



Problem of Statelessness in Nepal

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Abstract

This paper highlighted Nepalese statelessness issue from Nationality perspective. Nationality is one of the major human rights concerns of the citizens. In fact, citizenship is one of the major fundamental rights guaranteed by the constitution. According to the universal principle related to the statelessness, no one shall be arbitrarily deprived of his or her nationality. In this connection, on one hand, this paper traced out the international legal obligations created by the conventions to the state parties in which state must bear the responsibility for making national laws to comply with the international instruments. On the other hand, this paper also appraised statelessness related lacunae and shortcomings seen in Municipal laws as well as gender discriminatory laws that has been supporting citizens to become statelessness. By virtue being a one of the modern democratic states in the world, it is the responsibility of the government to protect and promote human rights of the citizens including women and children. Finally, this paper suggests government to take necessary initiation to change and repeal the discriminatory provisions related to citizenship which are seen in the constitution and other statutory laws.

Key words: Human rights, statelessness, citizenship, nationality, honorary, signatory and naturalized.

Introduction

Human Rights are the fundamental rights to which every man or women inhabiting any part of the world should be deemed entitled merely by virtue of having been born as a human being (Padma & Rao, 2010). Stateless is the situation of violation of human rights when one is not under the protection of any state. In this respect, Nepal has become the state party of different human rights related Conventions. To fulfill the legal obligations imposed by the Conventions, Nepal has to formulate different national laws to comply with those obligations. Among them, for the nationality, Nepal has already formulated its national legislation relating to Children in the year 1989 according to the obligation created after signing the Convention on the Rights of Children, 1989 (Khanal, 2017, p. 1).

Black's Law Dictionary has defined the term 'nationality' as the relationship between a citizen of a nation and the nation itself, customarily involving allegiance by the citizen and protection by the state; membership in a nation. This term is often used synonymously with citizenship (Garner,

2009). Likewise, in international law, nationality means the legal bond between a person and a state. It denotes membership and gives rise to both rights and duties on the part of the individual and the state concerned. This legal bond is also commonly referred to as ‘citizenship’ and in most writing on the subject, ‘nationality’ and ‘citizenship’ are used as interchangeable synonyms. However, it is important to note that at the domestic level, citizenship and nationality may constitute distinct legal status. Each state’s municipal law dictates on whom nationality shall be conferred. The two principal doctrines for the attribution of nationality are *jus soli* (nationality based on birth on state soil) and *jus sanguine* (nationality based on descent from a national) (Waas, n. d.). Likewise, Article (1) of the Convention Relating to the Status of Stateless Persons, 1954 defines statelessness persons as “a person who is not considered as a national by any state under the operation of law” (Convention Relating the Status of Stateless Persons [CRSSP], 1954). In this respect, while going through the Article 11 (2) b of the Constitution of Nepal 2015, it seems to have inserted as- a person whose father or mother was a citizen of Nepal at his or her birth shall be the citizen of Nepal by descent (Government of Nepal [GoN], 2015). This provision has guaranteed a child for citizenship by descent from the identity of a father or a mother. This is the *de jure* situation which is very contrast different from the *de facto* situation. The father or both parents have no obstacles to support the child's citizenship; however, it is particularly difficult for the offspring to acquire Nepali citizenship by descent only from the mother. It was found that, as of 16 July 2011, 23.65 percent of the population aged 16 and above (4,346,046 individuals), did not have citizenship certificates and living as stateless persons (Forum for Women, Law and Development [FWLD], 2014). Similarly, Article 24 (2) and 24 (3) of Covenant on Civil and Political Rights (1976) has guaranteed right to nationality and states that “every child has the right to acquire a nationality” (International Covenant on Civil and Political Rights [ICCPR], 1976).

National Legislations Relating to Citizenship

While going through the national legislations, the Constitution of Nepal, 2015 has guaranteed the right to identity as a fundamental right. Article 10 of the Constitution enacts: “No citizen of Nepal may be deprived of the right to obtain citizenship” (GoN, 2015). Legal identity documents confirm a state’s acknowledgement of a person’s existence. In Nepal, the citizenship certificate is considered as the most important formal legal document, as it is often a prerequisite for obtaining other identity documentation. It is one of the documents that indicate an individual as a citizen of Nepal by authorities (Supra note, 7).

In fact, Citizenship is a fundamental element of human security In Nepal, citizenship certificates serve not only as the foundation for ensuring key social, economic and political rights for citizens, but also as the basis for social inclusion and a common national identity. Without citizenship certificates, individuals are barred from registering marriages, births, or on voter lists, buying or selling land, sitting for professional exams, opening bank accounts, and accessing credit. Many women and persons from certain communities and/or areas in Nepal who suffer from poverty, illiteracy, landlessness, social exclusion, and geographic isolation lack access to citizenship certificates and the enjoyment of related rights (Supra note, 7)

Article 15 (1) and 15 (2) of Universal Declaration of Human Rights (UDHR) have guaranteed everyone with the right to a nationality and protected everyone from arbitrarily deprived of his or her nationality or denied right to change his nationality (Universal Declaration of Human Rights [UDHR], 1948). Article 11 (4) of The Constitution of Nepal has provisioned as: “Every minor who is found

within Nepal and the whereabouts of whose father and mother are not known shall, until the father or the mother of the child is traced, be a citizen of Nepal by descent". This provision has guaranteed the citizenship right of such minors accepting the principle of State as a Guardian. Further, this provision has protected the human rights of children as provisioned by UNDHR 1948 and CRC (Child Right Convention) protected a child from being statelessness.

Likewise, Article 11 (5) of The Constitution of Nepal 2015 reads, a person who is born in Nepal from a woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced shall be provided with the citizenship of Nepal by descent. Provided that his or her father is held to be a foreign citizen, the citizenship of such person shall be converted into naturalized citizenship as provided in the foreign law. Therefore, the Federal law will also be very much important to this concern. This provision has respected womens' right to pass the citizenship to her children even in the absence of the father's identity which is a landmark step protecting rights of a single mother to pass her identity. This is a remarkable step through the eyes of feminism which was not incorporated in the previous Constitutions.

Both the two Articles have protected the rights of a child to have a citizenship in the absence of their father or mother. As such, those two provisions have also protected the minors from being stateless. On the contrary, Article 11 (3) of the Constitution reads, a child of a citizen having obtained the citizenship of Nepal by birth prior to the commencement of this Constitution shall, upon attaining majority acquire the citizenship of Nepal by descent if the child's father and mother both are citizens of Nepal (GoN, 2015). This provision seems to have more challenging one for the gender discrimination against women because for a child to attain the citizenship by descent must have both his/her both the parents must be the citizens of Nepal. In Hindu tradition, women have always been considered as the creator and mother of this world but this provision has challenged the identity of a woman that she is always inferior to a man.

While going through the Article 7 (1) of The Convention on Rights of Child, 1989 reads, the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents (Convention on Rights of Child [CRC], 1989). Further, Article 7 (2) of the Convention reads, states parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless (CRD, 1989).

International Obligations

Nepal, as a signatory state of CRC, 1989, she has to fulfill the legal obligations created by the treaty. However, the existing Constitution, the Constitution of Nepal 2015, seems to have failed to comply with the rights provisioned by Convention on Rights of the Child, 1989. In this regard, Article 11 (3) has stated that a child of a citizen having obtained the citizenship of Nepal by birth prior to the commencement of Nepal shall, upon attaining majority, acquire the citizenship of Nepal by descent if the child's father and mother both are citizens of Nepal. Further, Article. 10 (1) of the Constitution states that, No citizen of Nepal may be deprived of the right to be obtained citizenship. Though this Article has guaranteed right to citizenship but till now many Nepalese people are not getting citizenship. Similarly, Sub-Article 2 of Article 10 provisioned for single federal citizenship with State identity in Nepal. However, it is also not implementing in practice till date.

Eligible to be the Citizens of Nepal

Art 11 (1) of the 2015 Constitution states that, the persons who have obtained the citizenship of Nepal at the time of commencement of this Constitution and who are qualified to obtain citizenship in accordance with this Part 2, shall be the citizens of Nepal. Similarly, Article, 11 (2) has provisioned that the following person who has his or her permanent domicile in Nepal at the time of commencement of this Constitution shall be the citizen of Nepal by descent:

- (a) A person who has obtained the citizenship of Nepal by descent prior to the commencement of this Constitution.
- (b) A person whose father or mother was a citizen of Nepal at his or her birth.
- (4) Every minor who is found within Nepal and the whereabouts of whose father and mother are not known shall, until the father or the mother of the child is traced, be a citizen of Nepal by descent.
- (5) A person who is born in Nepal from a woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced shall be provided with the citizenship of Nepal by descent. Provided that his or her father is held to be a foreign citizen, the citizenship of such person shall be converted into naturalized citizenship as provided for in the Federal law.
- (6) A foreign woman who has a matrimonial relationship with a citizen of Nepal may, if she so wishes, acquire the naturalized citizenship of Nepal as provided for in the Federal law. But the federal law relating to this subject matter has not been prepared till date.
- (7) Notwithstanding anything contained elsewhere in this Article, in the case of a person born from a woman who is a citizen of Nepal and married to a foreign citizen, the person may acquire the naturalized citizenship of Nepal in accordance with the Federal law if he or she has permanently resided in Nepal and has not acquired the citizenship of a foreign country. However, if such person's mother and father both are citizens of Nepal at the time of acquisition of citizenship, such person born in Nepal may acquire the citizenship of Nepal by descent.
- (8) In the cases other than those mentioned in this Article, the Government of Nepal may, in accordance with the Federal law, grant the naturalized citizenship of Nepal. However, the Federal law by including with those is not made till the day.
- (9) Honorary Citizenship: The Government of Nepal may, in accordance with the Federal law, grant the honorary citizenship of Nepal. This is a provision relating to honorary citizenship to the foreigners.
- (10) Honorary Citizenship: Whenever any territory is acquired by way of merger into Nepal, a person having his or her domicile in such territory shall become a citizen of Nepal, subject to the Federal law.

Citizenship Certificate to be Provided with Identity of Descent and Gender

Though Article 12 of the 2015 Constitution reads that, a person who obtains the citizenship of Nepal by descent in accordance with this Constitution may obtain a certificate of citizenship of Nepal with gender identity by the name of his or her mother or father. This provision also is not being implemented properly in practice. So far as acquisition, reacquisition and termination of citizenship is concerned, Article. 13 of the Constitution clearly states that other matters relating to the acquisition, reacquisition and termination of citizenship shall be as provided for in the Federal law.

Power to Grant Non Resident Nepalese Citizenship

Article 14 states that, the non-residential citizenship of Nepal may be so granted to a person who has acquired the citizenship of a foreign country, has resided in a country other than a member state of the South Asian Association for Regional Cooperation, and who or whose father or mother,

grandfather or grandmother was previously a citizen of Nepal by decent or birth but subsequently acquired the citizenship of the foreign country that such person may enjoy economic, social and cultural rights in accordance with the Federal law.

Other Provisions Relating to Citizenship of Nepal

Article 15 of the existing Constitution has provisioned that other matters relating to the maintenance of records setting out the identity of every citizen of Nepal and the citizenship of Nepal shall be as provided for in the Federal law. The sentence which is enacted in Article 11 (3) as: *If the child's father and mother both are citizens of Nepal*. This sentence seems to have quite against the spirit of the CRC, 1989 promoting a child towards the statelessness. Further, Article 11 (5) of the Constitution reads, a person who is born in Nepal from a woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced shall be provided with the citizenship of Nepal by descent. This provision is discriminatory because a woman despite of giving birth to her child cannot pass the citizenship by herself rather she needs to prove that the father is not traced which has ignored the single identity of a women. The existing Citizenship Act, 2006 has provisioned for Nepali citizens who has attained the age of 16 to obtain citizenship certificate.

Statelessness is a symptom of a dysfunctional system which does not allow the members of a minority group within the Nepali society to explore their full economic, political and social capacities. Citizenship is an individual's entry point into a society that is based on specific cultures cultivated and formed through institutionalized practices. Statelessness therefore has a life-long and direct impact on the person's sense of belonging within the private and public sphere (Nowack, 2015). National laws do not grant women equality with men in conferring nationality to their children are cause of statelessness. This has radically changed for the better since the adoption of 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Nepal is one of the countries among 27 countries in the world that does not provide equal conditions for women to confer nationality to their children (UNHCR, 2014, p. 2). These nationality laws do not give mothers the ability to confer their nationality to their children on an equal basis as fathers. Ensuring gender equality in national laws can mitigate the risks of statelessness (UNHCR, 2014, p. 2). In 2011, the Supreme Court had set a valuable precedent in the case of *Sabina Damai vs. Nepal Government* and acknowledged that married or singles can transfer their citizenship to their offspring (Forum for Law and Development [FWLD], 2011). The landmark directive has been a sign of hope for women's equal and respectful treatment preventing women and children from being stateless in Nepal.

Though Nepal is a signatory of Convention on the Rights of the Child (CRC) 1989, Convention for Elimination all Forms of Discrimination against Women (CEDAW) 1989, International Covenant on Civil and Political Rights (ICCPR) 1989 and CERD the existing Constitution of Nepal, 2015 and Children Act, 1990 do not comply with legal obligations of these Conventions. By these insufficient and unclear legal provisions, many women and children are not being able to attain the citizenship certificates in Nepal. The existing domestic laws relating to citizenship in Nepal (i. e. the Constitution of Nepal, 2015 and Nepal Citizenship Act, 2006) still contains discriminatory provisions against women and their children.

Conclusion

In conclusion, on the basis of the above discussion, we can say that Nepal is state party to more than 24 human rights related Conventions including ICCPR, CEDAW, CRC etc. As a signatory

party of those Conventions, Nepal has to abide by those treaty obligations seriously. These provisions seem to have contrary to Nepal's international treaty obligations contained in such instruments like CEDAW, ICCPR, CRC, and CERD. For this purpose, Nepal has to formulate the new laws and amend the old laws as per the need to comply with the treaty obligations. But in practice, we do not find the laws formulated and amended in accordance with the letter and spirit of the Convention concerned. The legal provisions provided in the Constitution has not strengthened or protected the gender equality. It is the responsibility of people living in Nepal and the international community has to give pressure to the government to revise the new Constitution in such a way that human rights will be protected. Women must have freedom to transfer their citizenship to their children independently as their husbands. Gender equality can be made a just and democratic society for the elimination of statelessness in Nepal. Let's hope that the Federal laws which will prepare by the Parliament of Nepal will include all the provisions related to the citizenship certificates in the name of mother instead of in the name of father as guided and directed by the Convention related to Statelessness. The Supreme Court of Nepal has issued directives in the name of the Nepal Government to make the laws to provide citizenship to the citizens through the name of mother or father but the government is not making the law as per the direction of the Supreme Court. Therefore, the Government of Nepal has to take initiation to make and change the laws to abide by the international conventions relating to statelessness.

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