

Citizenship provisions discriminate against women

Sapana Pradhan Malla

With Nepal's adoption of a new constitution, news has surfaced that in conferring citizenship by descent the requirement of both "father and mother to be Nepali" has been substituted by "father or mother", meaning essentially that "and" has been substituted by "or" by the drafters, perhaps in response to massive public pressure in the past few weeks. Now the question is whether "or" really applies equally to both Nepali men and Nepali women.

Identity and citizenship are key in designing any constitution, as they provide the means to claim individual rights. Citizenship is associated with full membership within the state. Citizenship creates a legal covenant between state and citizen; therefore, the burden is to make sure that statelessness is avoided and non-discrimination on the basis of sex is guaranteed. But let us examine what has been achieved though all the pressure, advocacy and negotiation of the past few weeks in terms of the constitutional language on citizenship.

What has been achieved after the struggle to replace "and"?

With listing of citizenship as a contentious constitutional issue and with considerable struggle "and" has indeed been substituted with "or" in Nepal's new constitution. Article 11.2.b provides citizenship by descent to all children born to parents one of who is a Nepali citizen. Now with the removal of "and" at least citizenship can be acquired through the father. At least the rights that was exercised by Nepali men and foreign women married to Nepali men has not been curtailed. At least with this provision, where fathers do exist and they acknowledge a relationship with mother and child, the child can get citizenship and statelessness can be prevented.

Is there any improvement compared to the Interim Constitution of 2007?

The requirement to be born in Nepal to gain naturalised citizenship has been removed for children of Nepali women married to foreigners. Article 12 of the new constitution allows for the citizenship certificate in either of the parents' name and also carries their gender identity.

CHALLENGES

The child of a single woman must be born in Nepal to obtain citizenship by descent

Generally two principles apply in



conferring citizenship: *jus sanguinis* (by blood) and *jus soli* (by birth). Nepal has applied only one principle: that is *jus sanguinis*. Further, to make it restrictive only for women, the constitution also requires that for women their children need to be born in Nepal to obtain citizenship by descent. With this requirement, a different standard is clearly and egregiously applied to the children of Nepali women, whereas this is not applied to the children of Nepali men. What then will happen to the children of trafficked women, migrant women workers and other transient women whose offspring are born outside Nepal? Since mother is identified, Article 11.4 will not be applicable. And since the child is not born in Nepal, citizenship cannot be obtained under Article 11.5.

The child of a Nepali woman can only obtain naturalised citizenship if married to a foreigner

On the one hand Nepali women have the right to marriage, which includes the right to marry of one's own choice, whether the spouse is Nepali or foreigner. But if the spouse is a foreigner, the children of Nepali women are only entitled to naturalised citizenship under Article 11.7, whereas the children of Nepali men married to a foreigner spouse are entitled to citizenship by descent. Thus, for the children of Nepali citizens, there is a bias in their treatment based on their birth to a Nepali *chhori* or *bideshi bharhi*.

Constitutional rigidity and discrimination applies only to Nepali daughters

Although the concept paper for the drafting of the citizenship provisions clearly calls for applying the principle of non discrimination and rigidity equally, rigidity is only applied to Nepali daughters and explicit discrimination is made only to the

children and spouses of Nepali women. In the case of family of mixed nationality, the right of non national family is to be enjoyed on equal basis; however, under the new constitution such provisions have not been made. Also naturalization is not a matter of right in Nepal, it is at the discretion of the state. Inequality is also perpetuated on citizenship by naturalization in other entitlements under the constitution.

The Nepali woman has to establish that her father is Nepali

Ultimately it is the mother who has to prove the father of the child. Therefore in claiming citizenship through the mother, female has to prove first that her husband is not foreigner and then her husband is Nepali due to other subsequent articles and provisions in the constitution. And if she cannot prove this, or if her husband denies their relationship, or in case of violence, her child may not be able to obtain Nepali citizenship.

Therefore the concession by constitutional drafters on "or" is not for Nepali women; it is "or" only for Nepali men! The intention of the constitutional provision cannot be interpreted by reading the first clause, subsequent sentences and provisions must be carefully scrutinised. Although Article 11.7 does say that while acquiring citizenship if both parents are Nepali, children can get citizenship by descent. However, if foreigner husbands are excluded from Article 11.6 in getting citizenship based on marital naturalisation, how can any child born to a Nepali mother married to a foreigner obtain citizenship by descent?

Therefore, the citizenship provisions in the Constitution of Nepal 2015 explicitly discriminate against Nepali women and consider them to be second-class citizens, continuing to treat women based on the dependent notion of nationality. This is not only against Article 9 of the Convention on Elimination of Discrimination Against Women but also against the Convention on the Nationality of Married Women-1957 and the Convention on Child Rights-1989.

Misogyny is clearly evident as driving the citizenship chapter in the new constitution: the right to family and the right to non-discrimination based on marital status, as well as patriarchy as a reason for discrimination and injustice have all been removed. Further and more worrying, if discrimination in citizenship is thus explicit in the constitution, its unconstitutionality cannot be tested by the Supreme Court, as it is subject to constitutional amendment!

THE ONLY WAY FORWARD

The fundamental question is whether or not the Nepali state still views nationality as a privilege that is rigid and mystical or regards it as an instrument to secure the rights of individuals, nationally and internationally, and is therefore a right of individuals to nationality. Note too that this is at a time when the subject of international law is no longer limited to the state but extends also to individuals. There needs to be clarity on which principles citizenship is to be granted: *jus soli* or *jus sanguinis*. How can we have different standards for our sons and daughters when the new constitution has guaranteed the right of equal lineage without discriminating on the basis of sex?

The state also has the duty to make sure discrimination is prohibited on citizenship, statelessness is avoided, and that there is no arbitrariness in conferring citizenship. Therefore, constitutional amendment in this regard is critical, and Nepali political leaders need to internalise the subject matter and understand the implications of treating women as second-class citizens. Is it because women are not politically powerful in Nepal, or because the leaders think that women's agenda are not political agenda?

Yes, there is a potentially huge alternate market for citizenship, and that needs to be managed through policy instruments that are lawful, just and good governance. Geopolitics, national security and the open border with India can no longer be used as justification for the continuation of systematic state discrimination against Nepali women. In this day and age, no one can become eligible for citizenship by crossing a national border. This is a bogey raised by those who wish to perpetuate patriarchy in Nepal!

NEXT STEPS

Non-action by the state can create further tensions and statelessness. Therefore, until amendments can be made to the new constitution, clear laws, rules, regulations and procedures should be enacted to ensure documentation of birth, marriage and migration and to facilitate the implementation of present provisions.

The government also needs to enact the decision to confer citizenship through naturalisation as per the new constitution. Officials of local government and the chief district offices have to be educated, empowered and sensitized in making sure births are registered and relationship papers, as well as travel documents, are provided. Throughout all of this, it is most important to respect motherhood, and to treat women with dignity. Special instructions must be issued to these officials to proceed with naturalised citizenship as a matter of priority, as even today the Supreme Court's direction to confer naturalised citizenship has not been followed by the government in the matter of the children of Nepali women married to foreigners. In such cases, the foreign spouses of Nepali women should be given permanent residence with socio-economic rights.

Although constitution has also brought many progressive provisions for women's rights, only if discrimination in citizenship provision is addressed can we proudly claim that the constitution is progressive and celebrate the equal treatment of all Nepalis.

Constitution of Nepal heralds a fresh beginning

Tika Ram Bhattarai

On September 20, Nepal promulgated the new constitution, arguably the most awaited event in the political history of the nation.

It was not merely a historic moment, but also a milestone that advances the nation into another era, a revolutionary one. Along with the constitution, the mission of political change has reached a conclusion and the Nepalis are bestowed upon with a whole new destination - the destination of peace, security, development and social transformation.

The promulgation of the new constitution, along with all its challenges, required immense bravery to be showcased by all the Nepalis. We've been able to adopt one of the most democratic and progressive constitution through a democratic process.

In the end, it was the Nepalis who turned out victorious in a battle that started 65 years ago. We've successfully promulgated a republican constitution, which is a fact all Nepalis can take pride in and a special one considering the world history and politics.

The constitution, besides being a means of social change, can be a tool for social transformation. Every constitution in a democratic nation is as much a political document as it is legal. One of the major characteristics of an ideal constitution is the fact that it reflects the socio economic scenario and the intellectuality of the society. Every society is based upon a definite socio economic foundation that demands a constitution that can regulate the society and the state.

Flexibility

The science of constitution often revolves around a principle - one can never expect an isolated generation to assume the desires and the aspirations of the ones to follow and incorporate them into the constitution of the present. This principle, though a basic guideline, points to another important characteristic of the constitution.

The constitution should be flexible enough to allow the following generations to amend it, in order to incorporate the desires and aspirations of the then generation, yet be careful enough to not allow the alteration of its basic norm. Hence, this gives rise to a factor - flexibility, which helps measure the robustness of the constitution.

The present constitution is flexible considering the fact that besides sovereignty and national unity, all other provisions or article are open to amendment via a two-thirds majority of the Parliament.

This opens a democratic pathway for every political slogan to be legitimated in the constitution, as a preferred alternative to armed struggle.

Constitutionalism

Constitutionalism is the basic value of the constitution and other important factor to analyse the constitution's robustness. Rule of law, independence of the judiciary,

separation of the powers with checks and balances, periodic election, adult franchise, democratic process and limited government are the core and fundamental values of the constitutionalism.

All these principles and values are secured in the new constitution, hence keeping it under the guidelines of the principle of constitutionalism.

Acceptance

It's not a new fact that the constitution-making process has been adopted by almost ninety per cent of the members of the constituent assembly making it a widely accepted document by its nature.

Social harmony and nationalism

Every constitution must guarantee the prevalence of social harmony, peace and security following its implementation.

The fact that some differences have been shown in this process and some Tarai-based political parties have boycotted the process can and should not be isolated.

Major political parties should address the reasonable demands of those who were an integral part of the Constituent Assembly.

It takes no hesitation in mentioning that each individual living in Tarai and Madhes must be able to recognise the constitution as not

just a mere document but a guarantee of their rights, freedom and justice. The constitution must be able to arouse the same feelings in Tarai and Madhes as it does in other parts of the country, the feelings of patriotism, nationality, social harmony, peace and justice.

Social harmony has been a prominent feature of the Nepali society throughout history and it must be kept that way by all stakeholders. No forces can and should break our social harmony, and we as aware citizens must be responsible and sensitive enough to protect our harmony in order to protect our nationalism.

The three tier court system are left untouched, however the provi-

tion of a constitutional bench within the Supreme Court is a major policy introduced in the new constitution.

By adopting the provision of constitutional bench, Nepali judiciary can take a step forward towards reducing its criticism.

Disputes between centre and provincial governments, between provincial and local governments and election disputes regarding members of federal Parliament and provisional assemblies will be under the jurisdiction of the constitutional bench.

Another fundamental change is the provision of high court and its jurisdiction. All kinds of writ petitions shall be heard by the high court, including the power of ultra vires regarding provisional law.

This means that the federal system has been applied to the judiciary.

Another important change in the judicial system is the fact that no ad hoc judges shall be placed in the Supreme Court and the high court and that the district court has the right to hear appeals in particular cases.

After the promulgation of the new constitution district court may hear appeals to those cases that are disposed by quasi-judicial bodies, which is another fundamental change considering the judicial history.

There's also a fundamental change in the impeachment pro-



cess. According to the Interim Constitution, after 25 per cent lawmakers register a motion of impeachment against Supreme Court judges, the Parliament could proceed with impeachment procedure. However, following the promulgation of the new constitution, there is a provision for a permanent standing committee within the parliamentary committee to look into impeachment cases. The committee, consisting of 11 members, may independently initiate the impeachment process.

This is an essential provision regarding judiciary whose adoption shall no doubt lead to reduction in judicial corruption and enhance the sustainability of the Supreme Court. Judiciary is the back bone of any democratic system and efforts must be made to restore and preserve the faith in judiciary.

All in all, despite all measures, the ultimate means for the success of any constitution resides in its recognition by the citizens of the nation, and in that sense, without doubt, the present constitution is in fact a progressive and democratic one, which, if implemented precisely, can lead the country to a new era.

Judiciary is yet another aspect that determines the quality of a constitution. Independent judiciary is a salient feature of the new constitution. Although judiciary has been one of the areas not completely transformed with respect to the constitutions in the past, some fundamental provisions have been changed.

The three tier court system are left untouched, however the provi-

Nepal embarks on journey towards federal destiny

Prof Krishna Khanal

With the promulgation of the new constitution Nepal has begun a journey towards federal destiny.

After the peace deal with the former Maoist insurgents and overthrow of monarchy the country was declared 'a federal republic' waiting its formalisation by the new constitution to be adopted by popularly elected Constituent Assembly. President Ram Baran Yadav officially declared the promulgation of the 'Constitution of the Federal Democratic Republic of Nepal' on September 20, ending a decade-long complex political transition which had begun following Jana Andolan II and signing of the Peace Accord in 2006. An entry to a legitimate and sustainable constitutional political order was much waited course by all the people.

It took more than seven years to accomplish the task of constitution writing which has incorporated federalism as the principle structure of state. The first CA (2008-12) had failed to make a deal on the constitution due to conflict on provincial de-

marcation though it had accomplished most of the constitution-writing. Federalism is agreed in principle by most parties in the Constituent Assembly but had been the major contentious issue and difficult to resolve by consensus. Especially the carving of provinces had become the most controversial and contested issue. Therefore, decision by vote was inevitable. The controversy remains even with the adoption of the constitution. This will continue in the days to come and determine the success of the constitution as well.

The new constitution has adopted a three-tier structure of the state - namely federal, provincial and local with enumerated lists, including concurrent ones, of competence for each level of governance. Seven provinces are carved out of current seventy-five administrative districts mostly keeping the district boundaries unaffected as mentioned in the Annex 4 of the constitution. However, due to unacceptance of Madhes-centric political parties and violent agitation of the communities in Tarai, the major political parties - NC, UML and UCPN Maoist, who took the initiative to strike a deal on the constitu-

tion -- have repeatedly assured to resolve the demarcation of the provinces even after the promulgation of the constitution and amend it to this effect.

Looking at the constitutional provisions Nepal fits well into the category of federal countries. Each level of government will have its own polity

and solve or suspend the provincial government and assembly for six months on the ground of national independence and territorial integrity which requires to be endorsed by the Parliament within 35 days. The residual power has been kept with the centre. The distribution of powers is thus relatively tilted in favour of the strong

centre and may be termed as the centralised federalism. In this context the federal arrangement looks closer to the Indian model.

But it differs significantly too. Unlike in India, the provinces in most cases are not demarcated on linguistic or ethnic lines. In amending the constitution provinces of Nepal have greater role than the Indian states. The new constitution provides that provincial consent is required to amend the constitution if

it affects the boundary and powers of the provinces. A double majority provision for amending the constitution, which is considered as a vital principle of the advanced federal system, is thus adopted.

The provinces of the new federation have closer affinity in terms of the size of population and territory. The population of the provinces ranges between five and 20 per cent of the total national population figure. And in size too it corroborates almost same ranging between seven and 20 per cent of the national territory. Most provinces resemble the national diversity both in territorial and population features. Five out of seven border both neighbours - India and China. Two have access only to India. However, the current level of development and future potentiality differ significantly.

But here one has to understand that the system of interdependence is a core value of federalism. Self-reliance is hardly found in any federal system. Federalism evolves interdependence among its constituent units through equalisation and mutuality over the period and practices. Nepal is now constitutionally set to

and negotiations who did not heed the leaders of major political parties. Instead, the constitution was adopted on a fast track. Without taking the agitating groups and parties into confidence establishing the provinces as per the constitution in particular is very difficult, almost impossible. Such a move is definite to invite use of force which can hardly help the constitution implementation task.

The federal dimension of the constitution is still in the process of taking shape. Much depends on its future evolution. Therefore, restraints and wisdom from all the concerned groups and parties are highly required at this critical juncture. Nepal cannot allow the newly declared constitution to be a failure or be marred by mutually defeating positions. Review and reorganisation of the provinces is a natural course for any emerging federal polity. It is good that the new constitution has made the province a part of the annex and provides for final delimitation through a federal commission. Such flexibility could prove a safe side for all the concerned parties to make a further deal and harp on the success of the newly promulgated constitution.

Despite repeated appeal for dialogue and negotiation the agitating groups are not yielding. Due to the sensitivity of the border and ethnic affinity India's concern is also drawn which might provoke the hill elite to be more defensive. India had publicly appealed to the decision makers in Kathmandu to delay the constitution making process for a while and engage the agitating parties in dialogue

The distribution of powers is relatively tilted in favour of the strong centre