

# The Gender Biased Problems of Citizenship and Statelessness in Nepal

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## Summary

Nepal has historically suffered from the problem of equal citizenship, which the Constitution of Nepal, 2015 has failed to address. Women, in particular, are deprived of the equal status in imparting citizenship to their children. The practice of a male-dominated citizenship policy has continuously hindered fulfillment of the aspirations of gender equality. The problem of citizenship has aggravated a number of issues, especially male lineage, single mother's conundrum, and marriage. In other words, male lineage has been institutionalized as the basic standard of citizenship policy. Second, marriage, identification of the whereabouts of the father who left his wife and children, and proof on the father's domicile have placed women, especially single mothers, in many inconvenient socio-cultural, political and economic situations, including the denial of citizenship to their children, which has also been one of the sources of statelessness. Third, women continue to face discrimination on the grounds of marriage. A foreign woman marrying a Nepalese man can receive the Nepalese citizenship through the act of marriage, whereas a Nepalese woman marrying a foreign man has been historically deprived of the right to confer the Nepalese citizenship to her husband. By analyzing these three problems (male lineage, single mother's conundrum, and discrimination on the grounds of marriage), this paper also offers some practical solutions to the problems of citizenship in Nepal.

## 1. INTRODUCTION

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Citizenship is one of the most important elements of a civic identity. Without citizenship, an individual may easily lose the legal basis for establishing almost all social, political, economic, and *jural* relationships in a modern state, society, and community. In any democratic state, citizenship concludes the civic relationships fused with rights and duties as the core expression of an individual identity. Despite the immense significance of citizenship, it is widely perceived that there are a number of people, especially women and children, deprived of citizenship in Nepal<sup>3</sup> due to a gender-biased citizenship policy

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<sup>3</sup>. To date, there has been no specific public research or government estimation about the exact number of such people. However, civil society studies based on a sampling technique provide some estimation. For example, the FWLD Report on Acquisition of Citizenship provides that 0.9 million people eligible for citizenship are living with a single parent. In addition, the report estimates that 4.5 million people are eligible but have not acquired citizenship. One interesting case was covered by media, in which one of the sons of the former Minister of Tourism, Mr. Kripashwor Sherpa, was deprived of citizenship, as the Minister had denied being his father and the mother alone could not transfer citizenship. On the contrary, an adult should obtain citizenship on the grounds of birth, independent of the status of parents, as provided under Article 2 of the Child Rights Convention. *See also* Durga Karki, *One Million Children to be Stateless*, in COLLECTIVE CITIZENRY VOICE ON CITIZENSHIP SPECIAL ISSUE, (Women Security Pressure Group, Kathmandu, 2015).

legitimized through constitutions and laws, mainly on the grounds of male lineage, single mother's conundrum, and discrimination through marriage.

The new Constitution of Nepal, promulgated on September 20, 2015, has perpetuated the discrimination on all aforementioned grounds. The 2015 Constitution is not the first one to legitimize a gender-biased citizenship policy in Nepal. Indeed, such a policy has been in force in Nepal since the first law on citizenship was enacted in 1952. For example, Article 10 of the Citizenship Act of Nepal, 1952, provided that, as per the terms and conditions of a treaty reached with the Government of Bhot,<sup>4</sup> only sons born to a Nepalese male married to a local female of Tibet (Bhoteni) would be deemed eligible to be a Nepalese citizen, while the daughters had to become the citizens of Bhot. Thus, legal policy discrimination between a son and a daughter had clearly subsisted from the very inception of the 1952 Act. However, on many accounts, the 1952 Act was much more advanced than are some of the existing citizenship laws of Nepal, which are discussed in the following sections.

Among others, three factors have historically caused a gender-biased citizenship regime in Nepal. First, owing to cultural factors associated with geographical proximity, the Nepalese people have historically established marital relationships with the Tibetan and Indian people. In addition, as the trade opportunities expanded, so did the cultural interactions that encouraged marriages between these people, which was understandably natural. However, the grounds and consequences of a marriage were treated with a discriminatory policy on citizenship since the Citizenship Act of Nepal, 1952. Second, Nepal has an open border with India. Consequently, there was always a fear of extensive migration from populated India, which could create massive pressures on the social, political, cultural, and economic conditions in the country. However, to remedy the fear of influx, since the enactment of the 1952 Act, a gender-biased citizenship regime has continuously been adopted, which was further supported by Dr. Harka Gurung's Immigration Report in the 1980s. Third, the historically indoctrinated patriarchal system and the sense of patriarchal nationalism have ignored the role of women and children in the nation-building process. Consequently, nation has been mainly understood from the perspective of male hegemony. In the following paragraphs, it is argued that, to address the fear of influx, Nepal does not need to adopt a gender-biased citizenship regime. Rather, with a gender-neutral citizenship policy in place, Nepal can end the discrimination on citizenship. Further, this paper also analyzes how a gender-neutral citizenship policy could be developed in addressing the problem of the influx of foreigners, especially of Indians in Nepal, as well as secure the citizenry rights of the people who are eligible for citizenship.

To provide a clear perspective and systematic analysis of the citizenship policy and practices in Nepal, this paper is divided into six sections. Following this introductory section, section two provides a brief overview and analysis of the development of citizenship laws and policies in Nepal from 1952 to 1990. Nepal entered into a

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<sup>4</sup>. Historically, Tibet was known as Bhot in Nepal.

democratic phase of political development in 1990. Therefore, the third section examines the post-1990 legal political development of citizenship issues in Nepal. The ten-year-long Maoist insurgency in Nepal had resulted in a peaceful democratic transition in 2006, followed by a democratic federal republican state of Nepal. In this period, the Constituent Assembly of Nepal was engaged in the making of a new constitution for Nepal. The constitution-making process has prompted widespread social demands and processes for a gender-neutral citizenship policy in Nepal. Thus, the fourth section of this paper analyzes the citizenship issues discoursed in the post-2006 political scenario of Nepal. The fifth section examines the reasons behind continued adoption of a gender-biased citizenship regime in Nepal. The final section, i.e., section six, draws some conclusions and provides a few practical recommendations for streamlining Nepal's present legal regulatory mechanism, in line with the idea of equal citizens and international human rights standards.

## 2. CITIZENSHIP LAWS AND POLICIES IN NEPAL FROM 1952 TO 1990

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In the legal and political history of Nepal, a specific citizenship law was enacted for the first time on May 8, 1952. Nevertheless, prior to the 1952 Act, there already existed some general laws, including the National Code (*Muluki Ain*), which had secured some distinctions between citizens and non-citizens in terms of rights and duties. In particular, non-citizens were not eligible to acquire immovable property, including land, in Nepal.

From 1952 to 1990, a number of major legal policy developments took place on the issue of citizenship in Nepal. The 1952 Citizenship Act is the starting point of specific legislation on citizenship, followed by the 1959 Constitution of the Kingdom of Nepal and the 1962 Constitution of Nepal. Following the 1962 Constitution, the 1964 Citizenship Act was enacted, which continued with a number of amendments, and was replaced by the Citizenship Act of 2006. The Citizenship Rules, 1965 and 1968 had complemented the implementation of the 1964 Citizenship Act.

The 1952 Act had adopted the following four standards on granting citizenship:

- Citizenship by birth
- Citizenship by descent
- Citizenship by marriage
- Citizenship by domicile

*Citizenship by birth:* Any person born in Nepal was eligible to acquire Nepalese citizenship, subject to living in Nepal with a family and the intent of permanent domicile.<sup>5</sup> The status of parents was not a precondition to acquiring citizenship of Nepal on the grounds of birth. In sum, any person born of even non-Nepalese parents could also attain the Nepalese citizenship by fulfilling two conditions: being born in Nepal and having domicile in Nepal, i.e., living in Nepal with the intent of a permanent residence.

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<sup>5</sup>. Section 2(a) of the Citizenship Act, 1952.

*Citizenship by descent:* Any person was eligible to acquire the citizenship of Nepal if one of the parents, i.e., either father or mother, was born in Nepal and had a domicile in Nepal.<sup>6</sup> Children born outside of Nepal to parents both of whom were born in Nepal were eligible for the Nepalese citizenship as well, even if parents were not Nepalese citizens.<sup>7</sup> Similarly, children born outside Nepal to Nepalese parents living in other countries without acquiring foreign citizenship were eligible to acquire the Nepalese citizenship.<sup>8</sup>

*Citizenship by marriage:* A foreign woman married to a Nepalese man could become a Nepalese citizen by the fact of marriage.<sup>9</sup> She did not need to spend a certain amount of time to be considered domiciled in Nepal after the marriage. However, the 1952 Act had no provision for a foreigner man marrying a Nepalese woman acquiring citizenship. Thus, when a Nepalese woman married a foreigner man, she was supposed to live with her husband in the country of his domicile. Consequently, she could obtain Nepalese citizenship only upon death of her husband, following a divorce, or after being deserted by her husband.<sup>10</sup> With these provisions, a gender-biased or a discriminatory policy on citizenship was legalized in Nepal, and has remained in force since 1952. Moreover, the children born within a marriage between a Nepalese man and a Tibetan woman also suffered from this gender-biased citizenship policy. As mentioned above, the daughters were denied the Nepalese citizenship and had to obtain the Tibetan citizenship, whereas the sons were eligible to acquire the Nepalese citizenship.<sup>11</sup>

*Citizenship by domicile:* Domicile was a pre-condition to acquire the Nepalese citizenship either by birth or descent.<sup>12</sup> Further, Nepalese individuals living outside of Nepal by acquiring foreign citizenship, as well as their children, could also acquire Nepalese citizenship after continuously living in Nepal for one year.<sup>13</sup> In addition, foreigners living in Nepal for at least five years could acquire Nepalese citizenship.<sup>14</sup> However, the 1952 Act had introduced a policy of single citizenship.<sup>15</sup> Therefore, to acquire the citizenship of Nepal, foreign citizenship had to be renounced.

Despite gender-biased citizenship policy on the ground of marriage, the system of acquiring citizenship on the grounds of birth, descent, and domicile was much more forward-looking and practical compared to the post-1964 conservative system of citizenship in Nepal. Still, the data presented in Table 1 below indicate that the more conservative policy on citizenship resulted in a greater number of foreigners acquiring the Nepalese citizenship. This was especially the case when the citizenship policy was

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<sup>6</sup> *Id.* sec. 2(b).

<sup>7</sup> *Id.* sec. 4(a).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* sec. 4(a).

<sup>10</sup> *Id.* sec. 4(b).

<sup>11</sup> *Id.* sec. 10.

<sup>12</sup> *Id.* sec. 2.

<sup>13</sup> *Id.* sec. 4(c).

<sup>14</sup> *Id.* sec. 4(d).

<sup>15</sup> *Id.* sec. 8.

changed for some political bargaining in the post-2006 regime, where around 3 million (30 lakh) people have acquired the Nepalese citizenship.

Table 1: Foreigners Acquiring Citizenship in Nepal

Census Year	Foreign born population	Foreign born as % of total	Foreigner acquiring citizenship in Nepal	Foreigner acquiring citizenship % of total	Foreigner acquiring citizenship as % of foreign born population	Total population of Nepal
1961	337,620	3.59	110,061	1.17	32.6	9,412,996
1971	337,448	2.92	136,477	1.18	40.4	11,555,983
1981	234,039	1.56	483,019	3.21	206.4	15,022,839
1991	439,488	2.38	90,427	0.49	20.6	18,491,097
2001	608,093	2.67	116,571	0.59	19.2	22,736,934

Source: Bhim P. Subedi, *The Issue of Foreign Born Population in Nepal: A Short Essay in honor of Dr. Harka Gurung*, 38 THE HIMALAYAN REVIEW 23-34 (2007); see also Vidya Bir Sing Kansakar, *International Migration and Citizenship in Nepal*, available at [http://cbs.gov.np/image/data/Population/Monograph\\_vol\\_1\\_2%281-10,11-21%29/Paper%2014%20%20International%20Migration%20and%20Citizenship%20in%20Nepal.pdf](http://cbs.gov.np/image/data/Population/Monograph_vol_1_2%281-10,11-21%29/Paper%2014%20%20International%20Migration%20and%20Citizenship%20in%20Nepal.pdf), last visited on January 3, 2016.

Comparatively, the 1952 Act was much more liberal, since it did not prohibit anyone on the grounds of descent or naturalization to hold the highest position of the state, including the position of the prime minister, minister, and chief of the army staff. Yet, the only condition required was that one had to be a Nepalese citizen for at least ten years,<sup>16</sup> which was applicable for all. Article 289 of the 2015 Constitution requires that, to hold the top public positions, an individual must have citizenship by descent, which has been understood as a calculated political move to deprive of the naturalized citizens from acquiring the top public positions in the country.

The short-lived 1959 Constitution of the Kingdom of Nepal did not provide any provision on citizenship. Constitutionally, the autocratic *panchayati*<sup>17</sup> constitution of 1962 was the first to provide provisions on citizenship. While the 1962 Constitution was undemocratic, it upheld almost the same policy on citizenship as that adopted by the 1952 Act. The 1962 Constitution adopted two broad categories of standards with respect to granting citizenship. They were:

- Citizenship on the grounds of domicile

<sup>16</sup> *Id.* sec. 9.

<sup>17</sup> The term ‘panchayati’ denotes a political system adopted by the 1962 Constitution that banned political parties, institutionalized absolute monarchy, and ruled the country suppressing all the democratic aspirations of the Nepalese people for almost 30 years.

- Citizenship to foreigners

*Citizenship on the grounds of domicile:* Every person having domicile in Nepal was eligible to acquire citizenship of Nepal at the commencement of the 1962 Constitution on one of the following grounds:

- By birth, i.e., any person could obtain Nepalese citizenship by the fact of birth in Nepal, i.e., *jus soli*. The parents were not required to be the Nepalese citizens. Thus, *jus soli* with the pre-condition of domicile was a sufficient standard for citizenship.<sup>18</sup>
- If one of the parents was born in Nepal, the descendant could acquire the Nepalese citizenship. In other words, the parents did not need to be Nepalese citizens. Hence, the birth of either a mother or a father in Nepal could be sufficient grounds to acquire the Nepalese citizenship, subject to the person applying for citizenship being domiciled in Nepal.<sup>19</sup>
- A foreign women married to a Nepalese citizen could acquire the Nepalese citizenship by the fact of marriage.<sup>20</sup> However, she had to fulfill two pre-conditions. First, she had to renounce her previous citizenship.<sup>21</sup> Second, she had to have made Nepal her domicile.<sup>22</sup> On the other hand, a Nepalese woman marrying a foreign man could live in Nepal but her husband had no right to Nepalese citizenship.<sup>23</sup> Consequently, after marrying a foreign man, a Nepalese woman was practically forced to leave the country to live with her husband.
- A person who had already acquired the citizenship of Nepal in accordance with the laws of Nepal was deemed the citizen of Nepal.<sup>24</sup>

*Citizenship to foreigners:* After living in Nepal for at least 15 years, a foreigner could be qualified to acquire the Nepalese citizenship on the following grounds:

- Having ability to read and write the national language of Nepal, i.e., Nepali language
- Being engaged in an occupation by residing in Nepal
- Having taken steps to renounce the previous citizenship
- A foreigner of the Nepalese origin could obtain the Nepalese citizenship by residing in Nepal for a minimum of two years

The 1962 Constitution further augmented the requirement of domicile in acquiring citizenship of Nepal, which was one of the key policy instruments to contain the possible influx. However, it also gave continuity to the practices of discrimination between men and women on the grounds of marriage. A Nepalese man marrying a foreign woman was

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<sup>18</sup> Article 7(a) of the Constitution of Nepal, 1962.

<sup>19</sup> *Id.*, Article 7(b).

<sup>20</sup> *Id.*, Article 7(c).

<sup>21</sup> *Id.*, Article 8(d).

<sup>22</sup> *Id.*, Article 7.

<sup>23</sup> *Id.*, Article 8(d).

<sup>24</sup> *Id.*, Article 7(d).

able to secure his wife's Nepalese citizenship, whereas a Nepalese woman marrying a foreign man had no such right. However, if the requirement of domicile was the policy defense against the influx, there seems no rational justification for discriminating between men and women on the grounds of marriage.

The 1964 Citizenship Act legalized an extreme form of gender-biased citizenship policy in Nepal. It broadly adopted two standards on granting citizenship. These two standards have been the major policy guidelines in designing citizenship regime in Nepal to date. They are as follows:

- Citizenship by descent
- Naturalized citizenship

*Citizenship by descent:* Any person born after the 1964 Act came into force, i.e., since February 28, 1964, could acquire the Nepalese citizenship on the grounds of descent, if the father was a Nepalese citizen at the time of birth of the person.<sup>25</sup> The Citizenship Rules, 1966, required a recommendation to acquire citizenship by descent from a government officer, the president of the District Panchayat, or the Chief of the local bodies. However, if the person was born outside Nepal, the birth had to be registered within a year from the date of birth at the concerned Embassy of Nepal or any other prescribed offices.<sup>26</sup> A person found in the Kingdom of Nepal, but without any identification of a father, could acquire the Nepalese citizenship on the grounds of descent until the father was identified.<sup>27</sup> A person born within a reasonable time after the death of the father could acquire citizenship, based on the status of the father at the time of his death.<sup>28</sup>

*Naturalized citizenship:* The 1964 Act adopted almost the same standards as those of the 1962 Constitution in granting Nepalese citizenship to a foreigner. A foreign woman married to a Nepalese citizen could acquire naturalized citizenship of Nepal on the renouncement of her previous citizenship.<sup>29</sup> Article 8(d) of the 1962 Constitution systematically denied the right of a woman marrying a foreign man to secure the Nepalese citizenship of her husband.<sup>30</sup> However, it adopted the policy of reciprocity in granting naturalized citizenship to a foreigner, except to a woman married to a Nepalese man and a person of a Nepalese origin.<sup>31</sup> It also stipulated that, to be eligible to acquire Nepalese citizenship, a foreigner had to meet both birth and descent conditions simultaneously, as well as choose a single citizenship, i.e., of either Nepal or of the foreign country.<sup>32</sup>

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<sup>25</sup> Section 3(1) of the Citizenship Act of Nepal, 1964.

<sup>26</sup> *Id.*, proviso.

<sup>27</sup> *Id.* sec. 3(4).

<sup>28</sup> *Id.* sec 3(5).

<sup>29</sup> *Id.* sec. 6.1(d).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* sec. 6.1(e).

<sup>32</sup> *Id.* sec. 9.

The 1964 Act institutionalized a conservative and patriarchal policy on citizenship. Only a father could grant citizenship on the grounds of descent, while a mother was denied such rights. Further, the right to citizenship was defined not from the perspective of the person eligible for acquiring citizenship but from the eligibility of a father. A single mother was denied all rights to grant citizenship to her children. In other words, if the father was unidentified or his whereabouts were unknown, in practice, the mother had to produce evidence about the father of the child. A mother had no privilege to decline disclosing her relationship with the partner. Practically, in many instances, this situation placed women (especially single mothers) in a very inconvenient position, rendering their children stateless. In most such cases, women and children had to live with social stigma at various levels when their fathers and husbands abandoned them. These situations denied the very core foundation of a right to dignified life of women and children. One assessment estimates that, due to this gender-biased citizenship policy being legitimized by the state, around one million children have been rendered stateless in Nepal.<sup>33</sup>

The 1962 Constitution and the 1964 Citizenship Act had some evident contradictions. The Act had legitimized patriarchal lineage in granting citizenship by ignoring the constitutional provision on equal rights of a father and a mother in granting citizenship to their children. However, due to the autocratic *panchayat* system in place, the 1964 Act was not challenged before the court and its compatibility with the constitution was not tested until 1990.

### 3. CITIZENSHIP LAWS AND POLICIES IN NEPAL FROM 1990 TO 2006

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The 1990 people's movement initiated changes that have resulted in a democratic political environment in the country. It ended the absolute monarchy and the autocratic *panchayat* system. It brought the absolute monarchy into the constitutional framework with the promulgation of the 1990 Constitution of the Kingdom of Nepal. However, the people's struggle for equality of men and women failed to reach the desired outcome, owing to the institutionalization of gender-biased citizenship policy by the 1990 Constitution. A democratic constitution bequeathed the discriminatory citizenship policy legitimized by the 1964 Citizenship Act.

Most regressively, it legitimized both Article 7 of the 1962 Constitution and the Citizenship Act, 1964, in particular Section 3 and 6 of the 1964 Citizenship Act. Section 3 of the 1964 Act, in contradiction to its parent law, i.e., the 1962 Constitution, had legitimized a patriarchal lineage in granting citizenship by denying the rights of a mother in transferring citizenship to her children. Section 6 of the 1964 Act, which pertains to naturalized citizenship, continued with the legitimization of discrimination between men and women in acquiring citizenship on the grounds of marriage. The 1990 Constitution classified the regime of citizenship into three broad categories:

- Citizenship at the commencement of the 1990 Constitution

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<sup>33</sup>. See Durga Karki, *One Million Children to be Stateless*, in COLLECTIVE CITIZENRY VOICE ON CITIZENSHIP SPECIAL ISSUE, (Women Security Pressure Group, Kathmandu, 2015).



- Citizenship after the commencement of the 1990 Constitution
- Honorary citizenship

*Citizenship at the commencement of the 1990 Constitution:* With the precondition of a domicile, the 1990 Constitution recognized following three types of persons as the citizens of Nepal at the commencement of the constitution:<sup>34</sup>

- a. Any person who was a citizen under Article 7 of the 1962 Constitution
- b. Any person who was a citizen under Section 3 of the 1964 Citizenship Act
- c. Any person who had acquired naturalized citizenship under Section 6 of the 1964 Citizenship Act

With the legitimization of Article 7 of the 1962 Constitution and 1964 Act, the 1990 Constitution could not ensure a gender-neutral citizenship policy in the post-1990 democratic phase of the country.

*Citizenship after the commencement of the 1990 Constitution:* Among others, on three specific grounds, the 1990 Constitution had further institutionalized a patriarchal and gender-biased citizenship policy. First, after instating the 1990 Constitution, any person could be eligible to acquire the Nepalese citizenship by descent only on the grounds of a father's lineage.<sup>35</sup> Against the spirit of the democratic movement in the country, it denied mothers equal and autonomous rights in imparting citizenship to their children. Second, children whose parents were not known could obtain citizenship on the grounds of descent until the father was identified.<sup>36</sup> With the identification of the father, the citizenship status of the child would be aligned with that of the father. Third, the 1964 Citizenship Act had required the renouncement of previous citizenship for a foreign woman marrying Nepalese man to receive the Nepalese citizenship. However, the 1990 Constitution required only initiating the process of renouncing the previous citizenship for a foreign woman marrying a Nepalese citizen.<sup>37</sup>

In short, the post-1990 citizenship regime in Nepal was specifically fraught with three main problems associated with the denial of equality of citizens. These three problems are instrumental in understanding the post-1990 development in the citizenship regime of Nepal and are discussed below.

*Problem 1:* A male lineage, i.e., the lineage of a father in governing the citizenship rights of a child. The regime of lineage denied the basic equality principle between men and women guaranteed by international human rights instruments and the equality provision adopted by the 1990 Constitution itself.<sup>38</sup> Constitutionally, women's independent and

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<sup>34</sup>. Article 8 of the Constitution of the Kingdom of Nepal, 1990.

<sup>35</sup>. *Id.* Article 9(1).

<sup>36</sup>. *Id.* Article 9(2).

<sup>37</sup>. *Id.* Article 9(3).

<sup>38</sup>. *Id.* Article 12(2) and (3). Article 12(2) provided that, "No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe, or ideological conviction, or any of them."

autonomous citizenry identity was rigorously denied. Consequently, a mother had no right to impart citizenship to her children.

*Problem 2:* A single mother had to suffer from immense practical problems in imparting citizenship independently to her children based on her citizenry identity. The citizenship-issuing authority, i.e., the Chief District Officer, used to ask her to declare who her husband was and identify the father of the child. This demand from the authority invariably placed a single mother into a number of inconvenient situations. First, if she did not know the identity of her child's father, she would be socially stigmatized, assuming that she does not have dignity in society. Second, if she disclosed the name of the father of her child, she had the responsibility to produce evidence that the father was a Nepalese citizen, which was practically impossible, if his whereabouts were not known, the father is not identified, refused to support the wife and child, or has denied fathering the child. Third, if she failed to provide information on the whereabouts or the citizenship status of the father of her child, the child would be deprived of citizenship. Fourth, with the deprivation of the citizenship, a child was rendered a stateless person. Under the existing laws of Nepal, a person without citizenship is not able to pursue higher education, apply for a driving license or a bank account, start a company or conduct a business, enter into any kind of formal services, and so on. Consequently, a person becomes not only stateless, but also the victim of the denial of all social, political, and economic opportunities.

*Problem 3:* The regime of marriage has remained one of the key sources of discrimination in the domain of citizenship in Nepal. A Nepalese man marrying a foreign woman could be able to secure the Nepalese citizenship for his wife by the very fact of marriage, provided that she has initiated the process of renouncing previous citizenship. Yet, the same right was denied to a Nepalese woman marrying a foreign man.

With these three problems, even in the post-1990 democratic phase of Nepal, women always felt discriminated and deprived of the rights of equal citizens. Against this background, legal, political, and social movements and initiatives were taken in challenging and reforming the discriminatory citizenship regime in Nepal.

In a case of *Advocate Chandra Kant Gyanwali and others v. the Council of Minister of Nepal*,<sup>39</sup> the Supreme Court of Nepal declined to declare *ultra vires* to the male lineage regime of citizenship legitimized under Article 9(1),<sup>40</sup> and 9(2)<sup>41</sup> of the 1990 Constitution, Section 3 of the 1964 Citizenship Act, and Rule 3 of the Citizenship Rules of Nepal. Instead, the Supreme Court of Nepal justified the patriarchal regime governing the system of citizenship in Nepal. The Supreme Court also remained reluctant to challenge the

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<sup>39</sup>. Writ Petition No. 3668 of 2000 A.D. decided on February 7, 2002 by the Special Bench of the Supreme Court of Nepal.

<sup>40</sup>. Article 9(1) of the 1990 Constitution provides that, "A person is born after the commencement of this Constitution and whose father is a citizen of Nepal at the birth of the child shall be a citizen of Nepal by descent."

<sup>41</sup>. *Id.* Art. 9(2) provides that, "Every child found within the Kingdom of Nepal and the whereabouts of whose parents are not know shall until the father of the child is traced, be deemed to be a citizen of Nepal by descent."

impugned provisions on citizenship on the grounds of international human rights conventions, including the Convention on the Rights of Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Another major departure from the earlier regime of citizenship institutionalized by the 1990 Constitution was that it had abolished the system of citizenship on the basis of birth (*jus soli*) and had adopted a system of citizenship by descent on the grounds of male lineage alone. Apparently, it did not solve the problems of citizenship in Nepal. There were social and political demands and pressures to provide citizenship on the grounds of birth corroborated by domicile. Against this background, His Majesty's Government of Nepal (HMGN) introduced a finance bill on the parliament to provide citizenship to people who were born in Nepal and had domicile in Nepal. Before the Bill was approved, His Majesty King Birendra sought the opinion of the Supreme Court<sup>42</sup> on whether the proposed system of providing citizenship on the grounds of birth was consistent with the 1990 Constitution. With the proposed provision, male lineage would not be necessary to impart citizenship; instead, both father and mother would be equally eligible to impart citizenship to their children. However, tendering its opinion to His Majesty, the Supreme Court of Nepal noted that the proposed amendment was unconstitutional. His Majesty took this opinion of the Supreme Court of Nepal as grounds for not approving the Citizenship Bill. Thus, the reform attempt initiated by the democratic government was not successful.

As a result, the three problems (male lineage, single mother's conundrum, and discrimination on the grounds of marriage) affecting citizenship remained as the key problematic issues even in the post-2006 era of the Nepalese legal political scenario, which is discussed in the following section.

#### 4. CITIZENSHIP LAWS AND POLICIES IN NEPAL IN THE POST-2006 SCENARIO

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The post-2006 citizenship laws and policies in Nepal have also failed to address the three problems mentioned above. The development of the post-2006 citizenship policy in Nepal is discussed in the following two subsections.

##### *4.1 Citizenship Act, 2006, and the Interim Constitution, 2007*

The post-2006 conditions in Nepal are marked by several profoundly important steps in the legal, political, and social development of the country. First, they are marked by the transformation of ten-year-long Maoist insurgency into the peace process. Second, by 2006, the centuries-long monarchical system in Nepal had ended, and Nepal was declared a republic state. Third, the transformation also promised to replace the unitary structure of the Nepalese state with a federal structure. Fourth, it opened an era with commitments for fair, equal, and inclusive Nepalese society. Fifth, it opened the door for a new constitution for a democratic federal republic of Nepal through a Constituent

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<sup>42</sup>. Supreme Court of Nepal, Special Constitutional Opinion No. 1 of 2001, provided on April 24, 2001.

Assembly. Thus, against the backdrop of the past experiences, huge social pressure, discourses and demands for treating men and women equally in all social, political, and legal domains emerged. As a result, a major initiative was taken by enacting a new Citizenship Act and Citizenship Rules of Nepal in 2006.

Section 3(1) of the 2006 Citizenship Act recognized the equal status of a father and a mother in imparting citizenship to their children. Moreover, the provision was construed from the rights of a child as well. Section 3(1) reads as follows:

Any person is deemed eligible to be a Nepalese citizen on descent if such person's father or mother was a Nepalese citizen at the time of birth of such person.

This provision legally addressed 'Problem 1' noted earlier, i.e., male lineage. However, in practice, the citizenship-issuing authority kept demanding that the father had to be a Nepalese citizen as well. Therefore, the problem of imparting citizenship by a mother independently of a father remained. Against this background, in a case of *Ms. Sabina Damai v. the Government of Nepal*,<sup>43</sup> the Supreme Court of Nepal made a landmark decision. The decision highlighted a number of important aspects in ensuring the equal and autonomous rights of a mother in imparting citizenship to her children. Some of the key principles established by the Supreme Court are noted below:

- The petitioner Sabina was born in Nepal from a mother, who is a Nepalese citizen. Therefore, the government should grant her citizenship based on that of her mother. In other words, the Supreme Court clearly established that, independently of the status of a father, a mother could impart citizenship to her children. This decision partly addressed 'Problem 1' as mentioned above.
- Citizenship right is a right of a child. When a mother does not know the identity or whereabouts of the father of a child, the citizenship-issuing authority should issue citizenship to a child born of a Nepalese mother through an easy and accessible process. Failure to do so would defeat the right of a mother to confer citizenship to her children independently of her husband or partner. The Supreme Court also ordered the Home Ministry to instruct the citizenship-issuing authority (Chief District Officers) to institute such arrangements. With this decision, 'Problem 2', i.e., the whereabouts issue, as mentioned above, was also addressed, albeit only theoretically.
- The Supreme Court also ordered the Home Ministry to take all necessary steps, including legislative measures, in ending all types of cultural and customary discrimination against women, as guided by the CEDAW. This instruction would help to eliminate 'Problem 3', i.e., discrimination on the grounds of marriage.
- The Supreme Court also ordered the Prime Minister and the Council of Ministers to take all necessary measures to end the patriarchal system that was the root cause of all discrimination between men and women, including the denial of the

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<sup>43</sup>. Supreme Court of Nepal, Writ Petition No. 067-WO-0703 of 2010.

equal status and right to impart citizenship to their children. This instruction would help to eliminate all three problems mentioned above.

To a certain extent, this landmark decision of the Supreme Court of Nepal influenced the citizenship provisions in the Interim Constitution of Nepal, 2007. However, the Interim Constitution could not mitigate some of the problems related to gender-biased citizenship regime in Nepal. The 2007 Interim Constitution provided the following two regimes on the issue of citizenship:

- Citizenship at the commencement of the Interim Constitution
- Naturalized Citizenship

*Citizenship at the Commencement of the Interim Constitution:* Article 8 of the 2007 Interim Constitution adopted different standards in imparting citizenship at its commencement, some of which are noted below:

- i. A person who had already acquired the citizenship of Nepal would be a Nepalese citizen.
- ii. Any person who had acquired the Nepalese citizenship by descent prior to the commencement of the Interim Constitution and had a permanent domicile in Nepal.
- iii. Any person whose father or mother was a Nepalese citizen at his or her birth and had a permanent domicile in Nepal. This provision would address ‘Problem 1’ mentioned above, since it ended the male lineage and legitimized the equal status of a mother and a father in imparting citizenship to their children.
- iv. Every child found within the territory of Nepal, even if the whereabouts of his/her parents were not known, would be deemed Nepalese citizen. With the overall application of a gender-neutral citizenship regime legitimized under Article 8.2(b) of the Interim Constitution, in the case of the identification of the mother of such child, the mother could impart citizenship to her children independent of the father. At the theoretical level, this provision had addressed ‘Problem 2’ mentioned above. However, the problems of requiring evidence of whereabouts of the father and his status by the citizenship-issuing authority defeated the spirit of this provision in practice.
- v. A person born before April 13, 1990, having a permanent domicile in Nepal, is granted citizenship. However, such an individual had to apply for citizenship within a prescribed time, using a prescribed procedure, and could do so only once. Based on this provision, the Government of Nepal issued citizenship to over 2.6 million people, supposedly to address the citizenship problem in different parts of the country, especially in Madhes.
- vi. A foreign woman married to a Nepalese citizen could obtain the Nepalese citizenship by virtue of marriage, but the same right was denied to a foreign man married to a Nepalese woman. In fact, the 2007 Interim Constitution has not ensured any right to a foreign man marrying a Nepali woman in acquiring

naturalized citizenship of Nepal on the grounds of marriage. In other words, the Interim Constitution failed to address ‘Problem 3’ noted above.

- vii. A person born from a woman who is a Nepalese citizen married to a foreign male citizen could acquire the naturalized Nepalese citizen status, if such person was born in Nepal and permanently resided in Nepal. This provision could solve some of the problems caused by the discrimination on citizenship on the grounds of marriage. However, this provision has failed to address some key problems. First, it recognizes the naturalized citizenship, but not the citizenship on the grounds of descent. In other words, a mother could not transfer her citizenship to her offspring. Second, it is discriminatory against women because a Nepalese man who marries a foreign woman (his wife does not need to acquire Nepalese citizenship) can impart the Nepalese citizenship to his children on the grounds of descent without any conditions. Third, a Nepalese woman, either married or unmarried, while working in a foreign country (or residing there for any other reason) that has a child with a foreign national, or if mother cannot produce the evidence of nationality of her child’s father, could not confer citizenship to her child independently of the father. This provision paradoxically repudiated the right of a mother in imparting citizenship to her children independently of the father ensured by Article 8.2(b) of the Interim Constitution itself.

On the enactment of the 2006 Citizenship Act, the GoN formed 561 Citizenship Distribution Teams, which distributed 26,15,615 citizenship certificates across the country. Of these, 12,75,355 were granted in Tarai and 13,40,260 in Kathmandu and other parts of the country. Repeatedly, the GoN has speedily distributed citizenship by forming different teams and committees besides the regular process of acquiring citizenship from the Offices of the Chief District Officers located in all 75 districts. Table 2 below shows the distribution of citizenship certificates resulting from the expedited process from 1975 to 2008.

Table 2: Citizenship Distributed at Different Times

Date	Speedy Process	Numbers of Citizenship Distributed
<b>From 2032-2038 BS, i.e., (1975-1981 AD)</b>	Citizenship Distribution Team at four different phases	<ul style="list-style-type: none"> <li>• Record of the eligible people prepared: 69,19,762</li> <li>• Temporary citizenship distributed: 51,27,441</li> <li>• Registration of infants: 50,98,101</li> <li>• Application collected for naturalized citizenship: 32,000</li> </ul>
<b>2043 BS (1985-1986 AD)</b>	Citizenship Team	<ul style="list-style-type: none"> <li>• Numbers of citizenship distributed: 5,43,000</li> </ul>

<b>2044-2045 BS (1987-1988 AD)</b> Citizenship Team	<ul style="list-style-type: none"> <li>• Citizenship distributed to those holding temporary citizenship: 30,12,187</li> <li>• Data collection of those not recorded before: 14,39,020</li> </ul>
<b>2046 BS (1989 AD)</b> Citizenship Team	<ul style="list-style-type: none"> <li>• The team was authorized to distribute citizenship to 21,43,000 persons not recorded before</li> </ul>
<b>2053 BS (1994 AD)</b> Citizenship	<ul style="list-style-type: none"> <li>• The Dhanapati Commission had identified about 34,000,000 people without citizenship and had recommended for the distribution of citizenship. To implement the Commission's report, an Implementation Commission was formed on December 11, 1995 under the Chairperson of Mr. Mahanta Thakur, Member of the Parliament.</li> </ul>
<b>2063 BS (2007 AD)</b> Citizenship Distribution Team	Citizenship distributed by the Team: <ul style="list-style-type: none"> <li>• 23,44,821 on descent</li> <li>• 1,70,042 on birth</li> <li>• 1,00,224 on marriage</li> <li>• 528 on naturalization</li> </ul>

*Source:* Home Ministry, Nepal.

Political parties had shown a tendency to use their influence in the process of citizenship distribution to consolidate their vote banks and had thus influenced the Citizenship Distribution Team of 2007. Moreover, the GoN has also been distributing citizenship through Movable Citizenship Distribution Services since 2004. Besides these efforts of distributing citizenship through different expedient methods, the problem of citizenship in Nepal is persistent due to the gender discriminatory policies. In sum, the 2007 Interim Constitution did not address 'Problem 2 and 3' mentioned above. In practice, 'Problem 1' has also persisted. In fact, the making of the new constitution by the Constituent Assembly of Nepal was supposed to address all three problems. Yet, it has rather unraveled 'Problem 1' that was theoretically addressed by the Interim Constitution, 2007. The citizenship issues under the 2015 Constitution are discussed below.

#### *4.2 Constituent Assembly and the 2015 Constitution*

With the conclusion of the Comprehensive Peace Agreement (CPA) between the Government of Nepal and the CPN (Maoists) in 2006, the Nepalese political history had significantly ushered the paradigm from a constitutional monarchy to a democratic

federal republic. Since then, Nepal has undergone a political transition. Following the CPA, the Interim Constitution of Nepal, 2007, affirmed the Nepalese people as the sovereign power and recognized them as the inherent source of the state authority. The Interim Constitution reiterated full commitment to the democratic values and norms, including a competitive multi-party democracy, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, the freedom of press, an independent judiciary, and the rule of law as the governing standards of the democratic federal republic of Nepal.<sup>44</sup> The post-2006 political environment started with a slogan of restructuring the state for progressive political relationships in the Nepalese society. However, despite the very impressive slogan, the delivery from the Constituent Assemblies in addressing the problems of citizenship has been lackluster. Rather, the gender-biased citizenship policy has been further deepened with massive implications for a gender-biased nation-building process in the country. Consequently, among many other dimensions, the ‘Three Problems’ mentioned above (male lineage, single mom’s conundrum, and discrimination on the grounds of marriage) have been revived by the 2015 Constitution at a scale reminiscent of the 1964 Citizenship Act.

The first CA (CA-I) started making a new constitution in 2008. Yet, it failed to solve some major contentious issues, namely the nature of a federal state structure, the forms of government, the system of election, the judiciary with a constitutional court, and the issue of citizenship. Consequently, the CA-I was dissolved on May 27, 2012. The second CA (CA-II) was elected in November 2013.<sup>45</sup> Starting in January 2013, the CA-II worked on the promulgation of a new constitution. Before promulgating the 2015 Constitution on September 20, 2015, the CA-II had also produced a Preliminary Draft version of the new constitution on July 8, 2015, followed by some revisions after the public consultations. Nevertheless, the Preliminary Draft and its revisions prompted serious dissatisfaction at all levels. The key causes for concern were a clear delimitation of the federal structure and a gender-friendly citizenship policy. Overall, by ignoring the public opinion, the 2015 Constitution followed the same provisions on citizenship as were provided by the Preliminary Draft. The 2015 Constitution adopted the following standards on citizenship:

- Citizenship at the commencement of the Constitution
- Citizenship on the grounds of descent
- Naturalized citizenship
- Non-residential Nepalese citizenship
- Honorary citizenship

*Citizenship at the commencement of the Constitution:* Under Article 11(1) and 11.2(a), any person acquiring the Nepalese citizenship at or prior to the commencement of the constitution is deemed a Nepalese citizen. However, Article 11(1) applies to any person acquiring

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<sup>44</sup>. For details see the Preamble of the Interim Constitution of Nepal, 2007.

<sup>45</sup>. For details on the issues of constitution making in Nepal by the CA-I and CA-II, see Surendra Bhandari, *Self-Determination and Constitution Making in Nepal*, Springer (2014).



Nepalese citizenship on any grounds, whereas Article 11.2(a) applies to a person acquiring Nepalese citizenship on the grounds of descent. When a person acquiring Nepalese citizenship at or prior the commencement of the constitution is deemed a Nepalese citizen, there seems no legislative wisdom in the formulation of Article 11.2(a).

*Citizenship by descent:* Under Article 11 of the 2015 Constitution, there are six major grounds for acquiring the Nepalese citizenship on the grounds of descent with an overarching precondition of a permanent domicile in Nepal. First, any person acquiring the citizenship of Nepal on the grounds of descent prior to the commencement of the constitution is deemed a Nepalese citizen by descent.<sup>46</sup> Second, any person is deemed eligible to acquire the Nepalese citizenship if one of his/her parents (father or mother) is a Nepalese citizen at the time of the birth of such person.<sup>47</sup> Third, any person can acquire the Nepalese citizenship if both of his/her parents (father and mother) were Nepalese citizens by birth prior to the commencement of the constitution.<sup>48</sup> Fourth, any person can acquire the Nepalese citizenship if both of the parents are Nepalese citizens at the time of acquiring the Nepalese citizenship.<sup>49</sup> Fifth, if the whereabouts of parents of any person found within the territory of Nepal are not known, such individual shall acquire the Nepalese citizenship on the grounds of descent until one of the parents is identified.<sup>50</sup> Sixth, any person born in Nepal of a Nepalese citizen mother and living in Nepal, but the whereabouts of the father are not known, can acquire the Nepalese citizenship.<sup>51</sup> A person eligible for citizenship by descent can acquire citizenship by providing evidence of the citizenry identity of either parent (father or mother).<sup>52</sup>

*Naturalized citizenship:* Article 11 of the 2015 Constitution provides naturalized citizenship on four grounds. First, any person born in Nepal of a Nepalese citizen mother and living in Nepal, but the whereabouts of the father are unknown, can acquire the Nepalese citizenship on the grounds of descent. However, when the father is identified as a foreign citizen, the person can be eligible to acquire naturalized citizenship only.<sup>53</sup> Second, a foreign woman married to a Nepalese male citizen can acquire naturalized Nepalese citizenship if she wishes.<sup>54</sup> Third, a child born of a Nepalese citizen woman married to a father who is foreign citizen can acquire naturalized citizenship of Nepal, if such person has a permanent domicile in Nepal and has not acquired foreign citizenship.<sup>55</sup> Four, the government of Nepal is authorized to grant naturalized citizenship to any person as prescribed by law.<sup>56</sup>

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<sup>46</sup> Article 11.2(a) of the 2015 Constitution of Nepal.

<sup>47</sup> *Id.*, Article 11.2(b).

<sup>48</sup> *Id.*, Article 11.3.

<sup>49</sup> *Id.*, Proviso of Article 11.7.

<sup>50</sup> *Id.*, Article 11.4.

<sup>51</sup> *Id.*, Article 11.5.

<sup>52</sup> *Id.*, Article 12.

<sup>53</sup> *Id.*, Proviso of Article 11.5.

<sup>54</sup> *Id.*, Article 11.6.

<sup>55</sup> *Id.*, Article 11.7.

<sup>56</sup> *Id.*, Article 11.8.

*Non-resident Nepalese citizenship:* Article 14 of the 2015 Constitution provides a non-resident Nepalese citizenship to individuals who have acquired foreign citizenship and living outside the SAARC countries. This type of citizenship provides rights only on social, economic, and cultural grounds. Political rights are not an aspect of such citizenship. Thus, this provision delinks the concept of citizenship from political relationships. At the same time, common Nepalese people have been skeptical of this provision as the legitimization of an elitist interest, since it is devised to secure the property rights of descendants of elite Nepalese class living in the North America, Europe, and other developed countries. Moreover, the non-resident Nepalese citizenship can be acquired on the grounds of lineage of a father or a mother, as well as a grandfather or a grandmother. The lineage does not require either parents or grandparents to be Nepali citizens. One of them being a Nepali citizen is sufficient to establish the lineage.

*Honorary citizenship:* The GoN is authorized to confer an honorary citizenship to a person as provided by the federal citizenship law.<sup>57</sup>

Despite the writing of a constitution by the constituent assembly, the three problems discussed above have not yet been satisfactorily addressed. For example, Article 11.2(b) of the 2015 Constitution<sup>58</sup> allows one of the parents (father or mother) to impart citizenship to their children on the grounds of descent. However, if the parents had acquired Nepalese citizenship on the grounds of birth before the commencement of the 2015 Constitution, their children can obtain the Nepalese citizenship on the grounds of descent only if both parents are Nepalese citizens. Article 11.2(b) and Article 11.3 retain the subtle controversies and contradictions between ‘or’ and ‘and’ concepts of conferring citizenship. Consequently, Article 11.3 seems to limit the scope of the ‘or’ provision incorporated under Article 11.2(b). Indeed, not only Article 11.3, but also Article 11.5 and 11.7, substantially derogate the ‘or’ provision incorporated under Article 11.2(b).

Article 11.3, 11.5, and 11.7 not only deny the glimmer of progress made by the 2007 Interim Constitution, but have also made the citizenship issue more complex by requiring both father and mother to be the Nepalese citizens and a permanent domicile in Nepal of a person applying for the Nepalese citizenship. With a widespread dissatisfaction with the discriminatory citizenship provisions and the burgeoning of public opinion in favor of equal and autonomous rights of a father and a mother in imparting citizenship rights to their children, the 2015 Constitution has failed to underscore the aspirations of the Nepalese people. Therefore, ‘Problem 1’ related to lineage has now been deepened and demarcated into two segments.

The first segment of lineage under Article 11.2(b) is linked to the ‘or’ clause, i.e., ‘a father or a mother’ at the time of the birth of the person seeking citizenship. However, the second segment of lineage is related to parents who had acquired citizenship of Nepal on

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<sup>57</sup> *Id.*, Article 11.9.

<sup>58</sup> Article 12.1 of the 2015 Constitution provides that, “ Any of the following persons having a permanent domicile in Nepal shall be granted the citizenship of Nepal.” Article 12.1(b) provides that, “Any person whose father or mother is a citizen of Nepal at the time of the birth of such person.”

the grounds of birth, and not on the ground of descent, prior to the commencement of the constitution. For such a person seeking citizenship under Article 11.3, both parents should be Nepalese citizens. Thus, Article 11.3 conspicuously limits the scope of the 'or' clause. Therefore, 'Problem 1' related to lineage has not been adequately and satisfactorily addressed. Further, given that a mother is required to produce evidence about the domicile, whereabouts, and citizenship status of the father of her child under Article 11.5 and 11.7, she is not recognized as able to impart citizenship independently. Consequently, these provisions undermine not only Article 2 of the CRC and other international human rights instruments, but also the decision of the Supreme Court of Nepal in *Sabina Damai's* case referred to above.

Similarly, 'Problem 2' related to the conundrum of a single mother has still not been addressed. A single mother on her own, i.e., without disclosing the identity and whereabouts of the father of her child, cannot impart citizenship to her child. Her child can obtain citizenship on the grounds of descent until the father is identified. When the father is identified, her child can attain a naturalized citizenship, but not a citizenship based on descent. In other words, a Nepalese woman is still not recognized as able to impart citizenship on the grounds of descent independently of her husband. As a result, the 'or' clause under Article 11.2(b) has been further limited by Article 11.5. Moreover, if a Nepalese woman, in a course of employment or in any other situations, while living outside the country gives birth to a child, she cannot impart citizenship to her child. This limitation is in place because her child was not born in Nepal and is not residing in Nepal, as required by Article 11.5. By living outside Nepal, her child can have no permanent domicile in Nepal under Article 11.7 as well. Moreover, there is no provision in the 2015 Constitution on imparting citizenship to a child born of an unmarried Nepalese citizen mother, i.e., a single mother. In fact, the entire citizenship regime is dominated by the concept that a mother should be married before giving birth to a child and imparting citizenship to her child. However, with the decision of the Supreme Court of Nepal in *Annapurna Rana* case,<sup>59</sup> an unmarried mother has been recognized as having autonomous and dignified status. Nonetheless, the CA has remained reluctant to recognize a single mother, either married or unmarried, as able to impart citizenship to her children. With this retrogressive constitutional development on the issue of citizenship, the problem of statelessness persists in Nepal.

Further, 'Problem 3' has been perpetuated without any intervention. As a result, a foreign woman marrying a Nepalese man can obtain the Nepalese citizenship through marriage alone. Yet, a foreign man marrying a Nepalese woman has no such right.

In short, the 2015 Constitution suffers from the same shortcomings in addressing the problem of citizenship in Nepal as did the 1964 Citizenship Act of Nepal. Thus, in the post-2006 constitutional development, efforts have failed to address the three problems

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<sup>59</sup>. See *Annapurna Rana v. Kathmandu District Court and others*, writ petition number 2187 of 2053 B.S., decided on 2055/2/25 B.S. by the Division Bench of the Supreme Court of Nepal, comprising of Justice Arbinda Nath Acharya and Rajendra Raj Nakhwa. For detail discussion on the issue see Surendra Bhandari, *Court-Constitution and Global Public Policy*, DDL Kathmandu (1999).

associated with citizenship issues in Nepal. Despite being a product of the democratically elected body, i.e., the CA, the constitutional provisions on citizenship are regressive, discriminatory, and patriarchal, as discussed above. Consequently, the citizenship laws and policies in Nepal have remained gender-biased. At this point, two questions might be raised. First, what are the factors that have constantly led to the adoption of a gender-biased citizenship regime in Nepal? Second, what are the possible and effective solutions to the gender-biased citizenship regime in Nepal? These questions are discussed in the following sections.

## 5. WHY HAS A GENDER-BIASED CITIZENSHIP REGIME BEEN ADOPTED IN NEPAL?

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Among many other reasons, patriarchy, open border with the fear of influx, and a weak rule of law have played a decisive role in the continued adoption of a gender-biased citizenship regime in Nepal. Patriarchy has been historically prevalent and is still socially indoctrinated in the Nepalese society. Open border with India and the fear of possible influx from India has always been one of the concerns in Nepal. Hence, to address the problem, an erroneous gender-biased citizenship policy has been regularly adopted. The Supreme Court of Nepal has, on many occasions, played a leading role in the implementation of international laws and ending the patriarchal system in Nepal. Nonetheless, the political understanding and atmosphere in Nepal remain guided by a short-sighted political vision that ignores the value of equal citizens and the role of international human rights instrument in creating equal citizens in the country and has failed in cementing a gender-neutral nation building process.

### 5.1 *Patriarchy*

In many instances, patriarchy is conventionally understood and practiced as the rule of a father or a male-dominated family, whereby the remaining members of the family are under the rule of the dominant male. Indeed, it is mostly linked to a system of the subordination of women with unequal power relations between genders in the name of culture, class, caste, and ethnic groups. Subordination is evident in various forms of discrimination, including disregard, insult, control, exploitation, oppression, and violence, both in private and public spheres. These core ideas of patriarchal values, norms, practices, and system, manifested in a gendered notion citizenship at the CA-I and CA-II, have been legitimized in the 2015 Constitution. The 2015 Constitution denies a mother the right to impart citizenship to her children independently of the status of her husband. The entire constitutional regime under Article 11 is designed to control women and their autonomy. As a result, women are considered inferior to men. The provision also considers a man as the head of the household and the natural guardian of the children. The provision, thus, constitutionally validates and provides legitimacy to a gendered notion of nationality, national identity, and nation building, which are clothed in patriarchal values promoted by the constitution makers in the country. The modern Nepalese state unjustly attempts to control the sexuality, wombs, and national identity of women through the system of gender-biased citizenship regime in place.

Notably, the State has misguidedly understood the issue of citizenship as a means to control women's sexuality. Through the discriminatory citizenship provisions, the State has created an entire set of moral, constitutional and legal regime, which restricts the expressions of women's sexuality both from within and outside the marriage. For instance, an unmarried woman is deemed unable to give birth to a child and impart citizenship to her child. Similarly, she is required to produce evidence about the citizenship status of her husband, her relationships, and whereabouts and the domicile of her husband. Each of these issues affects the citizenship rights of her child and denies independent identity and right to a dignified life of a woman. In short, the 2015 Constitution is steeped in patriarchal values, which is unjust and discriminatory. Moreover, Article 11 specifically undermines the instruction of the Supreme Court of Nepal to end the patriarchal values system from the Nepalese society.

### *5.2 Open Border and the Political Atmosphere*

The concept paper prepared by the Committee on Fundamental Rights and Directive Principles (CFRDP) of the CA-I in 2009 provided a basis for the development of citizenship provisions in the new constitution. The concept paper had clearly emphasized the principles of a non-discriminatory citizenship policy framework in order to address the problems constantly faced by the people in acquiring citizenship. It also analyzed international conventions and treaties that require a member country to develop a legal regulatory mechanism in ensuring equal citizenship rights that would also help to end the situation of statelessness in Nepal. The concept paper also provided a comparative analysis of the practices of other countries, Nepal's historical and existing constitutional and legal frameworks, and the decisions of the Supreme Court of Nepal on citizenship, along with outlining the institutional weaknesses of the state apparatus.

Despite all these political understandings, with the comparative knowledge about the democratic concept of equal citizenship rights and the requirements of the international human rights instruments, the CA has unfortunately adopted regressive citizenship provisions in the new constitution. The CFRDP concept paper, being heavily influenced by the fear of an open border, had also emphasized and recommended adopting a strict citizenship policy, referring to Nepal's unique geo-political context. Comically, it projected the state of open border as the reason for discriminating mothers in imparting citizenship to their children, but not the fathers.

Home Minister of India, Mr. Rajnath Singh, clearly spelled out that 30 percent of the total population of Nepal, called the Madhesis, migrated from India to Nepal.<sup>60</sup> This statement clearly proves that the gender-biased citizenship policy has failed to control the influx of Indian people in Nepal.

Among many other issues related to citizenship, the most debatable and the most controversial one pertains to whether a mother should be recognized by the constitution

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<sup>60</sup>. See *Indians will be Protected in Nepal: Rajnath Singh*, INDIA TODAY, August 31, 2015, available at <http://indiatoday.intoday.in/story/india-concerned-about-madhesis-in-nepal-after-the-atrocities-against-the-community-rajnath-singh/1/461958.html>, last visited on September 1, 2015.

as able to pass citizenship down to her children without being dependent on her husband or influenced by his status. At least two schools of thought have so far appeared in dealing with this issue: a liberal or progressive, and an illiberal or conservative school. The conservative school considers that the demand for autonomous status of a mother, including the issue of citizenship, is a notion influenced by the Western culture. They claim, “Whether we accept it or not the Eastern culture and practices recognize women being completely dependent on men. Despite it being discriminatory, the society is managed along the same line.”<sup>61</sup> Therefore, some argue that demanding citizenship on the grounds of the autonomous status of a mother will not promote the long-term interests of the country. Instead, such demands will not be sustainable due to the geo-political situation of the open border with India. Further, such demands will jeopardize dignity, independence, and sovereignty of the country.<sup>62</sup> The most cynical critics argue that the provision based on ‘father and mother’ in regard to imparting citizenship is the optimum liberal way of dealing with citizenship. Indeed, considering the geo-political situation of Nepal, a very strict citizenship policy is most appropriate. In managing the citizenship issue, it is insufficient to require both parents to be the Nepalese citizens, as both should be the Nepalese citizens on the grounds of descent. If this is not possible, at least the father should be the Nepalese citizen by descent. On the other hand, in the case of a father being a foreign national and the mother being a Nepalese citizen by descent, subject to the national conditions, discrimination is permitted, whereby the woman is not granted the right to impart the Nepalese citizenship to their children.<sup>63</sup>

The liberal or progressive school considers the illiberal and conventional views not only flawed, but also harmful for nation building and securing basic human rights in the country. Their main arguments can be summarized in six different points.<sup>64</sup> First, the conventional approach denies the autonomous status of a mother. Second, any act of perpetuating patriarchy erodes the nation-building process, since nation is composed of both men and women. Third, requiring a mother to be dependent on her husband in imparting citizenry rights to her children denies the equality between men and women and consequently fetters women. Fourth, it has compelled a number of children to be stateless and has deprived them of various opportunities in society. Fifth, denial of the autonomy of a mother and perpetuating discrimination against women is against the basic standards of international human rights rules. Sixth, the right to citizenship is not merely the right of parents or one of the parents, but it is the right of a child. In this context, a child has right to choose citizenship either through the lineage of one of the parents (*jus sanguinis*) or through the fact of birth (*jus soli*).<sup>65</sup>

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<sup>61</sup>. See Vidya Bhandari, Women’s Rights Activists under the Influence of Western Culture, a statement given in a press conference on July 23, 2015.

<sup>62</sup>. See Bhim Rawal, *Citizenship: Why and How?* KANTIPUR DAILY, July 11, 2015.

<sup>63</sup>. See Mohan Bikram Singh, *To What Extent is it Positive and Controversial?*, KANTIPUR DAILY, July 24, 2015.

<sup>64</sup>. See Indu Tuladhar, *Citizenship Issue in the Draft Constitution*, NAGARIK DAILY, July 21, 2015; see also Sapana Pradhan Malla & Dr. Aruna Upreti, *A Letter to Mr. Rawal*, KANTIPUR DAILY, July 17, 2015.

<sup>65</sup>. See Surendra Bhandari, *Issue of Citizenship in the Constitution*, NATARIK DAILY, July 1, 2015.

However, the political atmosphere reflected in the making of the new constitution in Nepal demonstrated that the illiberal or conventional school of thought has heavily dominated the citizenship regime. The development of citizenship provisions in the CA-I and CA-II provides clear evidence of prevalence of this gender-biased notion of citizenship.

As subscribed by all international human rights instruments, a modern democratic nation is not formed simply on the grounds of political convenience, but on the constitutionalist principles of equality of individuals, irrespective of race, color, gender, sex, belief, culture, and any other distinctions. A nation is not simply a congregation of its male members. Women are not only essential for building the institution of family, but also contribute to building a nation. They are instrumental to the economic growth, human resources development, social inclusion, political participation, and the sustainable development of the country. The mission of nation building cannot be attained by ignoring the roles and equal status of women in society.

A modern political state (constitutional state) cannot pretend to be unaware of its responsibility to protect the rights of women and men on the basis of rationally legitimized citizenry standards. Nation building is a continuous process that commences with securing the sovereignty of the state and spans to the institutionalization of constitutionalism and managing the system of post-constitutionalism, where both men and women play equal role and should gain equal status.<sup>66</sup>

The right to citizenship is a right of a child, not of parents alone. A child coming of age should be free to seek citizenship based on the grounds of birth or lineage of one of the parents. This right is well established and recognized by the international human rights instruments. Any denial of these basic human rights standards will be counter-productive in building a globally competitive, locally inclusive, and politically stable Nepalese nation. By depriving the rights of citizenship, a state cannot build competitive, inclusive and stable social and political environment in Nepal.

### *5.3 The Weak Rule of Law Situation*

Traditionally, the Nepalese political culture has been primarily characterized by realist features—the obsession with power and power as the most important standard of righteousness—that have constantly bent law for political and personal benefits. This political culture pays importance to the rule of law if law serves the political interest of power brokers, including the political parties and political leaders. This political culture has impudently relegated international human rights instruments into disutility. Therefore, despite being member of a number of human rights instruments, which call for equal and independent status of a mother and a father in imparting citizenship to

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<sup>66</sup>. See Surendra Bhandari, *Parliamentary Oversight in Nepal: The Science of Legislation (The Rights of Children—A Case in Point)*, UNICEF Nepal Working Paper Series WP/2015/007, available at <http://unicef.org.np/uploads/files/852275885921697748-2015-007-parliamentary-oversight-full-report-2.pdf>.

their children, the post-2006 political development in Nepal has ignored the call of human rights instruments, as mentioned above.

Nepal has ratified several international human rights instruments, which require the Government of Nepal to give effect to the human rights provisions through constitutional, legal, and administrative mechanisms. Contrary to the requirements of the human rights instruments, the proposed citizenship provisions in the new constitution of Nepal defy the following obligations arising from the human rights instruments:

- Article 15 of the Universal Declaration of Human Rights (UDHR), 1948, which states that everyone has the right to nationality. It also indicates that no one should be arbitrarily deprived of their nationality, nor denied the right to change it.
- The International Covenant on Civil and Political Rights (ICCPR), 1966, recognizes that all children have the right to nationality under Article 24, and establishes an affirmative obligation on the part of state parties to take measures, including the passage of appropriate laws, to give full effect to this right (Article 2).
- Article 5(d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that state parties undertake to prohibit and eliminate racial discrimination in all its forms, and guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of, *inter alia*, the right to nationality. ICCPR also provides, in Article 24(3) that every child has the right to acquire nationality.
- Article 7 of the CRC, 1989, provides that children should be registered immediately after birth and have the right from birth to, *inter alia*, acquire nationality, and that state parties should ensure the implementation of these rights in accordance with national laws and international obligations, in particular where the child would otherwise be stateless. Article 8 of this convention provides that state parties should respect the right of children to preserve their identity, including their nationality, as recognized by law, without unlawful interference.
- Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD), 2008, states that state parties should recognize, *inter alia*, the right of persons with disabilities to nationality, on an equal basis with others, including by ensuring that persons with disabilities have the right to acquire and change their nationality and are not deprived of their nationality arbitrarily or on the basis of disability. The convention also recognizes that children with disabilities should have the right to acquire nationality.
- Article 2 of the CRC (1) 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; (2) 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.

Moreover, the CEDAW Committee, considering the national report of Nepal, has recommended the following:<sup>67</sup>

- Women should be granted full and equal rights on the transmission of citizenship to their children
- Training programs should be run for government officials at all levels on legal provisions related to the transfer of citizenship
- A widespread citizenship distribution campaign should be carried out to issue citizenship certificates to entitled persons

The CEDAW Committee had also recommended that the provisions of CEDAW be taken into consideration while drafting the new constitution. As noted above, the Convention on the Rights of the Child establishes that all children have a right to acquire nationality. CEDAW requires that women should also enjoy equal rights to men in acquiring citizenship and conveying nationality to their children. Against this background, it is obvious that the proposed provisions on citizenship are not in line with the country's obligations under the aforementioned international treaties, which Nepal has ratified. Moreover, the proposed provisions stand in serious violation of the international human rights instruments.

## 6. THE WAY FORWARD AND CONCLUSIONS

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The provisions on citizenship of the 2015 Constitution repudiate the citizenship right of the children by subjecting it to the status of their parents. Despite the welcoming declaration that the Nepalese people are sovereign and the sources of the state powers, the constitutional provisions demonstrate the scale of political demagogue in the country. As a result, even in the post-2006 changed political atmosphere of the country, the idea of nationhood, sovereignty, and state power is reflexive of the male perspective alone. The right to citizenship, which is one of the most important determining factors in ensuring equality and the roadmap of connecting people with the state, is based on discrimination and inequality. As a result, the proposed provisions on citizenship might not have the requisite positive implications for social inclusion and cementing the sense of belongingness.

As discussed above, the three problems associated with the citizenship regime in Nepal—male lineage, a single mother's conundrum, and discrimination on the grounds

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<sup>67</sup>. See CEDAW Committee, CEDAW/C/NPL/4-5, paras. 25, 26, 49, July 29, 2011.

of marriage—are amenable to rational, legitimate, and valid solutions. However, even the agitating parties in Madhes have failed to raise voice to eliminate these three problems. They were limited to focus on ensuring citizenship on the grounds of marriage, especially targeting to ‘beti’ (girls) from India.

‘Problem 1’ associated with the male lineage, which is further aggravated by resisting the ‘or’ clause, i.e., ‘a father or a mother’ by political leaders on the grounds of fear of influx from India, can be addressed through four logical and rational methods. First, the requirement of a domicile, i.e., a permanent residence in Nepal, will rule out the possibility of influx. Second, putting a scientific and digitized civil registration and vital statistical system in place will ensure that those eligible to acquire the Nepalese citizenship can be easily identified. Third, by introducing an individual domicile tax system, each individual having domicile in Nepal would be required to pay minimum tax, irrespective of income. This system will help to verify who has domicile in Nepal. Fourth, developing a system for registering birth and other basic statistics at the Nepalese Embassies, or other prescribed offices for people living outside Nepal, would help to rule out the problem of influx, as well as ensure that a child born to a Nepalese mother or a father is not stateless. With these four systems in place, with full commitment to implementing them in practice, a gender-biased citizenship regime does not need to be adopted to overcome the fear of influx. In fact, as mentioned above, the existing citizenship regime in Nepal has historically failed to control the influx. Therefore, these four solutions can be the best alternatives in addressing the problem of influx, as well as devising an equal and autonomous status of a mother and a father in imparting citizenship to their children.

‘Problem 2’ is associated with the requirements of a mother in producing evidence about the whereabouts and citizenship status of the child’s father, as well as her relationships, to the authority responsible in imparting citizenship to her children. This policy of citizenship is a byproduct of the fallacious concept that a woman should give birth to a child only from the wedlock. An adult woman by nature is capable of giving birth to a child even without being married. A woman should thus have the right to be a single mother, i.e., she should not be compelled to disclose her relationships, whereabouts, and other details of her partner against her will. A woman should have the right to impart citizenship to her child independent of her husband or partner. Therefore, as mentioned above, the ‘or’ clause is the best alternative solution to the single mother conundrum. There should be no provisions limiting the scope of the ‘or’ clause, like Article 11(3), 11(5), and 11(7).

‘Problem 3’ associated with the discrimination between men and women on the grounds of marriage to a foreign citizen can be addressed by introducing equal requirements for both men and women. One of the best possible alternatives can be the requirement for renouncing the previous citizenship. During the process of renouncing the citizenship, the government of Nepal should provide a travel document, so that travel during the renouncement process is not hindered. However, it is advisable that citizenship of Nepal

be granted only after producing the evidence of the renouncement of the previous citizenship with the expression of willingness to choose Nepal as the person's domicile.

Without revising the provisions on citizenship in line with the above suggestions, the citizenship regime in Nepal continue to be dominated by a gender-biased policy, which will neither address the fear of influx nor solve the problems of patriarchy that has historically persisted in denying the equal citizenship rights. Equal citizens on the basis of an 'or' clause with no limitations imposed by other redundant clauses can end the gender-biased citizenship regime in Nepal.