

CITIZENSHIP: ITS APPLICATION AND DENIAL IN CONTEMPORARY NEPALESE LEGAL SYSTEM

Krishna Prasad Bashyal

Associate Prof., Faculty of Law, Tribhuvan University, Nepal and Senior Advocate

Abstract

Citizenship is one of the major constitutional rights guaranteed by the Constitution of Nepal. Universal Declaration of Human Rights sets that everyone has the right to a nationality, and no one shall be arbitrarily deprived of his or her nationality. This article aims to identify the discriminatory clauses contained in the Constitution and the citizenship-related laws in Nepal. The Constitution of Nepal 2015 possesses some discriminatory clauses that restrict the independent identity of women to transfer citizenship to her children and spouse. Access to citizenship certificates remains a challenge for women and the marginalized communities who are affected by poverty, illiteracy, displacement, isolation and discrimination.

KEYWORDS: *citizenship, Constitution, Article, gender, nationality*

Introduction

The socio-political philosophy as an autonomous discipline of study examines innumerable theories and issues of concerns in the community. Amongst the numerous approaches and issues that attract much attention is the concept of citizenship. Right to identity holds a presiding role to recognize an individual's independent worth as a human being. In this contemplates, citizenship certificate bestows a person with his/her identity that enables a person to exercise any sort of economic, social, cultural or political rights. The citizenship certificate provides an individual his/her identity within a particular state and assigns rights and duties. As the citizenship certificate provides identity, safeguards one's rights and

privileges being a citizen of a state is a desirable notion.

The concept of citizenship certificate seems to have a broader scope in the globalized world as nationality is one of the significant human rights concerns of the citizens. However, in the case of contemporary Nepalese society, there is an existence of narrow dimensions. This disturbing situation has back-peddled; therefore, many rights and privileges are unofficially denied to those who do not have a Nepalese citizenship certificate. Many eligible people from certain geographic areas and communities who endure poverty, illiteracy, social exclusion, landlessness and geographic isolation lack citizenship certificates and the enjoyment of rights vested to the document.

Citizenship is one of the significant constitutional rights guaranteed by the Constitution of Nepal, 2015. The “Universal Deceleration of Human Rights” poses that everyone has the right to a nationality, and no one shall be arbitrarily deprived of his/her nationality. Legal identity documents, mainly civil registration and citizenship certificates, are closely linked in Nepal. The lack of access to civil registration documents could lead to the denial of access to citizenship certificates and vice versa. The citizenship certificate is the primary legal identity document in Nepal. Without citizenship certificate, individuals cannot obtain other identity cards, such as passports, register for the electoral roll, obtain a Permanent Account Number (PAN), driving license and even a SIM card of the mobile phones. In addition to that, they are not allowed to open a bank account, cannot own property; cannot access social welfare allowances; widow allowances and face difficulties in registering births and marriages.¹ It possesses a huge challenge in every aspect of one’s life and presents major challenges for living a dignified life in a country.

Nepal’s system of legal identity operates under a broad framework of the Constitution

and several laws and regulations. The Constitution of Nepal, 2015, is the paramount document to deal with the legal identity of people living in Nepal and it guarantees that no citizen of Nepal shall be deprived of the right to obtain citizenship. The constitutional provisions have been supplemented by several laws, major if, which is the Citizenship Act, 2006. Since the proof of the very existence of a person is exhibited by the registration of his or her birth, the birth registration has been taken as the solid basis for creating the legal identity of a person. The occurrence of the personal events (birth, death, marriage, divorce and migrations) is the fundamental basis for creating or changing the legal identity or legal status of a person in Nepal.

International human rights obligations of Nepal on nationality

Nepal has ratified majority of the international human rights treaties, including the “International Covenant on Civil and Political Rights (ICCPR)” and its “Optional Protocols”, the “International Covenant on Economic, Social and Cultural Rights (ICESCR)”, the “Convention on the Elimination of all Forms of Racial

¹ FWLD (2014). Acquisition of Citizenship Certificate in Nepal: Understanding Trends, Barriers and Impact.

Kathmandu: Forum for Women, Law and Development

Discrimination (CERD)”, the “Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)”, the “Convention on the Rights of the Child (CRC)”, the “Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)” and the “Convention on the Rights of Persons with Disabilities (CRPD)”. Nepal has not ratified the 1954 “Convention Relating to the Status of Stateless Persons” and the 1961 “Convention on the Reduction of Statelessness”. However, it is notable that Nepal ratified the CEDAW and the CRC without any reservation, which contains vital protections against gender discrimination in nationality law² and the prevention of childhood statelessness³. Thus, the Government of Nepal is obligated to domesticate its international obligations protecting discrimination in nationality law into the national legislation and to create enabling environment to ensure the rights guaranteed by these international instruments.

² Article 9, the Convention on the Elimination of All Forms of Discrimination against Women

³ Article 7 & 8, the Convention on the Rights of the Child

⁴ Section 9 (1), the Treaty Act, 2047 (1990) available at:

<http://www.lawcommission.gov.np/en/archives/9646>

⁵ The Constitution available at: <http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/constitution/constitution-of-nepal>

Additionally, the “Treaty Act of Nepal” stipulates that “In case of the provisions of a treaty, to which Nepal or the Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.”⁴ Nepal is therefore obligated to treat the provisions of those international instruments as good as domestic laws. Furthermore, the Constitution⁵ requires the state to implement international treaties and agreements to which Nepal is a party⁶.

Denial and application of Citizenship

In the face of substantial international obligations and assertions by the Government of Nepal, the Constitution of Nepal⁷ an estimated six million individuals lack citizenship documentation. However, the majority of these would be eligible for Nepali citizenship under local law⁸. The

[ory/documents/prevailing-law/constitution/constitution-of-nepal](http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/constitution/constitution-of-nepal)

⁶ Article 51 (b)(3), the Constitution of Nepal

⁷ The Constitution of Nepal, 2015 available at: <http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/constitution/constitution-of-nepal>

⁸ Acquisition of Citizenship Certificate in Nepal: Estimation and Projection (2015), Forum of Women,

Constitution still includes several articles on nationality that discriminates based on gender, and that is internally contradictory with other articles of the Constitution, which enshrine non-discrimination and the right to citizenship⁹ on the one hand and the other hand contravene the rights guaranteed by the CEDAW¹⁰ and can lead to statelessness when fathers are stateless or also unable to confer their nationality on their children.

Article 10(1) of the Constitution¹¹ states that “no citizen of Nepal shall be deprived of the right to obtain citizenship”. However, in the absence of provision of the right to remedy in the violation of this provision, it is remained merely as discretionary. Further, the Article 11(2) (b) of the Constitution¹² states that “any person whose father or mother was a citizen of Nepal at the time of birth is a citizen by descent”. Articles 11(3), 11(5) and Article 11(7) were getting contradicted with Article 11(2). The Article 11(3) requires “both the ‘father and mother’ to be citizens of Nepal for a child to acquire citizenship by descent in cases where one of the parents acquired

citizenship by birth, preventing Nepali women from transferring her citizenship to their children independently”. Similarly, the Article 11(5) states that a “Nepali woman only retains the right to pass nationality by descent if her child is born and resided in Nepal and “whose father is not traced,” with the condition that the citizenship of the child to be converted into naturalized if the father is known to be a foreigner”. Further, the Article 11(7) states that the “child of a Nepali woman married to a foreign man may only acquire naturalized citizenship if the child has permanently resided in Nepal and has not acquired citizenship of father's country”. In contradicting Article 11(2)(b), these provisions further violate Nepali citizens’ right to equality before the law and equal protection of the law as well as equal lineage right of women without gender-based discrimination, as enshrined in the Article 18 and 38 of the Constitution.¹³

The Constitution¹⁴ further “discriminates against women with regard to the conferral of nationality on foreign spouses, a right

Law and Development (FWLD) also reported in "2019 Country Reports on Human Rights Practices: Nepal" (2019), U.S Department of State available at : <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/nepal/>

⁹ Nepal Citizenship Act, 2006, available at: <http://www.lawcommission.gov.np/en/archives/ca>

tegory/documents/prevaling-law/statutes-acts/nepal-citizenship-act-2063-2006

¹⁰ Article 9 (2), the Convention on the Elimination of All Forms of Discrimination against Women

¹¹ The Constitution of Nepal

¹² The Constitution of Nepal

¹³ The Constitution of Nepal

¹⁴ The Constitution of Nepal

reserved for Nepali men and denied to Nepali women.” The Constitution¹⁵ where “a foreign woman married to a Nepali man may apply for citizenship, if she wishes, with a marriage certificate and proof that she has initiated the renunciation of any other citizenship¹⁶ whereas, the Constitution is silent with respect to the ability of the foreign spouses of Nepali women to acquire citizenship through marriage.” The provision¹⁷ meanwhile allows Nepali men to confer citizenship to their foreign wives if they wish and initiate proceedings renounce their previous nationality there is no provision of the conferral of Nepali citizenship by Nepali woman to a foreign spouse through marriage and their children. This has limited women's autonomy regarding nationality and the ability to transmit citizenship through marriage and to their children.

The provision of Article 11(5) of the Constitution states that “a child is born to a Nepali mother whose father is not identified, such children may be given citizenship by descent in cases where the child is born and residing in Nepal. However, citizenship would be changed automatically to

naturalized citizenship in cases where the father of such a child is identified as a foreigner. This discriminatory provision not only fails to recognize the independent identity of the mother but also may result in stigmatizing both mother and child in genuine cases of unknown paternity involving incidents of rape, sex-work, trafficking, migrant women workers, extra-marital relationship and similar cases.”

The Citizenship Act denies Nepali women equal rights to acquire and retain their own nationality. According to the proviso of Section 8(1)(a) of the Act¹⁸, Nepali women married to foreign men before obtaining citizenship certificate do not have a right to obtain it subsequently. This is not only internally contradicted with the constitutional provision but also contradicts with CEDAW Article 9(1). This continues despite the decision made by the Supreme Court of Nepal in 2008, stating that citizenship to be issued without any discrimination on the basis of gender and marital status¹⁹.

“Putting a special condition for women creates discrimination against them and puts their children at the risk of exclusion of legal

¹⁵ The Constitution of Nepal

¹⁶ Articles 11(6), the Constitution of Nepal

¹⁷ Articles 11(6), the Constitution of Nepal

¹⁸ Nepal Citizenship Act, 2006

¹⁹ Nakkali Maharjan v, Office of Prime Minister and the Cabinet of Ministers et. al., Supreme Court of Nepal, 2007

identity. Lack of clarification expands the authorities' discretionary power on the issuance of citizenship, thereby making it challenging to implement this provision, especially in a non-discriminatory way²⁰.” Complementing the Article 11 (7) of the Constitution²¹, the Section 5(2) of the Citizenship Act²² and Section 7 of the Citizenship Rules²³ deny “Nepali women the right to confer their citizenship to their children by decent. Instead, such children have only the option to seek naturalization. However, the discretion wielded by state authorities in relation to naturalization is extensive, and the overwhelming majority of naturalization applications do not result in the conferral of nationality even after the decision made by the Supreme Court of Nepal.”

The application process for acquiring “citizenship by children born to Nepali women, outlined in the Citizenship Act²⁴ and the Citizenship Rules²⁵ is a challenging, bureaucratic process.” According to the Section 5(2) and 5(3), “this process requires

the applicant to provide a copy of the mother’s citizenship certificate; a recommendation by the local authorities certifying the child’s birth and permanent residency in Nepal, and evidence that the child has not acquired the father's foreign citizenship.” It is likely to be particularly onerous for Nepali women's children – especially in women-headed households – to provide evidence that foreign citizenship has not been acquired. “The denial of equal nationality rights leads to both the denial of proof of legal identity and the denial of the right to a nationality.” Furthermore, “discrimination in Nepal’s nationality laws inhibits women's ability, in practice, to freely choose a spouse, in violation of CEDAW Article 16, further entrenching traditional stereotypes regarding the primacy of male legal identity, and contributing to women's inequality within the family and society at large. Further entrenchment of such stereotypes is in breach of Nepal’s obligations under the CEDAW Article 5(a).”

²⁰ Forum for Women, Law and Development (FWLD), "Legal Analysis of Citizenship Law of Nepal", 2016, pg. 15, available at <http://fwld.org/publications/legal-analysis-citizenship-law-nepal/>

²¹ The Constitution of Nepal

²² Nepal Citizenship Act, 2006 available at: <http://www.lawcommission.gov.np/en/archives/13035>

²³ Nepal Citizenship Act, 2006 available at: <http://www.lawcommission.gov.np/en/archives/13035>

²⁴ Nepal Citizenship Act, 2006

²⁵ Nepal Citizenship Act, 2006

Despite the Constitution²⁶ proclaims that no citizen of Nepal may be deprived of the right to obtain citizenship²⁷ the Nepal Citizenship Regulation, 2006 requires to submit documentation of recommendation from the orphan home (approved by the government)²⁸ or from the organization under which protection the child was grown up²⁹ or from the individual who has legally obtained guardianship of the child.³⁰ This restricts the street children or the orphan children who have grown up on their own from obtaining citizenship as well as stops them from enjoying their fundamental rights guaranteed by the Constitution.

Further, even almost five years after the promulgation of the Constitution, necessary amendments in the prevailing Nepal Citizenship Act, 2007 in line with the Constitution has not been possible. In the absence of legal amendments, many people are constitutionally eligible to acquire citizenship by being deprived of citizenship. In this context, after two years since the Nepal Citizenship Act, Amendment Bill submitted to the House of Representatives (HOR) the State Affairs and Good Governance Committee of House of

Representatives (HOR) had recently passed the Bill and had submitted to the HOR plenary for consideration. Unfortunately, the Bill's passage has been delayed due to the government's sudden decision to end the parliament session. Because of this, along with hundreds and thousands of people who are eligible to obtain Nepali citizenship, hundreds of children of the citizens by birth who are entitled to obtain citizenship by descent are being denied as the amendment of existing law is lingering for a longer time. This way, many citizens of Nepal are being deprived of their citizenship for none of their faults. Hence, there must be a provision of compensation for these categories of people.

The Nepal Citizenship Act Amendment Bill, passed by the State Affairs and Good Governance Committee of the House of Representative, Federal Parliament by a majority has yet to address shortcomings from the perspective of sexual and gender identity, Nepali citizen married to a foreign citizen has to submit of proof of not acquiring citizenship of foreign country or renounced, no provision for complaint mechanism, issues of landless people for the purpose of permanent residence to apply for citizenship,

²⁶ The Constitution of Nepal

²⁷ Article 10 (1), the Constitution of Nepal

²⁸ Rule 3 (3) (a), the Nepal Citizenship Regulation, 2006

²⁹ Rule 3 (3) (a and c), the Nepal Citizenship Regulation, 2006

³⁰ Rule 3 (3) (b), the Nepal Citizenship Regulation, 2006

there is no provision whereby Nepali woman can confer citizenship to her foreign husband. Likewise, the provision whereby an individual wish to be mentioned 'other' in the citizenship certificate on the basis of his or her sexual and gender identity shall submit a recommendation of a recognized Medical Doctor. This will create an unnecessary burden of proof for persons from sexual and gender minority as well as such procedures may not be dignified and might hurt the dignity of such persons.

While the Article 39 (1) of the Constitution first ever in any constitution of Nepal explicitly proclaims that "every child shall have the right to name and birth registration along with his or her identity". The recent National Identity Card and Civil Registration Act, 2020 which came into the force repealing the previous Birth, Death and Other Personal Events (Registration) Act, 1976 prerequisites document of citizenship certificate for the national identity card. This also requires birth registration. As a result, the children who do not have access to citizenship might be systematically excluded from national identity card and birth

registration. It further restricts landless people from acquiring national identity card as they have difficulties in accessing citizenship certificate as well.

Gender discrimination in Nepal's citizenship law often results in the exclusion of birth certificate and citizenship of children whose mothers have faced discrimination, despite Nepal's obligations under various international human rights treaties. Further, the Constitution guarantees right to birth registration³¹ however recently enacted law³² requires national identity card for birth registration and citizenship is made mandatory to obtain a national identity card resulting in the systematic exclusion of children born in Nepal.

Amidst the lockdown imposed by the Government of Nepal due to the given situation of COVID 19, the government announced the relief package targeting the workers of the unorganized sector and helpless people. The Standard³³ prepared to distribute the relief package made citizenship certificate or any identity document a mandatory document to receive the relief due to which the considerable number of people

³¹ Article 39 (1), "Every child shall have the right to name and birth registration along with his or her identity", the Constitution of Nepal also available at <http://www.lawcommission.gov.np/en/archives/98>
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³² National Identity and Civil Registration Act, 2019

³³ The Standards relating to the Relief Distribution to the Workers of an Unorganized Sector and Helpless People, 2020

without citizenship certificate were excluded from the benefit of the government's relief package³⁴. The Supreme Court of Nepal issued an interim order to the government telling to provide relief materials immediately to the economically marginalized and helpless people without requiring them to provide citizenship certificate keeping in mind the people's right to food and on the grounds of humanity. However, there are still cases reported where the people without citizenship certificate were denied the relief package.

People without citizenship certificate often already live on society's sidelines, and the absence of identity documents exacerbates their lack of access to social services. The Government of Nepal (GON) should encourage to extend support to all individuals residing within its territory that meet the criteria of vulnerability, regardless of legal status. All persons are treated equally without discrimination irrespective of gender, caste, class, marital status, sexual orientation, profession, political or ideological beliefs, religion and physical condition. The ultra-nationalist or radical nests should not be the barrier and cause an obstacle to work for the welfare of the people. The Government of

Nepal (GON) both at the central and local levels should specify and simplify the provisions of the Act to prevent ambiguity. With the introduction of the explicit provisions and the non-discriminatory mindset of the administrative officers, most of the issues related to citizenship certificate can be addressed. As citizenship certificate acknowledges the existence of an individual and it is the document that recognizes one's legal identity issues faced by the individuals who lack citizenship certificate or who are denied to acquire citizenship certificate will be addressed. It is observed that when a person lacks citizenship certificate, s/he is deprived of various facilities endowed by the government.

The predominant cause of denial of citizenship is found mainly relating to the State, laws, institutions, and officials' behaviour rather than the personal reasons of the denied persons. This, in the long run, could result in an exponential growth of the persons suffered due to the stateless condition in Nepal. The availability of State administrative services to the public at the district level seems insufficient to encourage their access to citizenship. Women's rights to get citizenship for themselves are not

³⁴ Ibid, Number 8 (a), (b) and (c) of the Annex 1

recognized, and they are made dependent on their male counterparts; thus, there is an immense loss of women's independent identity as a sovereign citizen.

Conclusion

The Constitution that was passed on September 20 2015, includes some progressive changes wherein citizenship is recognized as a right of every citizen (Article 10), and women are allowed to confer citizenship if the father of the child is unidentified (Article 11(5)). However, the provision is still discriminatory to women (Article 11(5), (6) and (7)). It also needs to be carefully monitored how the existing Act, Regulation and Directives are amended to accommodate the constitutional changes.

The Citizenship Act (Amendment) Bill, which was tabled in the Federal Parliament in 2018 has stalled there though significant discussions and agreements were made in the parliament. The session of the parliament was ended in 2019 without adopting the Citizenship Act Amendment Bill. After two years of being under consideration of the State Affairs and Good Governance Committee of the House of Representatives, the report relating to the Bill to Amend the

Nepal Citizenship Act was passed by the Committee on the day of June 21, 2020. The report than had been submitted to the House of Representatives on June 23, 2020, for a consideration. However, due to the sudden decision of the Government of Nepal the parliament session was ended without any conclusion made on the Citizenship Act (Amendment) Bill resulting in hundreds of thousand people who are eligible to obtain Nepali citizenship under the provision of the Constitution of Nepal, are being deprived of citizenship without their fault. The Constitution requires amendments in the laws as per the Constitution within a year, counting from the federal parliament's first session.³⁵ However, it has been more than two years since the first session of the federal parliament, but the amendments in the Citizenship laws have not been possible yet.

Access to citizenship certificates remains a challenge for women and the marginalized communities affected by poverty, illiteracy, displacement, isolation and discrimination. Impoverished and landless persons, for instance, may have difficulties in obtaining and preparing the necessary documents

³⁵ Article 304 of the Constitution of Nepal states that any law inconsistent with the Constitution shall ipso facto be invalid to the extent of such inconsistency

after one year of the date on which the first session of the Federal Parliament set forth in this Constitution is held.

required to apply for a citizenship certificate. Persons from rural communities are also presumed to lack adequate access to citizenship certificates and supporting documents from Rural Municipality or Municipality, which certify eligibility for the issuance of citizenship certificates.³⁶

Citizenship certificate is not only vested with one's identity and legal rights it is now the matter of one's existence and self-respect. To be undocumented means to be denied opportunities and possibilities to exercise civil and social rights. In practical terms, there is no distinction between an undocumented person whose birth was never registered and one whose birth was registered, but who never obtained his or her national identity document. The exclusion of the people without citizenship certificate from access to opportunities and activities is a non-material aspect that must be recognized and addressed. Exclusion takes many forms, but one of its common and determining factors is the lack of an identity document. Having a document that verifies one's identity is fundamental for any citizen to be able to access rights, benefits, and services. Today, having a legal identity is increasingly

important for any person who interacts with the public sector and society in general. Legal identity is understood to be the combination of factors that enable a person to access rights, benefits, and responsibilities.

³⁶ Forum for Women, Law and Development (FWLD), Acquisition of Citizenship Certificate in Nepal, Understanding Trends, Barriers and Impacts, Kathmandu, 2014.