division. International practice show that the joint custody does not mean equal amount of time is divided between both parents. Rather the notion of the joint physical custody is to allow both the parents to be able to spend the substantial amount of time with the children. In case of joint legal custody, it is not necessary that the child is under the joint physical custody. Rather, even if the child is with one parent, the decision regarding the important aspects like health and education has to be taken together. This allows both the parent to be involved in the decision making in the child's life. Thus, legal provision regarding the joint custody is necessary. Furthermore, the differentiation between the legal and physical custody is also necessary.
Chapter 5

COMPARATIVE ANALYSIS OF NEPALESE LEGAL PROVISIONS RELATING TO CHILD CUSTODY AND PARENTING WITH THE SELECTED FOREIGN LEGAL STANDARDS

While conducting KII and FGD in Sudurpaschim Province, the respondents mentioned that the laws addressing the rights of children are being reformed in time and the national laws are becoming in line with the international standards however such laws are not being implemented properly. There are enough provisions of child rights and duties in the Constitution and other laws relating to children in Nepal. The parents and guardians have appraise the best interest of children however due to lack of awareness, they are not being able to reach to the relevant authorities when the rights of children are violated and hence they have to be diverted from the access to justice. There are no facility of monitoring room as provisioned by law in the cases where the children are kept in custody for preliminary investigation. It has also been mentioned by one of the respondents that there is no child-friendly behavior during such cases. At the local level, Department of Women and Children and the Provincial Government have been raising awareness through Good Parenting Program with the parents of the schools under the local level through District Social Development Office. Various physical, mental and sexual violence is done by parents on children in some cases. Likewise the respondents answered that the inheritance property was not misused by the parents however some of them said that they had seen and heard of such misuse however there is no provision in the law to establish such offence. Similarly, it was said that the existing national laws regarding adopted children is effective and was also suggested in the interview that although the laws of Nepal are made according to international standards, such laws are not in accordance with Nepalese perspective.

Whereas in Lumbini Province, the participants who attended the KII and FGD expressed that, children have right to be raised in the environment for their overall development. After the breaking of a marriage and separation of a couple, protecting the welfare of the children should be taken seriously. The right of a child should not put into the jeopardy when the parents are going into separation. The rights of a child should be ensured accordingly. Various complex issues like maintenance fee, education, health facilities and other financial responsibilities should have been dealt without any dispute among the parents.

Even though national legal provisions regarding child custody do not mention the 'best interest' standard, but it has been analyses by the court who has the custody over the child. But our practices do not have any uniformity on what grounds shall be assessed to determine the best interest of the child and when the best interest of the child has to be assessed by the court during the determination of the custody of the child. In practices, sometimes the parents’ wishes are driven by the other factors rather than best interest of the child. But there are no clear criteria on what can be considered as best interest of the child. Almost all participants opined that the
national laws are not implemented effectively. Representatives from judicial committee of Butwal Sub metropolitan City and Tilottama Municipality confirmed that committee had to face some cases of child custody and parenting related issues. Some of the participants discoursed that guardian from literate backgrounds seems to take the best interest of the child into account. But guardian or curator from illiterate background are not serious enough about the best interest of the children.

The main concerns raised by the participants was that most of the foster parents/guardian/curator are not aware about the child custody laws and legal duties and responsibilities they have towards the child. Nearly of the participants provided example regarding misuse of inherited property of children by the guardian/curator. These issues were also evidenced in discussion.

Nepal ratified the Convention on Rights of the Child (CRC) on September 14, 1990. The convention obligates Nepal to take best interest of the child as of primary consideration in all actions considering the children in Article 3 of the Convention. Concluding observations on the combined third to fifth periodic reports of Nepal, 2016 has also pointed that the committee is concerned as neither legislation nor constitution had explicitly referred to ‘the best interest of the child’. The National (Muluki) Civil Code 2017 which has the provision regarding the custody of the child do not have any provisions regarding the consideration, least compulsory consideration of the ‘best interest of the child’. Section 6 of the Act Relating to Children, 2018 has incorporated the provision which allows the separation of child from parents in case it is in the best interest of the child, which deals with the provision on when the guardianship can be ensured to other person rather than the custody between the parents. This shows that the ‘best interest of the Child has been incorporated in the legal provisions of Nepal but this is not in the case of mandatory determination of best interest of the child in regard to the custody dispute between the Child. Thus, Nepal should explicitly mandate the authorities to determine the best interest of the child when determining the custody dispute between the parents.

Article 5 of CRC states that the child should be provided in a manner consistent with the evolving capacities of the child, which is not mentioned in Article 114 of the National (Muluki) Civil Code 2017. Thus, as mandated by the Convention and for the best interest of the child, child’s development should be provided considering their evolving capacities.

Article 9(3) of the Convention states that except when the court finds that it is against the best interest of the child, the child should be allowed to meet with both the parents. In regard to providing visitation rights and also to prohibit visitation rights when in contrary to the best interest of the children, has been ensured in Section 117 of the Code. This is the positive incorporation of the obligation under the Convention.

Article 12 of the CRC requires the view of the child to be given due weight in accordance with their age and maturity, in matters affecting the Child. If child is capable of forming his or her opinion in matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. In this regard, Section 115 of the Civil Code 2017 has stated that the opinion of the child above 10 years old ‘can’ be taken by the court when determining who shall be given the custody of the child. The Code has given discretion to the code with the use of the word ‘can’. This does not mandate the court to take the opinion of the child be given due weight nor it mandates the court to sought for the opinions. This can disregard the child’s opinion. Thus, the legal provision should at least mandate that the opinion of the child to be taken and the weightage can be given as per the age and maturity of the child.

Furthermore, Nepalese practice show this provision has not been applied appropriately. In case of Biraj Nagarkoti vs. Krishna Kumari Shrestha, the child was born in 2017 and when the decision
was given by the Bhaktapur District Court in 2020, the child was 3 years old. In this case, one of the grounds taken by the court to give the custody of the child to the grandparents and not to the father, was based on the fact that the child went with the grandmother in the court and completely disregarded the child. Here, the court had obligation to give weight to the opinion of the child as per the age and maturity of the child. The opinion of 3 years old cannot be matured enough to be considered by the court. Thus, this kind of practice which considers the opinion of the child ‘haphazardly’ should to be prevented.

Also, in these kinds of cases, child would not go with the father because he/she had not stayed with the father and the attachment has not been developed. But this should not be taken as the ground to hinder the child as well as the parents with the right to be with each other. Thus, Nepal should adopt laws which mandates the opinion of the child to be taken but the weight to be taken with the due consideration of the age and maturity of the child.

Under Article 18 of the CRC, both parents have the responsibility to carry out the upbringing of the child and development of the child by giving the due consideration to the best interest of the child, as a basic concern. This kind of provision should be incorporated in Section 114 of the National (Muluki) Civil Code, 2017.

Committee on the Convention on Rights of the Child in the individual communication N. R. vs. Paraguay (CRC/C/83/D/30/2017) has interpreted that the state has obligation to take the effective measures to ensure the determination and enforcement of the decision regarding the custody of the child to be done speedily. If these decisions are taken with expedition, then the child can get alienated with the separated parent and the lapsed time can cause bring irreparable consequences. Thus, Nepal should also ensure that the speedy procedure shall be taken in regard to the custody of the child and enforcement of such decisions.

Being the neighboring countries, the influence on laws between India and Nepal are exceptional. Parental responsibility and child custody are somewhat similar in India and Nepal. Both India and Nepal have acknowledged Convention of the Rights of the Child (CRC). Both the State works definitely on the welfare of the child as the paramount importance. Child custody is also somewhat similar in the both States. However, India has various laws including, Hindu Law, Islamic Law and Christian religion has to follow Divorce Act, 1869 in regards to child custody. In contrast, the Islamic Law of India strictly mentions about the custody of child only to the mother until she is found guilty of any misconduct. The custody of a child under Islamic law is with the mother until the child has attained the age of seven years for a boy and until she has attained the age of puberty or majority for a girl. The custody of the child remains with the father until the boy has attained the age of seven years and the girl has attained the age of majority or puberty as because the father is considered to be the natural guardian. However, regarding such, Nepal has provision that the custody of child remains with mother solely until the child attains the age of five years. The custody remains with mother even if the child attains more than 5 years of age if she is unmarried. Besides, such condition it will be the father's responsibility to take the custody of the child.

United States of America (USA) has various federal laws and state laws which cannot be seen in Nepal. USA is one of the two only countries who have not yet ratified the Convention on the Right of Child, 1989, which Nepal is a party to. USA and Nepal have recognized the responsibility of parents to provide for their children. Although United States of America is one of the most developed nations with higher economic growth, it fails to adopt the international convention for the protection of the children. As a result, United States of America has violated many Articles mentioned in the Convention of the Right of the Child, 1989. However, USA and Nepal preserve the notion “best interest of the child”.

United Kingdom (UK) has witnessed parental responsibility immediately after the birth of the child for the mother and to the father if he is married to the child’s mother or listed on the birth certificate. The provision of same sex partners is novel in the context of Nepal. As Nepal has not accepted fully the rights of its LGBTQI citizens, their parental responsibility is somewhat Nepal has to study further to be included in the laws of Nepal. The same sex partners in United Kingdom during the treatment of donor insemination or fertility treatment can be considered to have parental responsibility. Similar to Nepal, the United Kingdom has ratified Convention on the Right of Child, 1989. Other similarities are that United Kingdom allows parents or the Court decides itself in case of unable to decide for the custody of child after the divorce or separation.

Australian law encourages parents to remain involved in their children’s life after the separation. The Family Law Act, 1975 does not specify that the person with whom the child is to reside or spend time with must necessarily be their natural parent, and provision is made for anyone ‘concerned with the care, welfare or development of the child’ to apply to the Court for orders. Likewise in Nepal, the provision of alternative care is provided where relatives of the parents, family members, foster care and children’s home provides alternative care to those children who requires alternative care than their parents. Australia has ratified Convention on the Rights of the Child, 1989 and focuses on the paramount notion i.e., best interests of the child.

South Africa focuses their child rights law to safeguard child’s health, well-being and development. Similar to the laws of Nepal, the South African laws of children right protects the child from maltreatment, abuse, neglect, filth, discrimination, exploitation and any other physical, emotional or mental harm. Contrast to Nepalese law, South African law expects parents or guardians to say yes or no when the child needs to go to the Court if a child asks for permission to: get married, be adopted, leave South Africa or get a passport. In South Africa, The High Court is the only court that can give someone permission to become a guardian. The Divorce Court and the Children’s Court can give a person permission to take care of a child or just for visiting a child. Nonetheless, Nepal does not have Divorce Court or Children’s Court but the decision is taken by District Court and can be appealed on the High Court and again be appealed on the Supreme Court for the final decision. Similar to Nepalese law, the mother of a child has ‘full parental responsibilities and rights’ for that child even if she is not married to the father. Unmarried biological fathers have a responsibility to financially support the child and care for the child, and a court can grant them full guardianship.
Based on the analysis made above, following recommendations are made in regard to the legal reform:

1) In order to remove the discrepancies in the determination of the "custody of the child," the "best interest of the child" should be specifically mentioned in the legal provision, particularly one dealing with custody of the child. Additionally, the objective standard to test the "best standard of the child" should be laid out.

2) It is important to prevent the gender-biased narratives from being interpreted. Instead, a foundation for the impartial assessments needs to be built. Therefore, the court shouldn’t be given much discretion. Since every situation is unique and the "best interest" of the child must be determined on a case-by-case basis, discretion is indeed required. However, the discretion should continue to be constrained by some objective factors as outlined in the Indian Act, such as the guardian’s capacity, character, and closeness.

3) The court’s approach is inconsistent when granting custody of a child to a person other than the child’s mother or father. That does not, however, negate the requirement to acknowledge when a parent other than the mother or father is granted custody. As a result, when such an order may be made, a clear provision together with the criteria must be laid down.

4) The way the court has operated demonstrates that both parents have received joint custody. But there are no legal standards that cover "joint custody." Thus, the order of joint custody and the circumstances under which it may be provided should be specifically stated in laws.

5) The law has made it mandatory for people with child’s custody to give the child the necessities as stated in Section 114, including food, medical care, education, information, sports, amusement, and other things deemed required. Incorporating the idea of providing for children in accordance with their "evolving capacity" as described in the CRC should also be added to these requirements. Furthermore, as required by Article 18 of the treaty, the best interest criteria should also be applied here.

6) The obligatory language should be used in the clause under Section 115(3) to ensure that the court would inquire about the child’s opinions. The clause should be revised to incorporate the additional language that "such opinion should be given weight based on the age and maturity of the child."

7) The legal provision shall guarantee the prompt determination of the child’s custody and the prompt implementation of such decisions.
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