



Institut suisse de droit comparé
Schweizerisches Institut für Rechtsvergleichung
Istituto svizzero di diritto comparato
Swiss Institute of Comparative Law

E-Avis ISDC 2017-04

PRESUMPTIONS OF PATERNITY AND PATERNITY CLAIMS

Nepal

Current to: 29.09.2016

Please refer to as : Lukas Heckendorn Urscheler / Kapil Aryal,
Presumptions of Paternity and Paternity Claims, current to : 29/09/2016,
E-Avis ISDC 2017-04, available on www.isdc.ch.

This text may be downloaded for personal research purposes only. The Swiss Institute of Comparative Law does not accept liability for any other use of the text. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the Institute.

E-Avis ISDC

Série de publications électroniques d'avis de droit de l'ISDC / Elektronische Publikationsreihe von Gutachten des SIR / Serie di pubblicazioni elettroniche di pareri dell'Istituto svizzero di diritto comparato / Series of Electronic Publications of Legal Opinions of the SICL

Lausanne, 29 September 2016
LHU /ext

Avis 16-090

Nepal

Family law, Paternity

1. Summary of Facts

The case at hand involves a Dutch father (claimant) and a Nepalese mother who was married since 2000 with a Nepalese man at the time of the child's birth in February 2013 in Kathmandu. In 2012, the claimant also got married to the Nepalese mother but the mother's marriage was not dissolved by divorce until 2014. The claimant's marriage to the mother was registered both in Nepal and in The Netherlands after the divorce in 2014.

According to the Dutch court, there is a judicial presumption about Nepalese paternity which the claimant may now try to rebut. As the claimant has not gone the trouble of first denying paternity in Nepal, the birth certificate can not be registered into a Dutch civil status register. Thus, the civil status registrar had previously held that the first husband is the child's legal father. If the claimant wishes to change this situation, he would first need to deny paternity and have his paternity – already confirmed by DNA-evidence- established by the court.

The court also observes, if it is not possible to deny paternity in accordance with Nepalese law, Article 10:93 (2) of the Dutch Civil Code offers an alternative solution in applying Dutch law if this is considered to be in the interests of the child.

2. Questions

1. How can a family law relationship be established between a father and a child in accordance with Nepalese law?
2. Can paternity be annulled in accordance with Nepalese law and, if so, how?
3. Was there a family law relationship between the (Nepali) husband and the child prior to the divorce of the former husband and the child's mother?
4. Was there a family law relationship between the former husband and the child, and if not, is there a family law relationship between the claimant and the child at present?
5. Can paternity based on the mother's marriage (marital presumption of paternity) be denied in accordance with Nepalese law and how?

This report was drafted by Lukas Heckendorn Urscheler, who holds an LLM degree from Kathmandu School of Law, and reviewed by Kapil Aryal, LLM, a practicing lawyer and researcher.

3. Analysis

a. Preliminary remarks on the concept of marriage in Nepali law

There are relatively few sources available in English or other European languages on Nepali law. In comparative literature, the Nepali legal system is regarded as a mixture of common law and customary law.¹ Indeed, while the Indian legal system has influenced the Nepali legal system to a considerable extent, including by giving a strong place to the judiciary and especially the Supreme Court, it is important to note the strong influence of the Hindu legal tradition, given the absence of colonialization. Since 1854, the fundamental piece of legislation has been the General Code 2020 (*Muluki Ain*, literally Country Code), a compilation of legal provisions relating to a variety of legal issues ranging from family law to criminal law. The currently valid *Muluki Ain* dates back to 1963, though numerous amendments have been made. In addition, the Parliament adopted a huge number of specific Acts.² Proposals of more Western style / continental codifications have been discussed for the last 20 years.³ More specifically, a Civil Code Bill, drafted with support from the Japanese, was submitted to parliament in 2015.⁴ Currently, however, the main legal source relating to family relationships remains the *Muluki Ain*.

The *Muluki Ain*⁵ is divided into different parts and chapters, thereby not following the structures found in western codifications. Rules relating to the family can be found in Part III Chapters 12 (On Husband and Wife), Chapter 13 (Partition of property), Chapter 14 (Woman's share and Property), Chapter 15 (Adoption) and Chapter 17 (On Marriage). It is closely intertwined with criminal provisions relating to sexual offences (Chapter 16: On Bestiality and Chapter 18: On Adultery), part 4 Chapter 14: On Rape, Chapter 15: On Incest Chapter 18: on adultery).

Unlike many Western legal systems, Nepali law does not provide for formal requirements for the solemnization of marriage. According to section one in Chapter 17 (On Marriage) of the *Muluki Ain*, the only relevant element is consent ("marriage may be solemnized with one's consent according to one's own will and pleasure », Chapter 17 On Marriage⁶). Several other provisions (e.g. section 3, Chapter 17) refer to the completion of formalities (performance of rites, exchange of money), but they make it clear that these formalities are not constitutive of marriage. Registration of marriage is possible, but most people in Nepal do not seem to register their marriage. Interestingly, there is a considerable number of decisions that establishes a "legal marriage" between a woman having given birth and the biological father of the child,⁷ or where

¹ In this sense the classification by the University of Ottawa (JuriGlobe) : <http://www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php> ; see for a critical and more detailed account: L. Heckendorn Urscheler, *Nepali Law from a Comparative Perspective*, in: Cashin Ritaine & Donlan & Sychold, *Comparative Law and Hybrid Legal Traditions*, Zurich 2010, p. 55 seq.

² For an overview of Acts translated into English, see the Website of the Nepal Law Commission.

³ See e.g. Rajit Bhakta Pradhananga, *A text on the proposed draft criminal code – 2058*, Annual Survey of Nepalese Law 2001, p. 317 ss.

⁴ See Japan International Cooperation Agency, *Outline of Cooperation in Nepal*, 2016, p. 12, available at http://www.jica.go.jp/nepal/english/office/others/c8h0vm00009vyd39-att/brochure_07.pdf; see also http://www.jica.go.jp/english/news/field/2016/160701_01.html (16.09.2016).

⁵ Available in an unofficial translation on the Website of the Nepal Law Commission : <http://www.lawcommission.gov.np/en/documents/2015/08/muluki-ain-general-code-2020.pdf> (25.01.2016).

⁶ There are, however, age limits and some substantive grounds for declaring a marriage void.

⁷ E.g. *Wangel Moktan v Gyanu Tamangni*, NKP 2045 p. 127; *Bachi Bista v. Kabindra Bdr Bista*, NKP 2034, p. 138; *Chandra Maya Pathak v. Rudra Bdr Shivakottee*, NKP 2054, p. 463; all cited according to Madhav Prasad Acharya, *Criminal Law, Cases and Materials*, Lecture Note for LLM Students, Volume IV, 2060 BS (= 2003), p. 5 seq; see also *Bachhi Bista v. Kabindra Bista*, N.K.P.2034, Decision Number 1052.

the mother requests the court to do so (and the court denies, often for reasons of evidence, given the unavailability of DNA evidence at that time in Nepal).⁸ In those cases, marriage is seen as a tool to establish paternity and, more importantly, to give the status of a legitimate child. Treating each other as husband and wife (including by way of a consensual sexual relationship) is generally considered as valid marriage.⁹ This is especially important in the relatively conservative Nepali society. There is considerable social stigma attached to illegitimate children, both for the mother and the child. This also applies to children without an identified father. Traditional values are often very important in this regard in Nepali society, and sexual relationships are expected to take place solely within the context of marriage. Several court decisions reflect this situation.¹⁰

However, in a controversially discussed and relatively recent case¹¹, the Supreme Court indicates that the establishment of sexual relations and having a baby cannot automatically be construed as marriage. However, the indications on the notion of marriage are probably to be qualified as mere *obiter dicta*, as the substance of the decision deals with the right of privacy of a woman that, according to the Supreme Court, entitles her to refuse a medical examination of the vagina. In addition, the legitimacy and paternity issues were not dealt with in detail, as the Supreme Court only had to decide (and refused) on the possibility to order the evidence indicated above. As the indications on marriage go against a long line of cases, it was very controversially received.¹²

There is, therefore, considerable uncertainty as to the issue whether paternity automatically leads to marriage or not. In several provisions, the *Muluki Ain* makes a difference between marriage and sexual intercourse, though there are also provisions indicating that paternity automatically leads to marital relationship with the mother.¹³ In practice, this typically implies that the mother of a child can request the father to fulfil birth rituals, take on economic responsibility and that the paternity relationship is established. The draft Civil Code seems to automatically give marital status to a physical relation that leads to the birth of a child.¹⁴ This is an indication of the drafters'

⁸ Narahari Timilsina v. Baburam Timilsina, NKP 2044, p. 1200; Purna Sunar v. Indra Bdr Bhandari & Other, NKP 2052 p. 647, all cited according to Madhav Prasad Acharya, Criminal Law, Cases and Materials, Lecture Note for LLM Students, Volume IV, p. 5 seq.

⁹ Madhav Prasad Acharya, cit., p. 1.

¹⁰ See e.g. Wangeli Moktan v Gyanu Tamangni, Nepal Kanoon Patrika 2045 p. 127, cited according to Madhav Prasad Acharya, cit., p. 3: "The court held that in the society like ours it is least likely that an unmarried woman implicates anybody for having sexual involvement with her, unless the fact is true."

¹¹ Annapurna Rana vs. Gorak Shamsher JB Rana, NKP 2055 (1998), p. 476, translated in English in South Asia Regional Initiative/Equity Support Program, Landmark Judgments on Violence Against Women and Children from South Asia, p. 629, available at http://www.childtrafficking.com/Docs/judge_woman_childvio_0607.pdf.

¹² See comments by Madhav Prasad Acharya, Criminal Law, Cases and Materials, Lecture Note for LLM Students, Volume IV, p. 8, who indicates especially that the developments by the court on marriage seems to be contrary to "the tradition of marriage" in Nepal. He also points out that the separation between marriage and sexual intercourse in a decision, where the woman has no interest in the link of marriage.

¹³ Chapter 13 section 7 deals with the situation of children "born of a woman staying without having a particular husband," section 8 with a so-called "secret wife", i.e. a "wife staying outside without making it public or children born from her": In spite of the prohibition of polygamy, such women as well as their children are entitled to a share in property before the death of the husband or father, section 8.

¹⁴ According to Lila Devi Gadtaula, Provisions related to marriage and divorce in the proposed Civil Code, spotlight Nepal, Vol 8, No 2 (20 June 2014), available at www.spotlightnepal.com, Section 74

perception, and it probably reflects an opinion widely held within the legal profession¹⁵. Also society at large seems to recognize some practices as informal marriage (*poila janu* and *aprakasit swasni* – secret wife [Chapter 13, section 8]).¹⁶

Finally, it needs to be mentioned that, according to Part IV, Chapter 12 (on marriage), section 2, a marriage is automatically dissolved if the wife concludes the marriage with another person. The same substance is found in the draft Civil code.¹⁷This is an exception to the rule according to which marriage is only dissolved through judicial proceedings (especially divorce),¹⁸ though – as the wording of the rule does not provide for exceptions – it is unclear how this rule is applied. The provisions on adultery (Chapter 18 of the Muluki Ain) provide for punishment in case of sexual relationships between a married woman and another man, unless in certain circumstances such as the woman being entitled to divorce. In the present context, it is important to point out that a wife is entitled to request divorce if her husband has lived separately from her “without seeking any news of her and without taking care of her for a continuous period of three years or more” (Chapter 12 (On Husband and Wife) section 1 subsection 3 Muluki Ain).

According to the commentary, “adulterous marriage has become an accepted custom” and it is “legalized in [certain] conditions”, i.e. when there is no punishment.¹⁹ However, in a big part of society it has not been accepted and adultery is still punishable as a principle.

Interestingly, polygamy of the husband seems to be tolerated under current law under certain circumstances²⁰, and though it is punishable in the other cases, “having another wife” is only a ground for divorce²¹ and does not render the previous or the new marriage invalid. However, according to a recent amendment of the Muluki Ain (2015), the husband can’t get married without previous divorce except if he and his wife live separately and the property was separated. The provisions on partition of property provide for the partition in the presence of more than one wife.²² Here, the draft Code is different, as it does not recognize a marriage celebrated by an already married husband²³ (and thereby protects the married wife).

The aim of most judicial decisions and the ratio of many decisions is a protection of the wife (and children) within traditional rules that provide them generally a relatively weak status and where women are perceived as best protected when in a marital relationship. In that sense, the judicial decision Annapurna Rana cited above is an exception, as according to the facts, it was the woman who had an interest not to be in a marital relationship, as she was entitled to a share of her families’ property only if not married to a third person.

(1) of the Draft Civil Code states “‘if it is proven that a woman has become pregnant and given birth as a result of a physical relationship’, the relationship is automatically given marital status.”

¹⁵ See also Madhav Prasad Acharya, cit., p. 1: “Sex involvement between man and women also can be regarded as marriage. If the woman happens to be pregnant she may claim the man as her husband and the child as his legitimate baby.”

¹⁶ See Madhav Prasad Acharya, cit, p. 9.

¹⁷ Section 82(c), cited according to Lila Devi Gadtaula, cit.

¹⁸ Chapter 12 (On Husband and Wife) Section 1 Muluki Ain.

¹⁹ Madhav Prasad Acharya, cit., p. 7.

²⁰ Chapter 17 (On Marriage), Section 9 mentions several medical circumstances (insanity, physical disability, and others).

²¹ Chapter 12, Section 1, Subsection 3 Muluki Ain.

²² Chapter 13 (On Partition), Section 4 Muluki Ain.

²³ Lila Devi Gadtaula, cit, with criticism on the provision.

b. Establishment of a family law relationship

Chapter 12 (on Husband and Wife) section 5 of the Muluki Ain provides for the possibility of judicial “confirmation of his or her a relation with any other person”.²⁴ According to section 6, there seems to be a relatively short period of limitation of one year “of the occurrence and commission of the act in relation to the matters”, though that does not apply to dissolution of marriage by divorce or adultery. In cases of adultery, i.e. in case a wife entertains a sexual relationship with another man, the suit has to be filed within one year “after the disclosure of the matter” (Chapter on Adultery (18), section 6). According to case law, it is possible for a husband to file a case “at any time” against his wife and her new partner if the issue is the declaration of relationship between the parties.²⁵ This is, however, not possible if the marital relationship with the new partner is already registered, as registration has to be seen as disclosure of the matter.

The Chapters on Marriage (17) and Adultery (18) deal with conditions for marriage and criminal penalties for adultery, but not with children. The Chapter 12 (on Husband and Wife) deals mainly with divorce. The only provision relating to paternity is the presumption of paternity (“unless otherwise proved”) of the former husband for a child born within 270 days of the dissolution of a marriage (Chapter 12 section 3).

When looking at case law, there are several cases in which either a married mother files a case requiring that someone else than her husband is declared as the father or the husband files the case. The general issue in those cases is one of evidence (DNA evidence was not relied upon in any of the decisions): in some cases, the subsistence of marriage is regarded as decisive for establishing paternity with the husband²⁶, at least in the absence of evidence to the contrary²⁷ in another one, the simple declaration of the woman (and the absence of the defendant in court) was sufficient to establish paternity, as the husband was abroad at the time of conception and birth.²⁸ In the latter case, it is remarkable that the mother, when giving birth, stated that her husband was the father, and only later filed a claim to have another person being declared the father.²⁹ According to the Supreme Court, the declaration of the woman has paramount importance and is sufficient to hold a third person as father even during the marriage.³⁰

It follows from these cases that it is possible to file claims in order to establish paternity. The cases also show that there is a presumption of paternity of the husband, unless there is evidence (including a statement of the mother) to the contrary. The cases do, however, not indicate if and

²⁴ “One may file a suit for the confirmation of his or her relation with any other person. If the concerned person is a minor, the heir also may be entitled to file a suit, for the confirmation of the relation of such a minor.” Translation according to Nepal Law commission (cited). According to a Nepali correspondent, the term “heir” can also be translated as “family members.”

²⁵ Manahari Upreti v. Khagendra Upreti, NKP 2048, p. 476 FB, cited according to Madhav Prasad Acharya, cit., p. 5.

²⁶ Hurmat Pun Magar v. Khuiti Klamini, NKP 2044, p. 587; Khem Kumari Sharma v. Pradhumna Raj Sharma, NKP 2046, p. 1113 FB, cited according to Madhav Prasad Acharya, cit., p. 3.

²⁷ Bhajan Yadav v. Kariwati Yadavni, NKP 2041, p. 736, cited according to Madhav Prasad Acharya, cit., p. 3.

²⁸ Mohan Bdr Basnet v. Jyanti alias Jayanti Bharati, NKP 2048, p. 379, cited according to Madhav Prasad Acharya, cit., p. 3.

²⁹ Mohan Bdr Basnet v. Jyanti alias Jayanti Bharati, NKP 2048, p. 379, cited according to Madhav Prasad Acharya, cit, p. 3.

³⁰ Daynidhi v Mangal Kumari, NKP 2042, p. 262 ; see also Indra Bdr Khadgi v Tej Kumari Khadgi, NKP 2046 p. 458, cited according to Madhav Prasad Acharya, cit., p. 4.

how paternity is established in the absence of a judicial decision. In all the reported cases, the alleged father or the husband deny paternity.

According to section 4(a) of the Birth, Death and Other Personal Events Registration Act 2033 (1976), the head of the family has to announce the birth of every person, which will then be registered after a verification by the Registrar (section 5). Only for registration of divorce, there needs to be confirmation with the judicial authorities (section 5). The registration certificate is then regarded as “evidence for the occurrence of a personal event”, including in courts (section 9). A revocation of the certificate is possible if the certificate was received by submitting false details (section 9, subsection 2). In the absence of a judicial decision, it seems that the first proof for paternity is the birth registration certificate. In the case of a married and cohabiting couple, the birth registration certificate is established on the basis of the declaration of the father who is probably perceived as “the senior person who makes arrangement in the family or a person who takes care of the family.” (section 2 (d) Birth, Death and Other Personal Events Registration Act). In case a woman lives alone, she is probably the person reporting the event.

Given the strong link between paternity and marriage explained above and the fact that, according to the facts, marriage was celebrated (even without formally dissolving the previous marriage), the birth of a child or/and the previous marriage can be seen as a marriage that dissolves the existing marriage automatically (Part IV, Chapter 12 (on marriage), section 2). Therefore, the new husband is automatically be seen as the father of the child.

In addition, the law does not state whether it is necessary to start judicial proceedings in order to establish paternity of someone else than a formally married husband or of a second husband. The provisions on the presumption of paternity (for children born after the dissolution of marriage) allow for other proof. As the provisions on the Birth Registry provide for a certain counselling / verification by the registrar, it might be possible that the Registrar registers the event as indicated by all parties concerned, in so far they all agree. The Registrar generally will enquire as to the existence of marriage, though he/she will not require the production of a marriage certificate, as most marriages are not registered. As a general rule, there must be some strong ground / proof for the registration. Generally, when a mother of a child says that a man is her husband and father of a child, and the presumed father agrees, it will be taken as sufficient evidence.

c. Possibility to annul paternity and destroy the presumption of paternity

As indicated above (a.), Chapter 12 section 5 of the Muluki Ain, it is possible to establish (or confirm) a relationship through judicial proceedings. A case has to be filed in principle within one year from the occurrence of the facts or, in case a married wife gives birth to a child from another biological father (see above), from the moment the claimant reasonably should have knowledge of the fact. However, it is important to note that the husband-wife relation dissolves automatically if the woman marries another person (Chapter 12 (On Husband and Wife) Section 2 *Muluki Ain*).

4. Conclusion

1. In Nepali law, the existence of marriage with the mother establishes paternity, though, in several judicial decisions, paternity can also be seen as proof of marriage. Judicial decisions indicate that there is also room for proof of paternity by other evidence, most importantly the declaration of the mother. Nepali law also provides for automatic dissolution of marriage if the women celebrates another marriage. A birth registration certificate is

evidence of paternity. A legal family law relationship can be established or confirmed between a father and a child through judicial proceedings.

2. In Nepali law, it is possible to annul paternity by judicial decision.
3. As the conclusion of a new marriage by the wife is seen as putting end to the former marriage *ipso facto*, and as and in so far as the birth register does not indicate the former husband as the father, there was no family law relationship between a former husband and a child, even if a divorce with the former husband occurred after birth of the child. A potential claim by the former husband would have to have been filed within one year from the moment the former husband knew or should have known of the circumstances.
4. The birth registration certificate and the other evidence indicates that there is a family law relationship between the new husband and the child.
5. Paternity based on the mother's marriage can be denied on the basis of the evidence presented.

SWISS INSTITUTE OF COMPARATIVE LAW

Dr. Lukas Heckendorn Urscheler
Deputy-Director

Kapil Aryal, LL.M
Correspondent