

# **A Comparative Study Research on Reformation of Citizenship Laws in Nepal**



**Terai Human Rights Defenders  
Alliance (THRDA)**

# **A Comparative Study Research on Reformation of Citizenship Laws in Nepal**

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**TABLE OF CONTENT:**

- 1. Table of Abbreviations**
- 2. List of Authorities**
  - **Books**
  - **Journals and Research Papers**
  - **Articles, News and Reports**
  - **Acts, Legislations and Constitution**
  - **Treaties, Resolutions, Declarations and International Agreement**
- 3. List of Cases**
- 4. Acknowledgement**
- 5. Chapter 1: Introduction**
  - 1.1 General Background**
  - 1.2 Statement of Standards and the Problems**
  - 1.3 Objectives of the Study**
  - 1.4 Limitations of the Study**
- 6. Chapter 2: Laws Relating to Citizenship**
  - 2.1 Constitutions of Nepal, 2015**
  - 2.2 Nepal Citizenship Act (2063) and Nepal Citizenship Regulations, 2049 (1992)**
- 7. Chapter 3: Analysis of Legal Provisions**
  - 3.1 Comparative Study with International Laws related to Citizenship**
  - 3.2 Comparative Study with Decisions of the Supreme Court of Nepal on Citizenship**
  - 3.3 Citizenship Law of Nepal from the Perspective of Statelessness**
- 8. Chapter 4: Conclusion and Recommendation**
  - 4.1 Conclusion**
  - 4.2 Recommendations**

**TABLE OF ABBREVIATIONS:**

<b>A.D.</b>	<b>anno Domini</b>
<b>Art.</b>	<b>Article</b>
<b>B.S.</b>	<b>Bikram Sambat</b>
<b>BPFA</b>	<b>Beijing Platform for Action</b>
<b>CEDAW</b>	<b>Convention on Elimination of all forms of Discrimination against Women</b>
<b>CRC</b>	<b>Convention on the Rights of the Child</b>
<b>CDO</b>	<b>Chief District Officer</b>
<b>EC</b>	<b>Election Commission</b>
<b>FWLD</b>	<b>Forum for Women, Law and Development</b>
<b>HM</b>	<b>Home Ministry</b>
<b>HMG</b>	<b>His Majesty the Government</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>
<b>MDG</b>	<b>Millennium Development Goals</b>
<b>NKP</b>	<b>Nepal Kanoon Patrika</b>
<b>NRN</b>	<b>Non Residential Nepali</b>
<b>SC</b>	<b>Supreme Court</b>
<b>Sec.</b>	<b>Section</b>
<b>UDHR</b>	<b>Universal Declaration of Human Rights</b>
<b>vs.</b>	<b>Versus</b>

**LIST OF AUTHORITIES**

**Books**

<b>SN</b>	<b>Title</b>	<b>Page Number</b>
1.	Nepalese Constitutional Law	9, 27
2.	Commentary on the Nepalese Constitution	10, 23, 24

**Journals and Research Papers**

<b>SN</b>	<b>Title</b>	<b>Page Number</b>
1.	Acquisition of Citizenship Certificate in Nepal: Estimation and Projection	9
2.	Terai Human Rights Journal	10
3.	Acquisition of Citizenship Certificate in Nepal: Estimating Prevalence	9, 10, 11, 19
4.	Citizenship Laws of the World	11
5.	Creating the New Constitution	13
6.	Impact of Existing Discriminatory Citizenship Law on Women and Children in Nepal	22, 25, 26
7.	Handbook on Protection of Stateless Person	26
8.	Citizenship in Relation to Nationality, Equality and Statelessness	29

**Articles, News and Reports**

<b>SN</b>	<b>Title</b>	<b>Page Number</b>
1.	<a href="http://setopati.com/constituent-assembly/30820/">http://setopati.com/constituent-assembly/30820/</a>	11
2.	CDO's Refusal	29
3.	Closed Citizenship	12
4.	Stateless Madhesi	28, 29, 30

**Acts, Legislations and Constitution**

SN	Title	Page Number
1.	Nepal Treaty Act, 1990 Nepal Citizenship Act, 2006	22, 25, 26
2.	Nepal Citizenship Act, 2006	15, 16, 36
3.	Citizenship Regulations, 1992	16
4.	Constitution of Kingdom of Nepal, 1990	23
4.	Constitution of Nepal, 2015	10, 15, 36

**Treaties, Resolutions, Declarations and International Agreement**

SN	Title	Page Number
1.	Universal Declaration of Human Rights, 1948	19
2.	International Covenant on Civil and Political Rights, 1996	20, 36
3.	Convention on Elimination of all forms of Discrimination against Women, 1979	20, 22, 25
4.	Convention on the Rights of the Child, 1989	21
5.	Beijing Platform for Action, 1995	22
6.	Millennium Development Goals	22
7.	Convention Relating to the Status of Stateless Persons, 1954	26
8.	Convention on the Reduction of Statelessness, 1961	27

**LIST OF CASES**

<b>SN</b>	<b>Case</b>	<b>Page Number</b>
1.	Sarojnath Pyakurel et.al. vs Office of the Prime Minister and Council of Ministers et.al.	9
2.	Benjamin Peter vs. Home Ministry	23
3.	Chhabi Peters vs. District Administration Office	24
4.	Balkrishna Neupane vs. Council of Ministers	24
5.	Jabir Yasin vs. Home Ministry, HMG/Nepal, et.al	25
6.	Chandra Kant Gyawali vs. HMG/Nepal	25
7.	Prakash Mani Sharma, Tek Tamrakar et.al vs. HMG/Nepal	25
8.	Sarojnath Pyakurel et.al. vs. Office of the Prime Minister and Council of Minister et. Al.	9

## **ACKNOWLEDGEMENT**

This study research is prepared for the academic reading and legal discussion. The objective of the research paper is to give short insight on the prevailing Nepalese citizenship laws.

Terai Human Rights Defenders Alliance was a team of human rights activists working together in the sector of human rights, equity and social justice as a loose group for about a decade later formalized by registering the group as Terai Human Rights Defenders Alliance (THRDA or popularly known as THRD Alliance) in 2011.

Since its establishment, the THRDA has been working on the issues of serious human rights violations including torture, extrajudicial execution, illegal arrest/detention, citizenship, inclusion and discrimination in Terai, southern plains of Nepal.

The paper “**A Comparative Study on Research Reformation of Citizenship Laws in Nepal**” is an attempt to analyze the impingement of discriminatory citizenship laws and its procedural difficulties. The purpose of the research is to compare the citizenship laws in Nepal with different legal spectrum and recommend the authorities to act in line with the principle of equality.

The preparation of the research would not have been possible without the valuable contribution of the Dean and Faculties at Kathmandu University School of Law. I take this opportunity to thank the respected all. I would also like to give thank to my confrere Suraj Timalina for his technical support during the research.

**This paper is prepared and submitted with an intention to further extend THRDA’s mission, to promote equity and justice in Nepal through human rights based approach.**



## CHAPTER – I

### INTRODUCTION

#### 1.1 GENERAL BACKGROUND:

Advocate Chandra Kant Gyawali enunciates, 'Citizenship is a political ideology.'<sup>1</sup> Maybe that is why Government of Nepal made it mandatory for all to have citizenship card in hand to get their name registered in voter's list.<sup>2</sup> Politics of populace has sidelined placeable number of population from possessing citizenship. In April 2013, the Forum for Women, Law and Development (FWLD) published a study<sup>3</sup> conducted on the estimation of people without citizenship certificate in Nepal. The study showed that, as of 16 July 2011, 23.65% of the population aged 16 and above—or 4,346,046 individuals—lacked citizenship certificates. More than four years have passed since then and the number of people without citizenship certificate has obviously changed. The current number of people without citizenship certificate stands at 4.6 million, 22.82% of the total population of Nepal. The calculation of the projection shows this figure will rise to 6.7 million persons, or 26.14% of the total population of Nepal, in 2021.<sup>4</sup>

The citizenship certificate is considered the most important formal legal document, and is often required to obtain other identity documents in Nepal.<sup>5</sup> In older days, those dwelling in a defined political sphere were regarded as the citizens. With the emergence of *social contract theory*, which abided the State and Citizens in a political relation, the demands for the rights of the citizens sifted. Citizenship provided the citizens to participate in the state structure.

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<sup>1</sup> CHANDRAKANT GYAWALI, NEPALESE CONSTITUTIONAL LAW, 195 (2068)

<sup>2</sup> SAROJNATH PYAKUREL ET.AL. VS OFFICE OF THE PRIME MINISTER AND COUNCIL OF MINISTERS ET.AL (WRIT NO. 2067-WS- 0017)

<sup>3</sup> FWLD, ACQUISITION OF CITIZENSHIP CERTIFICATE IN NEPAL: ESTIMATING PREVALENCE, 1 (2013)

<sup>4</sup> FWLD, ACQUISITION OF CITIZENSHIP CERTIFICATE IN NEPAL, ESTIMATION AND PROJECTION, 19 ( 2015)

<sup>5</sup> FWLD, ACQUISITION OF CITIZENSHIP CERTIFICATE IN NEPAL, ESTIMATION AND PROJECTION , 1 (2015)

A qualification for obtaining a citizenship is obscure. A primary understanding is that there must be a political state, having permanent dwellers in a definite geography. The resoluteness of nationalism and sovereignty then follows the further qualification. Citizenship legitimizes the eligibility to attain the state's function.

A citizen of a sovereign state, unlike a mere subject, is somebody who has political rights in that state.<sup>6</sup> It is a base upon which, one claim their fundamental rights and seeks judicial remedy in case of violation of any civil or political rights. In bereft of citizenship, one gets barred from the enjoying the recourses of the state. This means preclusion from employment, education, civil service, right to vote and etc.<sup>7</sup>

Universal Declaration of Human Rights recognizes that to have a nationality is the fundamental human rights of all.<sup>8</sup> This means no state may disallow their citizens from the acquisition of citizenship. To acquire a citizenship in an equal protection of the laws, without any discriminative motive, is the right of a citizen. State by all means must protect this universal right.

Question on nationality and situation of being stateless is a stinging problem for those who are being subject to it. Nepal is a country of diversity. The constitution of Nepal recognizes the state as a multi-caste and multi-lingual country in Asia<sup>9</sup>. But still in this 'Ethnic Turn Table', there are unapproached communities, disavowed of citizenship. They are yet to be recognized as a citizen of Nepal.<sup>10</sup> After several years of discourse on citizenship issue, the country has come up with a constitution that provides new provisions to ensure citizenship rights to every Nepali. The delegated legislation is now to be amended in line with constitution and its spirit. Amendment will carry no meaning unless it in deed realizes the underlying problems, efforts that have been made to establish the discourse and possible

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<sup>6</sup> DeLF, COMMENTARY ON THE NEPALESE CONSTITUTION,84 (1998)

<sup>7</sup> TEJ NARAYAN YADAV, TERAI HUMAN RIGHTS JOURNAL 21 (2060 B.S.)

<sup>8</sup> ART. 15, UDHR, (1948)

<sup>9</sup> CONSTITUTION OF NEPAL, PREAMBLE, (2015)

<sup>10</sup> FWLD, ACQUISITION OF CITIZENSHIP CERTIFICATE IN NEPAL: ESTIMATING PREVALENCE, FIG. 4, 9 (2013)

way outs. No any plan and policy however made and implemented will be comprehensive unless it address the people's grievances and recognizes the international values and norms on citizenship rights.

## **EXPOSITION OF DISCOURSE:**

In Nepal a large number of population is deprived of obtaining a citizenship card.<sup>11</sup> In absence of which, they have yet not been able to enjoy any rights as a citizen. The dysfunctional characters of the public officials, whose mindset are preoccupied by bias thoughts, have resulted numbering of statelessness in Nepal. Administrative functionaries are in paradoxical situation either to uphold the decisions of the apex court or not. Some inferred to the rule of law and acted in line. Whereas some other driven by political coerce denied the precedents showing lack of enough legal sanction.<sup>12</sup> Populace, that plays a key role in political game, is confined in strict rule of citizenry rules. Long-familiar realness in political Nepal is that, there are communities whose claim to be a citizen is cognitively unheeded by the government. Distorted and legally jumbled criteria are preset just to debar political membership of such.

The new constitution has given a new hope to incorporate those who had lagged behind. The new reformation of citizenship law must respect the people's aspiration and internalize the global implications.

## **1.2 STATEMENT OF STANDARDS AND THE PROBLEMS:**

Nepalese law recognizes following standards for acquiring citizenship:<sup>13</sup>

**Citizenship by Birth:** Citizenship is granted due to birth within the country. The legal term for this is "*jus solis*." In most cases, there are few stipulations on citizenship being granted. Birth in the country automatically confers citizenship regardless of the parents' citizenship or status.

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<sup>11</sup>FWLD, ACQUISITION OF CITIZENSHIP CERTIFICATE IN NEPAL ESTIMATING PREVALENCE, FIG. 3, 9 (2013)

<sup>12</sup> <http://setopati.com/constituent-assembly/30820/>

<sup>13</sup> UNITED STATES OFFICE OF PERSONNEL MANAGEMENT INVESTIGATIONS SERVICE, CITIZENSHIP LAWS OF THE WORLD, 4 (2001)

1. **Citizenship by Descent:** Citizenship of a nation is passed on to a child based upon at least one of the parents being a citizen of that nation, regardless of the child's actual country of birth. The term for this is "*jus sanguinis*."
2. **Citizenship by Naturalization:** This is a formal process by which persons may acquire the citizenship of a country. The process varies and citizenship is not guaranteed. Basic rules may include a period of residence, renunciation of other citizenship, and familiarity with the language and customs of the country.

There are some problematic provisions in laws requiring the criteria for acquisition of above kinds of citizenship. The problems are shortly briefed below:

#### **Gender Disparity**

The prevalent citizenship law disallows a woman to pass a citizenship by descent to her child if her husband is a foreigner. Though she is a permanent domicile of Nepal and a citizen by descent, she is not allowed to pass descent, whereas this law stands inapplicable in case of a Nepalese man. This is a question on gender balance. The provision of acquiring citizenship through mothers needs to be corrected, otherwise patriarchy will persist.<sup>14</sup>

#### **Economic Disparity**

There are some ethnic and *dalit* communities, who never felt the necessity of acquiring citizenship. As they lack substantial level of needs, they never aspired of enjoying civil or political rights. To acquire citizenship by birth requires one to be a permanent dweller of a defined geography. Apart from this document of having a piece of land is also mandatory. This criterion is unattainable for some under acute poverty line.<sup>15</sup>

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<sup>14</sup> SUBEKSHA POUDEL, CLOSED CITIZENSHIP, (2015), <http://www.lalitmag.com/2015/07/closed-citizenship/>

<sup>15</sup> <http://setopati.com/constituent-assembly/30820/>

### **Social Disparity**

Southern Nepal holds matrimonial relation with the neighboring border to India. Majority of the families in plains have relations in border side because of the same social setup. The laws relating to naturalized citizenship, mistreats a foreign spouse. The discriminative provision disheartens the culture of cross-border conjugal relation.<sup>16</sup>

### **1.3 OBJECTIVE OF THE STUDY:**

The principle objective of the study is to examine the existing laws relating to citizenship in Nepal. The specific objectives are as follows:

- To compare delegated legislations on citizenship with constitutional provisions.
- To compare Nepalese citizenship laws with International laws.
- To evaluate the implication of the judgments given by the Supreme Court of Nepal on citizenship related cases.
- To assess the citizenship law of Nepal from the perspective of Statelessness.
- To recommend the authority for the reformation of the laws where deemed necessary.

### **1.4 LIMITATIONS OF THE STUDY:**

The study has following limitations:

- ❖ The study is conducted under limited time and financial constraints.
- ❖ This study is based on the socio-economic-cultural aspect of Nepal .Therefore, generalization may not be possible.

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<sup>16</sup> YASH GHAI & JILL COTTRELLCREATING THE NEW CONSTITUTION: A GUIDE FOR NEPALI CITIZENS, CHAPTER-CITIZENSHIP (2008)

- ❖ This study is based not only on primary information but also on secondary information. Secondary information are subject to open interpretation.
- ❖ This study is restricted on its subject matters, so the conclusion does not apply upon all regulation relating to citizenship laws.
- ❖ This study has focused specially laws relating to citizenship which may not be generalized to other laws.

## CHAPTER TWO

### LAWS RELATING TO CITIZENSHIP

The research paper is supposed to analyze the existing laws related to citizenship or specifically the 'Nepal Citizenship Act, 2063'. This chapter contains relevant provisions of the Act and the prevailing constitution.

#### 2.1 CONSTITUTION OF NEPAL, 2015

##### Art. 11: Nepali citizen to be deemed:

(1) The persons who have acquired citizenship of Nepal at the commencement of this Constitution and the persons who are eligible to acquire citizenship of Nepal under this Part shall be deemed to be the citizens of Nepal.

(2) Citizenship by descent:

(a) A person who has acquired the citizenship of Nepal by **descent** before the commencement of this constitution.

(b) Any person whose father or mother was a citizen of Nepal at the birth of such a person.

(3) A child of a citizen who has acquired citizenship of Nepal by birth before the commencement of this Constitution shall, if his/her father and mother both are the citizens of Nepal, shall be entitled to Nepali citizenship by **descent** upon his/her attaining the age of majority.

(4) Every child found in Nepal whereabouts of whose paternity and maternity is not known shall, until the mother or father is traced, be deemed a citizen of Nepal by **descent**.

(5) A person born to a Nepali citizen mother and having his/her domicile in Nepal but whose father is not traced, shall be conferred the Nepali citizenship by descent. Provided that in case his/her father is found to be a foreigner, the citizenship of such a person shall be converted to **naturalized** citizenship according to the federal law.

(6) If a foreign woman married to a Nepali citizen so wishes, she may acquire **naturalized** citizenship of Nepal as provided for in a federal law.

(7) Notwithstanding anything contained elsewhere in this Art., in case of a person born to Nepali woman citizen married to a foreign citizen, he/she may acquire **naturalized** citizenship of Nepal as provided for by a federal law if he/she is having the permanent domicile in Nepal and he/she has not acquired citizenship of the foreign country.

Provided that if his/her father and mother both are the citizen of Nepal at the time of acquisition of the citizenship, he/she, if born in Nepal, may acquire citizenship by **descent**.

(8) Except provided for in this Art., Government of Nepal may confer **naturalized** citizenship of Nepal according to federal law.

## **2.2 NEPAL CITIZENSHIP ACT 2063 (2006) AND CITIZENSHIP REGULATION, 2049 (1992)**

### **Section 3. Acquisition of Nepali Citizenship by descent:**

(1) A person born at the time when his/her father or mother is a citizen of Nepal, shall be a citizen of Nepal by descent.

(2) Whatever may be written in Sub-section (1), a child born out of wedlock by a Nepali female citizen to a foreign national shall be in accordance with Section 5, Sub section (2).



- (3) Every child found in the territory of Nepal, whose paternal and maternal addresses are undetermined, shall be considered a citizen of Nepal by descent until his/her father or mother are found.

**Section 4. Acquisition of Nepali Citizenship by Birth:**

- (1) Any person born before 2046 Chaitra 31, Bikram Sambat (i.e. 13, April, 1990 A.D.) within the territory of Nepal and having domiciled permanently in Nepal shall be deemed a citizen of Nepal by birth.
- (2) A person desiring to obtain citizenship certificate pursuant to Subsection (1) shall have to apply before holding of the election for Constituent Assembly and the procedure for granting of the Citizenship Certificate shall be as prescribed.
- (3) In case a person, due to certain reasons, could not submit his application within the period specified in Sub-section (1) may apply as prescribed within two years from the commencement of this Act.

**Section 5. Acquisition of Citizenship by Naturalization:**

- (1) A foreign women married to a citizen of Nepal desiring to obtain citizenship of Nepal shall have to submit an application in the prescribed form to the designated officer. On submitting such application she has to produce the marriage relationship document with the citizen of Nepal and also evidence to show the initiation of procedure for renunciation of own's foreign citizenship.
- (2) A child born to a Nepali female citizen from marriage with a foreign citizen in Nepal and having permanent domicile in Nepal may be granted naturalized citizenship as prescribed, provided the child has not acquired the citizenship of the foreign country on the basis of the citizenship of his/her father.
- (3) A person desiring to acquire naturalized citizenship pursuant to Subsection (2) shall have to submit an application with the following documents to the designated authority:
- (a) Duplicate copy of the citizenship certificate of the mother,

(b) Recommendation by concerned Municipality or Village Development Committee certifying the birth and permanent residency in Nepal,

(c) Evidence to show that foreign citizenship has not been acquired based on the citizenship of the father.

(4) The Government of Nepal may grant naturalized citizenship as prescribed to those foreign citizens, who have contributed specially for the upliftment of science, philosophy, art, literature, world peace, human welfare or Nepalese industry, finance or social development and have fulfilled the following conditions or status :

(a) who is able to read and write Nepali or any other language in practice in Nepal.

(b) who is engaged in any occupation and domiciled in Nepal.

(c) who has renounced or declared such renunciation of the citizenship of the other country.

(d) who has resided in Nepal for a minimum period of 15 years.

(e) who is a citizen of the country where there is provision of the law or practice to grant naturalized citizenship to Nepalese.

(f) who bears good moral character

(g) who is mentally fit and healthy.

(5) Whatever may have been written in Sub-section (4), from among the issues of the person, the child born to the person prior to that person having acquired citizenship by naturalization may also acquire Nepalese citizenship by naturalization as prescribed form.

## CHAPTER THREE

### ANALYSIS OF LEGAL PROVISIONS

#### 3.1 COMPARATIVE STUDY WITH INTERNATIONAL LAWS RELATED TO CITIZENSHIP:

Citizenship right is recognized as universal and fundamental right of everyone. Exhaustive studies show state of statelessness as a global problem. International communities and agencies have in different time and place, recognized various hurdles in implementation of the citizenship rights. There have been various laws and treaties enacted to comeback such hurdles. Some international law relating to citizenship laws ratified by Nepal are listed below:

##### 1. Universal Declaration of Human Rights, (1948):

The UDHR has some provisions on equalizing status between men and women and guaranteeing equal right to nationality. The provisions are;

- I) Everyone is equally entitled to all rights and freedoms without distinction made on the ground of sex.<sup>17</sup>
- II) Everyone has the right to nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.<sup>18</sup>

The constitutional and legislative provisions of Nepal on citizenship refuse to acknowledge principle of equality and non-discrimination evoked by the UDHR. Citizenship laws in Nepal unequally treat position of male and female while in passing citizenship by descent.<sup>19</sup> Gender discrimination in citizenship laws has left millions of citizenship less in lurch.<sup>20</sup>

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<sup>17</sup> UDHR ART. 2

<sup>18</sup> UDHR ART. 15, CEDAW ART. 9, ICERD ART. 5D.

<sup>19</sup> NEPAL CITIZENSHIP ACT, SEC. 4(2) (2006)

<sup>20</sup> FWLD, ACQUISITION OF CITIZENSHIP CERTIFICATE IN NEPAL: ESTIMATING PREVALENCE, 9 ( 2013)

## **2. International Covenant on Civil and Political Rights (ICCPR), (1966):**

As set forth the principle of equality and dignity the United Nation adopted the International Covenant on Civil and Political Rights. In relation to the marital relation of the spouses and right to nationality, the following provisions are made in the Covenant;

- I) The state parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all Civil and Political rights set forth in the Covenant.<sup>21</sup>
- II) Every child shall be registered immediately after birth and shall have a name and every child has the right to acquire a nationality.<sup>22</sup>
- III) All persons are equal before the law and are entitled equal protection of law without any discrimination. It prohibits any form of discrimination and guarantees right to equality for all people on all grounds including sex.<sup>23</sup>

The covenant ensures the civil and political rights of all, irrespective of their sex. Nepalese citizenship laws are sexually discriminative and that exempts females from enjoying their civil and political right to pass citizenship to her children. Such laws also undermine the Art.24 of the ICCPR.

## **3. Convention on Elimination of all forms of Discrimination against Women (CEDAW), (1979):**

The Convention on the Elimination of all forms of Discrimination against Women is an effort to protect and promote the rights of women. Nepal became signatory party to it in 1991, obliging the existence of gender discrimination. The term "discrimination against women" means any distinction, exclusion or restriction made on the basis of sex or irrespective of the marital status.<sup>24</sup> Further Art. 2 of the Convention states to embody the principle of the equality of men and women in their national constitution or other appropriate

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<sup>21</sup> ICCPR, ART. 3

<sup>22</sup> ICCPR, ART. 24

<sup>23</sup> ICCPR, ART. 26

<sup>24</sup> CEDAW, ART. 1

legislation if not yet incorporated therein and to ensure, through law and other means, the practical realization of this principle.

#### **4. Convention on the Rights of the Child (CRC), (1989):**

The convention on the right of the child embodied nationality/identity of children as follows;

The child shall be registered immediately after the birth and shall have the right from the birth to a name, the right to acquire nationality and as far as possible, the right to know and be cared for by his/her parents.<sup>25</sup>

Further, state parties shall ensure the implementation of these rights in accordance with their national law and their obligation under the relevant international instruments in this field, in particular where the child would otherwise be stateless.<sup>26</sup>

In addition, state parties undertake to respect the rights of the child to preserve his/her identity, including nationality and have family relation as recognized by law without unlawful interference. Further, where a child is illegally deprived of some or all of the elements of his or her identity, the state party shall provide appropriate assistance and protection with a view to speedily reestablish his or her identity.<sup>43</sup><sup>27</sup>

Though efforts have been taken by the government to reestablish the identity of citizenship less children, reluctance to ensure the rights have left the children without nationality. Undertaken citizenship laws have fault lines in ensuring rights of children.

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<sup>25</sup> CRC, ART. 7(1)

<sup>26</sup> CRC, ART. 7(2)

<sup>27</sup> CRC, ART. 8

### 5. Beijing Platform for Action (BPFA), (1995):

In September 1995, the Fourth World Conference on Women was held in Beijing and the Beijing Declaration and Platform for Action were adopted. The strategic objectives taken up by BPFA to promoting gender equality and women empowerment are as follows<sup>28</sup>:

- Ensure equality and non-discrimination under the law and in practice
- Integrate gender perspective in legislation, public policies and projects
- Strengthen national machineries and government bodies

Under Beijing+10 Islamabad declarations (3-5 May 2005) Nepal has committed to recognize the gaps and challenges in implementation in the following areas<sup>29</sup>:

- a) Lack of expeditious enactment of legislation as well as failure to repeal and amendment of discriminatory laws
- b) Inadequate progress in meeting the commitments under Art. 9 of CEDAW on gender equality in citizenship laws.

Nepal committed the flawed provisos in citizenship laws back in 2005, however the prevailing laws of citizenship are still discriminatory on gender basis.

### 6. Millennium Development Goals (MDG)

MDG has made the equality of women a focus on gender equality and women empowerment. The defective value systems in Nepal, consequentially, have been depriving women of their independent identity. Therefore, to meet the objectives of the MDG also reformation in citizenship law is essential.

Scads of international laws related to citizenship are enacted to maintain equality pertaining to persisting gender discrimination. Section 9 of the Nepal Treaty Act, 1991 specifies that any Nepalese laws inconsistent with any international convention or treaty ratified by the government can be declared null

<sup>28</sup> FWLD, IMPACT OF EXISTING DISCRIMINATORY CITIZENSHIP LAW ON WOMEN AND CHILDREN IN NEPAL, 25 (2006)

<sup>29</sup> FWLD, IMPACT OF EXISTING DISCRIMINATORY CITIZENSHIP LAW ON WOMEN AND CHILDREN IN NEPAL, 25 (2006)

and void. Notwithstanding to international treaties and conventions, discriminatory laws are prevalent. To uphold the consistency is the state's obligation under international laws.

### **3.2 COMPARATIVE STUDY WITH THE DECISIONS OF THE SUPREME COURT OF NEPAL ON CITIZENSHIP:**

Constitutionalism sees judiciary's role beyond the text. It is the judiciary who actively interprets the law and by passing ameliorative judgments meets the absence of law. The judiciary is responsible for ensuring observance of Rule of Law. But quondam rendering of undue self-restraint by judiciary induced to bring down 'lax rule of law'. Supreme Court of Nepal has given various decisions on the cases of citizenship counts. Following are some debated cases decided by the apex court:

#### **3.2.1 Benjamin Peter vs. Home Ministry<sup>30</sup>**

The Supreme Court, in this case, held that whilst the provision of Art. 11 of the Constitution of Kingdom of Nepal, 1990, is a general provision of right to equality, the provisions in Part 2 on citizenship constitute a special arrangement. As such, the fact that the right to citizenship does not reflect the right to equality cannot be used as grounds for complaint against denial of citizenship.<sup>31</sup>

The argument that the general provision of right to equality and special provision regarding citizenship does not tally is not a reasonable argument: if the government enters into an agreement contrary to the special provision of the constitution, the agreement will not be enforceable. Thus, the two limbs of the right to equality – equality before law and equal protection of laws – must be understood in the context of citizens and not foreigners.<sup>32</sup>

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<sup>30</sup> BENJAMIN PETER VS. HOME MINISTRY, 32 NKP 749 (2048)

<sup>31</sup> DeLF, COMMENTARY ON THE NEPALESE CONSTITUTION,85 (1998)

<sup>32</sup> DeLF, COMMENTARY ON THE NEPALESE CONSTITUTION,102 (1998)

### 3.2.2 Chhabi Peters vs. District Administration Office<sup>33</sup>

A person who is born of a Nepalese father after the commencement of the Constitution is a Nepalese citizen by birth and it is not material whether he is born in Nepal or in a foreign country. The Supreme Court in this case laid down that the citizenship of the father is the prerequisite in such a case. Supreme Court didn't regard it as a material whether the mother is Nepalese or not. This provision, neglecting the relevance of maternity, discriminates against women (including those women who have children by a non-Nepalese partner and the children of such women), and this discrimination appears to be a reflection of historically favored patriarchal line used for the purpose of determining descent by birth.<sup>34</sup>

### 3.2.3 Balkrishna Neupane vs. Council of Ministers<sup>35</sup>

Supreme Court in this case held that the creation of further (permissive) grounds by administrative rules issued by the Council of Ministers in excess of the powers granted by the 1994 Act is unconstitutional . The court ruled that the constitution and the 1964 Act have themselves determined the conditions for the acquisition of citizenship and so upheld a challenge to an attempt by the government to make 1975 a baseline year for the purpose of granting citizenship to further vested political interests. Such a decision would have entitled people who happened to have their names in the voter rolls prepared during the National Referendum of 1981 to citizenship.<sup>36</sup> The Supreme Court invalidated the process of distribution and voided the certificates without attempting to provide to remedy the problem.

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<sup>33</sup>CHHABI PETERS VS. DISTRICT ADMINISTRATION OFFICE, 33 NKP 443 (2049)

<sup>34</sup> DeLF, COMMENTARY ON THE NEPALESE CONSTITUTION,89 (1998)

<sup>35</sup> BALKRISHNA NEUPANE VS. COUNCIL OF MINISTERS, 35 NKP 675 (2051)

<sup>36</sup> DeLF, COMMENTARY ON THE NEPALESE CONSTITUTION,90 (1998)



**3.2.4 Jabir Yasin vs. Home Ministry, HMG/Nepal, et.al<sup>37</sup>**

The Supreme Court decided this case on 2057/07/25 declining to give effect to the Art 9 (2) of the CEDAW, which state:

“States Parties shall grant women equal rights with men with respect to the nationality of their children.”

The court gave the verdict that a mother cannot transfer citizenship to her child, if her husband is not a Nepali citizen. This is an extreme example of insensitivity to human rights and justice in Nepal.<sup>38</sup>

**3.2.5 Chandra Kant Gyawali vs. HMG/Nepal<sup>39</sup>**

A writ petition was filed in Supreme Court to issue an order to the parliament to amend the provision of Art 9 (1) of the Constitution of the Kingdom of Nepal 1990, Section 3, 3 (4) (5) of Citizenship Act and Rule 3, 3 (1), Index 1,2 of Citizenship Rule 1992 because they are inconsistent and prejudiced with the Art 11 (1) (2) (3) of the Constitution on the grounds of sex and also with the provisions of CEDAW, 1979. It is also in disagreement with the section 9 of the Nepal Treaty Act 1990. In the case, the court stated that "Supreme Court has no jurisdiction to amend the Constitution; it has only the rights to interpret it."

This judgment shows that Nepalese court has accepted the international law only to that extent where it does not contradict with the provision of the Constitution.<sup>40</sup>

**3.2.6 Prakash Mani Sharma, Tek Tamrakar et.al vs. HMG/Nepal<sup>41</sup>**

Although the Supreme Court ruled out the petition against this discriminatory provision of acquiring citizenship only after identification of father, this verdict denied the independent identity of Nepalese

<sup>37</sup> Jabir Yasin vs. Home Ministry, HMG/Nepal, et.al, Writ No. 3503,(2055 B.S)

<sup>38</sup> FWLD, IMPACT OF EXISTING DISCRIMINATORY CITIZENSHIP LAW ON WOMEN AND CHILDREN IN NEPAL, 62 (2006)

<sup>39</sup> Chandra Kant Gyawali vs. HMG/Nepal, Writ No.3668, 2057BS

<sup>40</sup> FWLD, IMPACT OF EXISTING DISCRIMINATORY CITIZENSHIP LAW ON WOMEN AND CHILDREN IN NEPAL, 64 (2006)

<sup>41</sup> Prakash Mani Sharma, Tek Tamrakar et.al vs. HMG/Nepal, Writ No.121, (2060 B.S)

women, as it endorsed the law prohibiting women from passing their nationality to their children making the father the sole source of citizenship by descent. It is a perfect example of patrimonial supremacy and as such discriminates against women on the basis of sex. By applying Art. 9 (2) of the Constitution, this judgment failed to recognize the existence of mother.<sup>42</sup>

It's not the patriarchic impression that is fabricating hegemony in state structure; it's those in politics exploiting patriarchy to have their politics sustained. It's the politics of patriarchy that has made court ambivalent while deciding any case related to citizenship.

### **3.3 CITIZENSHIP LAW OF NEPAL FROM THE PERSPECTIVE OF STATELESSNESS:**

The international legal definition of a stateless person is set out in Art. 1 of the Convention Relating to the Status of Stateless Persons, 1954, which defines a stateless person as "a person who is not considered as a national by any State under the operation of its law".

Statelessness arises in a variety of contexts. It occurs in migratory situations, for example, among some expatriates who lose or are deprived of their nationality without having acquired the nationality of a country of habitual residence. Most stateless persons, however, have never crossed borders and find themselves in their "own country". Their predicament exists *in situ*, that is in the country of their long-term residence, in many cases the country of their birth. For these individuals, statelessness is often the result of problems in the framing and implementation of nationality laws.<sup>43</sup>

Supreme Court of Nepal has handed down a number of verdicts on citizenship issue. Regressive analysis of legal provisions and literal interpretation of laws, made it almost impossible to get the right decisions by the SC on the citizenship rights.

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<sup>42</sup> FWLD, IMPACT OF EXISTING DISCRIMINATORY CITIZENSHIP LAW ON WOMEN AND CHILDREN IN NEPAL, 66 (2006)

<sup>43</sup> UNHCR, GENEVA, HANDBOOK ON PROTECTION OF STATELESS PERSONS, 3 (2014)

To be determined as a stateless, it depends upon the authority that defines law in regard to that particular person. Identification as stateless varies, as the interpretation of laws regard to it varies. The citizenship laws of Nepal are not flexible enough to be interpreted in a progressive manner. Furthermore it also depends upon how the competent authority has taken up the rules of obligation to fill the gap of law.

The long-haul cause of statelessness is structured discrimination by the state and inflicted gap in domestic legislation. The rising of gender discrimination in politics and exclusion of Women, Madhesi, Janajati and Dalits by the ruling caste, has been subjecting them to suffer from statelessness. In, Nepal mother does not hold the sole right of her to pass the nationality to her child. So, the child of single mother cannot attain nationality until the mother reveals the identity of the father. If unrevealed, the child goes stateless, though s/he fulfills all other criterions of being a citizen.

Furthermore, Convention on the Reduction of Statelessness, 1961 establishes safeguards against statelessness. The Art. 1 of the convention states that “A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law”.

The structure of Nepalese law defining the procedures for acquiring citizenship is maintained in a way that keeps the discriminatory provisions intact and exempts the victims form any kind of remedy in a situation like of statelessness.

### **3.3.1 Legal Consequences due to the Statelessness of Children<sup>44</sup>**

#### **a. Political Rights**

Any child, who does not possess a nationality or is in status of statelessness, will be deprived of;

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<sup>44</sup> CHANDRAKANT GYAWALI, NEPALESE CONSTITUTIONAL LAW, 208 (2068)

1. Right to adult franchise
2. Right to inheriting exercise of the sovereign powers and state authority
3. Right to enjoying fundamental rights
4. Right to be a member of the parliament
5. Right to be the President
6. Right to be the Prime Minister or Minister
7. Right to hold office of any local authority

**b. Constitutional Rights**

Any child, who does not possess a nationality or is in status of statelessness, will be deprived of holding the office of, judgeship of any courts of the state, judicial council, constitutional bodies and membership of any constitutional council.

**c. Economic Rights**

Any child, who does not possess a nationality or is in status of statelessness, will be deprived of;

1. Right to employment
2. Right to job
3. Right to visit foreign country
4. Right to acquisition and selling of property.

**3.3.3 Stateless Madhesi<sup>45</sup>**

The identity of Madhesi and the percentage of population they share in the national sphere has always been a matter of dispute and discussion. Generally, Madhesis are the people with non Nepali mother tongue, residing in southern (plains) part of Nepal. “Madhesis are a complex, community of Hindus,

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<sup>45</sup> TERAI HUMAN RIGHTS DEFENDERS ALLIANCE, STATELESS MADHESI (2069 B.S.)

Muslims, Dalits and indigenous people having different livelihood occupations and migratory and settlement history in the Terai region.<sup>46</sup>

According to the 2011 Census report the Madhesi community represents more than 37% of Nepal's total population.<sup>47</sup> The distribution of citizenship to Madhesi people is always at scrutiny with the suspicion that it will lead to disintegration. A madhesi person clearly identifiable with his/her outlook, surname, dress or language has to face many procedural, administrative and behavioral barriers in addition to legal problems in getting citizenship cards and other procedures in government offices.<sup>48</sup>

#### **Legal Barrier:**

Previously enacted citizenship laws in Nepal prerequisite one to have been born in Nepal, one permanently settled in Nepal, and a women married to a Nepal, to be a Nepali citizen. No definition provision of 'Nepali Origin' was the discretion of administrative officers to interpret in any way they like. The hill high dominated administration of Nepal holds reservation on the loyalty and nationality of madhesi people.<sup>49</sup>

#### **Administrative Barrier:**

Chief District Officer (CDO)s are officially responsible to issue citizenship to the people in their concerned district. CDOs in Nepal majorly belong to hill high community. The diversity between the office bearer and

<sup>46</sup> CLAF, CITIZENSHIP IN RELATION TO NATIONALITY, EQUALITY AND STATELESSNESS, CLAF, 573s

<sup>47</sup> TOTAL OF TERAI CASTE THARU, MUSALMAN, YADAV, CHAMAR, KOIRI, KURMI, SANYASI, DHANUK, MUSHAR, DUSADH, SONAR, KEWAT, BRAHMIN, MALLAH, KALWAR, HAJAM, KANU, RAJBANSHI, SUDI, LOHAR, TATMA, KHATWE, DHOBI, NUNIYA, KUMHAR, DANUWAR, HALWAI, RAJPUT, KAYASTHA, BADHAE, MARWADI, SATAR, BANTAR, BARAE, KAHAR, GANGAI, RAJBHAR, BIN, GADERI, NURANG, TAJPURIYA, CHIDIMAR, MALI, BANGALI, DOM, KAMAR, HALKHOR, SIKH, DHUNIYA, MUNDA, PATHARKATTA, KALAR, NATUWA, DHANKAR, KHAWAS, RAJDHOB, KORI, AMAT, DEV AND TERARI OTHERS MAKES 9916209 WHICH IS 37.42% OF TOTAL POPULATION OF NEPAL 26494504. HOWEVER FEW CASTE GROUPS INCLUDING THARU HAVE REFUSED THEIR IDENTITY AS MADHESI AT TIMES.

<sup>48</sup> TERAI HUMAN RIGHTS DEFENDERS ALLIANCE, STATELESS MADHESI, 2 (2069 B.S.)

<sup>49</sup> CDO's REFUSAL, <http://www.ekantipur.com/2012/02/15/nationality/hapa-cdo-firm-on-snowballing-citizenchip-row/348950.html>

the right holder sometime creates problems for madhesi in the acquirement of their citizenship, especially with the fear of being as an Indian.<sup>50</sup>

**Judicial Barrier:**

Where the ameliorative judgment of the apex court could have swapped away the threat of future statelessness, in relation to madhesi and citizenship a number of verdicts passed by the apex court rather disconsolated their life.

In year 2054 B.S. 34094 citizenships were distributed by a Citizenship Distribution team deployed by Citizenship monitoring and Work Evaluation Committee formed by the then government were declared null and void by the Supreme Court.<sup>51</sup>

The Supreme Court declared the distributed citizenships null and void on the ground that the distribution process for those citizenship cards, contradicted with the Constitutional and legal provisions related with Citizenship distribution in Nepal. It is important to note that Supreme Court in this case has not stated that the recipients of those citizenship certificates were illegal; rather it has questioned the process of citizenship distribution and its legality. Question arises upon the duality of the Supreme Court, which in a number of cases has taken progressive ways to address the right to remedy for rights violations, in this case kept mum to order any mechanism to ensure the citizenship for those stateless people.<sup>52</sup>

To solve the problem of statelessness, Nepal should provide citizenship to every child born in Nepal, whose father or mother at his/her birth is a Nepali citizen. Nobody should be a stateless and not any foreigner or illegal capacity holder should acquire citizenship. To get away from the problem of statelessness, the authority should clean up all the pre-occupied biases which are resulting in legal (procedural), administrative and judicial hurdle for those real citizens from having citizenship.

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<sup>50</sup> TERAJ HUMAN RIGHTS DEFENDERS ALLIANCE, STATELESS MADHESI, 3 (2069 B.S.)

<sup>51</sup> BAL KRISHNA NEUPANE VS. COUNCIL OF MINISTERS AND OTHERS, WRIT NO (2980/054)

<sup>52</sup> TERAJ HUMAN RIGHTS DEFENDERS ALLIANCE, STATELESS MADHESI, 5 (2069 B.S.)

### 3.3.4 Recommendations by Citizenship Committee, Circular Issued by Home Ministry and Drawbacks of its Implementation

#### Recommendations by Citizenship Committee

The High Level Citizenship Committee led by Jitendra Narayan Dev, identified some problem in citizenship laws during its study and has suggested recommendations as follows:

1. A Citizenship Follow-up Committee under the chairmanship of a state minister is recommended to be formed under the Home Ministry in order to formulate policies, amend the laws, to make organizational provisions, reform and implement policies with the view to resolve citizenship issues. In addition to this, citizenship distribution should be done as a campaign.
2. It is recommended to provide citizenship in a simplified and hassle free manner to landless tribes and indigenous nationalities that have been living in different parts of the country for long but have failed to acquire their citizenship. Citizenship should be issued to them at their doorsteps.
3. It is in the national interest to provide citizenship and it is also duty of the country to provide citizenship to all citizens free of cost since citizenship is a form of identity which can be used for multipurpose including the purpose of voter identity card.
4. Children born to Nepali mother and foreign father cannot acquire citizenship by birth or by descent under the existing citizenship act and rules; therefore, a policy should be adopted to grant naturalized citizenship to such children.
5. Nepali women, who are citizens by descent of Nepal who are married to foreigners but have not acquired citizenship of a foreign country, often have problem acquiring Nepali citizenship; therefore, it is recommended that a directive be issued to District Administrative Offices to grant citizenship by descent to such women if they have not acquired citizenship of a foreign country.
6. It has come to light that the children of those people, who were citizens by descent but died before acquiring their citizenship, often have difficulties acquiring citizenship; therefore, such children should be given citizenship by descent if their father was entitled to be citizens by descent.

7. Until now the duplicate copy of naturalized citizenship is not issued by the Home Ministry which should now be issued by the Chief District Officer.

**Circular Issued by Home Ministry:**

The Home Ministry circular, approved on December 6<sup>th</sup>, 2011, provides:

**Subject:** Grant of citizenship of the offsprings of the citizens who have attained Nepali citizenship by birth.

**Brief statement of matter:** As per Nepali Citizenship Act, 2006 and Nepal Citizenship Rules, 2006, it has been stipulated that persons who were born inside Nepal's territory on or before April 13, 1990 and residing continuously in Nepal shall apply for citizenship prior to CA elections, and as such, they shall be entitled to acquire Nepali citizenship certificates by birth. As for those who could not apply at that time, they may apply within two years.

As there is an ambiguity as to which type of citizenship for the offspring of persons who have attained Nepalese citizenship by birth are entitled to in the current Citizenship Act and Rules, this issue needs to be clarified.

**Ministry's Opinion:** There is no clear provision in the existing legal framework as regards which type of citizenship needs to be granted to the offspring's of those people whose father acquired Nepali citizenship and through the process. This has resulted in the risk of offsprings of such citizens being deprived of citizenship. Hence, as per the opinion of Ministry of Law and Justice, a proposal to grant citizenship to the children of citizens who have acquired Nepali citizenship by birth approved on December 6<sup>th</sup>, 2011 by Hon. DPM and Home Minister to be submitted to the Council of Ministers, Government of Nepal for a policy level decision. As such, this proposal has been submitted as per the Government of Nepal.



**Decision that has to be reached:** To grant Nepali citizenship by descent to offspring's of citizens who have acquired Nepali citizenship by birth, after fulfilling the formalities and the requirements stipulated in Rule 3, sub rule 1(a), (b), (c) and sub rule 2 of Rule 3 of the Nepal Citizenship Rules 2006.

#### **Drawbacks of its Implementation**

The Home Ministry deployed a citizenship distribution team in 2011, to cover the problems in execution of citizenship rights and state of statelessness. Though the government showed its effort to effectively distribute citizenship, there were some questions left unanswered in the directive. The majorly blemished point was the right to pass citizenship by birth or descent. Provision relating to this right did not give independency to women to pass citizenship by birth or descent to their children. For doing so, she was still dependent on her husband. This was still discriminative in terms of gender balance.

## CHAPTER FOUR

### CONCLUSIONS AND RECOMMENDATION

#### 4.1 CONCLUSION:

Upon comparative analysis with different spectrum of citizenship values, conclusion suggests that citizenship laws in Nepal are not liberal enough to address the international values and principles of universal human rights. The confines clauses of law and regressive analysis by the authority, has resorted to discrimination on the basis of gender issues. Laws in Nepal require to women to depend women to attest her identity with her husband to pass citizenship to her child. This level of dependency on patriarchy is resulting in gender misbalance in the society. The universally inherent right to nationality is not being respected in full swing.

Oppressed women in Nepal themselves may not propose a version of gender justice that challenges male privilege because they have been socialized into acceptance of their situation. A progressive change in Nepalese law is duly necessary to cover the issue of discrimination while in distributing citizenship.

I concluded following structural flaws in citizenship laws of Nepal.

#### 1. Architectural Flaws:

Architecture here means the structural framework designed to formulate any law. Structural framework of citizenship laws in Nepal is designed by the ruling, of the ruling and to the ruling. The restraint to approach to the decision making level, have left the unnoticed to be still be unnoticed. The patriarchal decision making level has set out rules which makes the matriarchy out of the sphere.

Those who penned down the laws structurally left the term 'citizen' undefined. The discretion on defining a citizen is solely left out for individual administrative officers distributing citizenship. They, by themselves, interpret the criteria of being a citizen of Nepal. The subjective and manipulative interpretation leads to over enjoyment of rights to someone, whereas lets other fall down.

2. Ambiguous Flaws:

The 1962 Constitution and the Citizenship Act 1964 did not define what the term "Nepali origin" purport. It was deliberately left to the officials responsible for distributing citizenship certificates in different districts to interpret the term "Nepali origin". This ambiguity is used as a measure of protectionism for some whereas it riddance's others. Protectionism measures taken up while in subjective interpretation by an official, is unconstitutional for their means as well as their ends.

3. Reluctant Flaws:

Government of Nepal, now and then, have issued circulars, directives and had made several executive level decisions to set right the difficulties in citizenship laws in Nepal. But the decisions and the issuance of directions are never an appropriate one. These efforts were inadequate in terms of incorporating public voice and international values. The efforts to amend the domestic laws in line with international conventions and treaties have been proved futile. The mindset occupied by conservatism, have exclusively dominated the rule of law, thus change in progress is not yet possible.

**4.2 RECOMMENDATIONS:**

1. Nepali citizenship laws must protect equal rights of men and women and should ensure their individual identity,
2. The laws should now be shaped in a way to ensure the women's right to transfer citizenship by her name.

3. The administrative functionary should tackle the issues of statelessness.
4. Nepal government should duly amend provisions relating to citizenship such as Art. 11(7) of the Constitution of Nepal, 2015 and section 4(2) of the Nepal Citizenship Act, 2063 to ensure women's right to confer citizenship to their children and spouse as well.
5. Nepal is a signatory to several international human rights including ICCPR, ICESCR and CEDAW. The prevailing domestic legislations are not in line with these international principles. Contradictions have been raised in the court of law with pursuant to the Nepal Treaty Act, 1990. Government of Nepal should amend the local legislation to comply with the international treaties.
6. Inadequacy of the judiciary has left the victims in a state of obscurity. Judicial restraint over declaring discriminative provisions unconstitutional is injustice for women. The judiciary should actively interpret the legal provisions and provide for judicial remedy to those who are in a state of statelessness.
7. Local administration is found to have been imposing unnecessary procedural hurdle while obtaining citizenship certificates. Local administrative officers should free themselves from any biasness or prejudices. CDOs should facilitate local people while approaching to acquire citizenship card.
8. Nepal government should abide its delegated mechanisms to the constitutional provisions and should hold them accountable if found manipulating the legal provision.
9. The new reformation of law should respect the people's aspiration and internalize the global implications.
10. Committee comprising legal experts, activists, international experts and the legal contributors in citizenship issue should be constituted while task of laws reforming is to be set by the government.



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