

## Women's Rights in Nepal: A Constitutional Insight

### Abstract<sup>1</sup>

*The authors delve to study the constitutional protection for women in Nepal. There are several clauses in the Nepalese Constitution that promote and defend women's rights. The charter grants women a variety of rights under Article 38, including the right to procreate, the right to lineage, and the right to be free from all forms of discrimination. The constitution provides the right to proportionate participation in state apparatuses and one-third representation in the legislature in an effort to advance the cause of women. The state would undoubtedly benefit from these advancements if it wanted to establish gender-sensitive laws and policies.*

**Keywords:** Constitution, Gender equality, Law, Nepal, Women

### INTRODUCTION

Internationally, women have felt the burn of discrimination. From developed states to developing ones, the situation has been almost the same. Take the example of the United States. Justice Bradley of the US Supreme Court held that the natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations in civic life. The paramount destiny and mission of the women are to fulfill the noble and benign offices of the wife and mother. This is the law of the creator. In this case, Bradwell, a women's lawyer, was denied an advocate's license by the state of Illinois. The US Supreme Court argued that such a restriction imposed by Illinois was not in contravention to Fourteenth Amendment to the Constitution of the United States. Bradwell was admitted to the Illinois Bar in 1890 and was granted license to practice before the US Supreme Court in 1892. Considering the instances of gender discrimination, the US Supreme Court was of the view that a woman's physical structure and the performance of maternal functions place her at a disadvantageous position for subsistence. It is still true that in the struggle for subsistence, she is not an equal competitor with her brother. She will still be where some legislation to protect her seems necessary to secure a real equality or right.

In this case, the constitutional validity of one of the Oregon laws, which prohibited women from working more than 10 hours in a day, was in question. The Court validated the law on the ground of being consistent with the due process clause envisaged under the Fourteenth

---

<sup>1</sup>**Jivesh Jha**

Judicial Officer, Rajbiraj High Court, Rajbiraj, Saptari, Nepal,

**E-mail:** [jhajivesh@gmail.com](mailto:jhajivesh@gmail.com)

**Rajendra Paudel**

Judicial Officer, Rajbiraj High Court, Rajbiraj, Saptari, Nepal

**E-mail:** [razzindra445@gmail.com](mailto:razzindra445@gmail.com)

Amendment to the US Constitution. In 1961, *Hoyt v Florida*, the US SC upheld a law placing a woman on the jury list if she made a special request because as put by Harland, J, “a woman is still regarded as the centre of the home and family life.” These instances clarify that even developed countries like the United States have and have had discriminatory laws and practices on board.

Women have fought against all types of abuse and prejudice against them and have become more aware of their rights across the world. These prejudices led the world community to pass gender sensitive domestic as well as international laws. The "Convention for the Elimination of All Forms of Discrimination against Women" (CEDAW), which was adopted by the United Nations in 1979 and ratified by 189 states on September 3, 1981, is a treaty that is essential for assessing the government's progress in eradicating discrimination. This treaty, which Nepal ratified in 1991, is recognised as a strong international agreement to protect gender equality and decrease violence against women. Acknowledging CEDAW, the drafters of the 2015 Constitution of Nepal have floated ample provisions to ensure the protection of women's rights in broad and universal principles of equality and participation. The preamble of the Constitution takes pledge to end all forms of discrimination lying along the gender basis. In a similar vein, the equality clauses and affirmative action clauses of the Constitution seek to ensure adequate representation of women in public life. To be specific, Article 38 provisions that all rights relating to women shall be fundamental rights. These rights include equal right to lineage, right to safe motherhood, and right to reproduction. In addition to this, Nepal has set aside 33 percent of seats to women in the legislature. This arrangement endeavors to press forward gender sensitive laws and policies. The reservation benefits ensured to women are there to supplement the principle of proportional inclusion. This article attempts to discuss the constitutional provision and protection given to women in Nepal.

### **Constitutional Scenario**

The Constitution of Nepal was adopted and enacted on September 20, 2015. As required under the Comprehensive Peace Accord signed in 2006 between the Government of Nepal and the Communist Party of Nepal (Maoists) to formally put an end to a ten-year Maoist insurgency, it is the first Constitution enacted by the people's elected representatives. The Constitution first institutionalized republicanism, federalism, and secularism after ending the 240-year authoritarian rule of the Hindu king. In an endeavor to cherish the goals of democracy, the constitution slams every form of discrimination, including that of gender disparity. It hosts a good deal of rights for championing the cause of women. Interestingly, Nepal sets aside 33% of parliamentary seats for women, which is a major breakthrough. This Constitutional provision will increase the participation of women in politics and public life, which may just be a single step, but it is nevertheless a step in the right direction. However, allotting adequate seats to women belonging to Madhesi, Indigenous community, Bahun-Kshetri, Dalit, Muslim and other clusters would remain a challenge in the Himalayan Republic. The women populace would remain underprivileged unless women from every ethnic group, community and caste and creed are fairly represented in the state apparatuses. The constitutional arrangement for proportional and inclusive representation of women implicitly intends to achieve fair representation of women belonging to every caste, creed and community. Inclusivity and diversity are the core focus of the 2015 constitution. However,

Nepal's journey towards inclusion depends, to a great extent, on the quality of democracy and constitutionalism it will achieve on the foundation of its constitution.

This enhanced role of women parliamentarians would certainly play a significant role in proposing gender sensitive laws and reviewing and amending discriminatory laws and practices. In India, Women Reservation Act, 2023 provides one-third seats in the House of the People, i.e., lower house of India's bicameral Parliament, and state Legislative Assemblies for women. The 73<sup>rd</sup> and 74<sup>th</sup> amendment to the Constitution of India led to guaranteeing 33 per cent reservation to the women at the local level. This way, there appears one-third representation of women at Centre, Province and Local levels in India. However, illiteracy, lack of political awareness, physical violence at home and economic dependency are a few reasons which restrain women from taking part in the political processes of the country.

In Nepal, the constitution from the initial stage ensures the rights of women as a fundamental right under Article 38. Article 38 (beginning with a marginal note of *Right of women*) guarantees a plethora of fundamental rights to women. It includes: equal right to women in lineage, right relating to safe motherhood & reproductive health, right to participate in all state structures on the basis of principle of proportional inclusion, right to special opportunity in spheres of education, health, employment, and social security on the basis of positive discrimination and right to (both spouses) in property and family affairs. Moreover, the charter also provisions that the victims shall have the right to seek compensation from the outliers.

In yet another breakthrough, the charter in Article 70 envisages that “while conducting election of President and Vice-President under this Constitution, the election shall be held so as to represent different gender or communities.” Interestingly, a similar arrangement has been made for the election of Mayor and Deputy Mayor of the municipality. In case of Speaker and Deputy Speaker of the House of Representatives, one of them must be a woman and so is the case with Chairperson and Vice-Chairperson of the National Assembly. In addition to this, Article 12 of the Constitution of Nepal is a welcome provision which confers an individual the right to seek citizenship certificate along with gender identity. Now, it's a well-settled law that an individual can choose his gender identity by his own declaration, without any third-party intervention. This intervention could have been an insistence on surgery, a medical diagnosis or any other such practice. In this vein, the judiciary also stood by the cause of trans-gender people and as a result of which the Supreme Court of Nepal in the case of *Sunil Babu Pant v. Government of Nepal* in 2007 held that the persons were entitled to select their gender identity based on their “self-feeling.”

The constitutional protection does not limit here only. The Himalayan state is also the first and foremost country in South Asia to explicitly recognize fundamental rights of sexual minorities. The charter permits states to make provisions for participating weaker sections of societies, including sexual minorities, into governmental apparatuses on the basis of principle of inclusion. Article 42 reads as “Socially backward women, Dalits, Adibasi, Adibasi Janajati, Madhesi, Tharu, minorities, persons with disability, marginalized, Muslim, backward classes, gender and sexual minorities, youths, peasants, workers, oppressed or

citizens from backward regions, and economically poor Khas Arya shall have the right to participation in the state bodies on the basis of principle of inclusion.” In addition to this, Article 18 dealing with the right to equality provides that there shall be no discrimination on the grounds of origin, religion, race, caste, tribe, sex, physical conditions, disability, health condition, matrimonial status, pregnancy, economic condition, language or geographical region, or ideology. The guarantee of equality, promise of non-discrimination and special provisions for bringing the weaker sections, including that of sexual minorities, show the progressiveness of Nepal's constitution and the state's dedication and devotion in securing the rights of vulnerable groups, including that of women.

In this respect, Slomita Rai argues that “Geographical size doesn't matter; even a small country can be a path finder of a new horizon, which becomes true with Nepal being the world's first country that has shown a new horizon to the whole world by recognizing the status of the transgender by including a third gender option in its census forms in the year 2011. It is actually the result of the landmark decision of the Supreme Court of Nepal. Rai further observes, “The Supreme Court acknowledging the growing ascendance of the notion that the homosexuals and third gender people are not mentally ill or sexual perverts, has held that their rights should be protected and they should not be discriminated in the enjoyment of rights guaranteed by the Constitution and human rights instruments. The Supreme Court hearing the matter has passed a ruling against gender identity discrimination. The country has introduced a third gender category on its passports as well.” Regardless of these legal developments, gender equality cannot be ensured unless we develop an attitude of zero tolerance to violence within our homes and outside.

### **Toward Right to Safe Motherhood**

The “Right to Safe Motherhood and Reproductive Health Act, 2018” has been enacted by the government of Nepal to give effect to Article 38 of the Constitution, which outlines a comprehensive number of essential rights for the country's female population. In this regard, Article 38 is a welcome provision that protects important human rights about how Nepal developed its feminist national policy within the parameters of its constitution, how it transitioned from a top-down policy to being a component of the broader socio-political environment, and the results it has attained. The clause grants women a wide range of rights, such as the equal right to inheritance without regard to gender, the right to a healthy pregnancy and childbirth, and the right to special opportunities in the fields of social security, health care, and employment based on positive discrimination and both spouses' equal rights in property and family affairs.

In this regard, the preamble of the Right to Safe Motherhood and Reproductive Health Act, 2018, states that the legislation's goal is to provide every woman with access to safe motherhood and reproductive health in a respectable and manageable manner. Some of the measures, however, have the potential to defeat the goal that the Act was designed to pursue. In this context, Section 7(3) of the Act envisages that if a government hospital is unable to provide a patient with treatment, it is the responsibility of the hospital to refer the patient to a better government hospital or, in the event that treatment in a government hospital is not possible, to a private hospital. But why couldn't government hospitals handle difficult

situations? Can we draw the conclusion that a private hospital in Nepal is a patient's final option? If referred to a private hospital, who would be responsible for the astronomical costs? Not the patients, is it? Private hospitals are required to charge easily determinable fees [Section 32(3)]. The Act, however, makes no mention of what exactly qualifies as "assessable" expenses. What criteria should be used to decide whether a charge is straightforward to assess or not? Any amount of costs may be interpreted as an assessable fee by private hospitals. Similarly, every woman is entitled to 98 days of paid maternity leave under Section 13 of the Act. All public, non-profit, and private entities must abide with the provision. The Act, on the other hand, makes no explicit mention of who—either the employer or the employee—has the final say or authority in determining the leave.

Section 13(3) stipulates that every office must have a designated area for nursing. However, the enforcement authorities do not take this provision's implementation in text or spirit very seriously. Unfortunately, only a small number of government and non-government offices in Nepal have established specialised areas for nursing mothers. The allocation of funds is contemplated under Section 22. The clause does not, however, outline the methodology for funding allocation. It has no provisions for how the funding would be allocated, i.e., whether it would be based on a report from provincial governments, hospitals, local organizations, or any legitimate study. According to Section 22(1), the Central Government will allocate funds. In this respect, the legislation gives the centre a lot of discretionary flexibility when assigning funds. In a federal democracy, it encourages the centralizing tendency of the government. In actuality, the causes of maternal mortality include the poor health of women before conception, insufficient, unavailable, or expensive healthcare, as well as lack of cleanliness and treatment during labor. Maternal fatalities are also significantly influenced by socio-economic factors including poverty and women's uneven access to resources. The Act fails to host robust provisions to prevent or reduce maternal fatalities or to take care of the needs of the underprivileged. This Act displays a tolerant attitude towards the private hospital mafias and shows little concern for healthy pregnancy and reproduction. However, if our regulations are followed to the letter and in their entirety, Nepal would make progress in advancing the cause of medical democracy.

### **Legal Framework on Termination of Pregnancy**

In Nepal, up to 12 weeks of fetus could be aborted at the consent of women. In the opinion of doctors, if abortion is necessary to save the life of the mother, then in such a case, abortion is permissible. Similarly, the law allows rape victim and HIV/STDs patients to abort. However, a jail sentence of up to one year and fine of up to ten thousand has been provisioned [under Section 188, National Criminal Code, 2017] in cases where a fetus of length of up to 12 weeks is aborted without the consent of the woman. The same law prescribes for up to three years of jail sentence and up to 30,000/- of fine in cases where a fetus of length of 12 to 25 weeks is aborted. Moreover, if a person causes abortion of a fetus of above 25 weeks, s/he would be liable to face jail sentence of up to five years and fine may extend to 50,000/.

In India, the Medical Termination of Pregnancy (MTP) Amendment Act, 2021 is an amendment to the Medical Termination of Pregnancy Act, 1971 which governs the law around the termination of pregnancy in India. The Amendment Act is a progressive step

towards protecting the reproductive rights of women and providing them with access to safe and legal abortion services. One of the significant changes brought about by the Amendment Act is the increase in the upper gestation limit for certain categories of women from 20 to 24 weeks. This includes survivors of rape, victims of incest, differently-abled women, minors, and other vulnerable women. This change recognizes the unique circumstances and challenges being faced by women and ensures that they have access to safe abortion services. The Amendment Act also allows for termination of pregnancy up to 20 weeks in cases of contraceptive failure. This is a crucial provision as it recognizes that even when using contraception, unintended pregnancies can still occur. It is a welcome provision as it allows women to terminate pregnancies that would, ultimately, help to prevent unsafe abortions and other complications which may lead to maternal mortality and morbidity.

Under the Amendment Act, only one Registered Medical Practitioner's (RMP) opinion is needed for termination of pregnancy up to 20 weeks of gestation, whereas two RMP opinions are required for termination of pregnancy of 20-24 weeks of gestation (fetus). This provision ensures that there is proper medical oversight and decision-making in cases where termination is sought after the 20th week. The Amendment Act also requires the opinion of a State-level medical board for termination of pregnancy after 24 weeks in cases of substantial fetal abnormalities. This provision ensures that the decision to terminate a pregnancy after the 24th week is based on medical grounds and is in the best interest of the mother and the fetus. One of the essential provisions of the Amendment Act is the confidentiality of women who undergo termination of pregnancy. The name and other particulars of a woman whose pregnancy has been terminated shall not be revealed. This provision ensures that women's privacy and dignity are protected.

In general, the MTP Amendment Act, 2021 is a significant step towards ensuring women's reproductive rights and access to safe and legal abortion services. It also strikes a balance with the Sustainable Development Goals (SDGs) 3.1, 3.7, and 5.6, which pertain to reducing maternal mortality ratio, universal access to sexual and reproductive health, and rights, and ensuring gender equality and empowerment of women and girls. In Japan, abortion is legal but the consent of the male partner is essential and must be written consent. The law of abortion has been prevailing in Japan since 1948. However, the law of Japan could be perceived as patriarchal in nature. As per Centre for Reproductive Rights, abortion is legal in 48 countries. However, by 2021, 24 countries, including Philippines and Laos, have made abortion completely illegal. In 1973, the U.S. Supreme Court's ruling in *Roe v. Wade* recognized that the decision whether to continue or end a pregnancy belongs to the individual, not the government. *Roe* held that the specific guarantee of "liberty" in the *Fourteenth Amendment of the U.S. Constitution*, which protects individual privacy, includes the right to abortion prior to fetal viability. Since *Roe*, the Supreme Court has repeatedly reaffirmed that the Constitution protects for abortion as an essential liberty, which is tied to other liberty rights to make personal decisions about family, relationships, and bodily autonomy.

In June 2022, in a devastating decision that will reverberate for generations, the U.S. Supreme Court abandoned its duty to protect fundamental rights and overturned *Roe v. Wade*, ruling there is no constitutional right to abortion. The ruling in *Dobbs v. Jackson*

*Women's Health Organization* abandons nearly 50 years of precedent and marks the first time in history that the Supreme Court has taken away a fundamental right. In Pakistan, abortion is a punishable offence under Pakistan Penal Code, 1860. Section 338A provides for up to three years of jail imprisonment for committing abortion with the consent of the woman and up to ten years of jail imprisonment in cases where the consent of the woman was not sought and abortion was done. However, abortion is permissible to save the life of a woman, or for providing necessary treatment to her.

## CONCLUSION

The traditional ideas of society, culture, and rights have undergone a significant change the world over. While there is still more to be done to protect women's rights, there has been significant progress accomplished. Change happens gradually. Nepal's Constitution gives the government broad authority to establish and enact initiatives, programs, and regulations that will safeguard and advance the rights of women and children. A beginning in the right direction is having one-third representation of women at the legislative spectrum. In the words of Mahatma Gandhi, "Democracy is something that would give the weak the same chance as the strong." Nepal's constitution contains progressive provisions that support the cause of women. Even yet, passing fair rules without also enforcing them in text and spirit would only be cosmetic.

## REFERENCES

- Adhikari, B. (2020). Salient Features of the Salient Features of the Constitution of Nepal, 2015. <https://bipinadhikari.com.np/wp-content/uploads/2021/08/Salient-Features-cut.pdf>
- Adhikari, B. (2020). From exclusion to inclusion: Crafting a new legal regime in Nepal – Social Science Baha. (n.d.-b). <https://soscbaha.org/publication/from-exclusion-to-inclusion-crafting-a-new-legal-regime-in-nepal/>
- Bochenek, M., & Knight, K. (2012). *Establishing a third gender category in Nepal: Process and prognosis*. Emory Law Scholarly Commons. <https://scholarlycommons.law.emory.edu/eilr/vol26/iss1/3/>
- Jha, J. (2016, November 18). Nepal Leads South Asia in Women's Political Representation. *The Diplomat*. <https://thediplomat.com/2016/11/nepal-leads-south-asia-in-womens-political-representation/>
- Nepal 2015 Constitution - Constitute*. (n.d.). [https://www.constituteproject.org/constitution/Nepal\\_2015](https://www.constituteproject.org/constitution/Nepal_2015)
- Rao, M. (2020). *Law relating to Women and Children - EBC Webstore*. EBC Webstore. [https://www.ebcwebstore.com/product/law-relating-to-women-and-children-1696662665?products\\_id=815](https://www.ebcwebstore.com/product/law-relating-to-women-and-children-1696662665?products_id=815)

Rai, S., (2015). Legal recognition and rights of third gender in India. LL.M. dissertation, Uttaranchal University).

Roe v Wade, Centre for Reproductive Rights, available at:  
<https://reproductiverights.org/roe-v-wade/> (Accessed on Dec. 1, 2023).

The Editors of Encyclopaedia Britannica. (1999, April 26). *Muller v. State of Oregon | Labor Laws, Working Hours & Women's Rights*. Encyclopedia Britannica.  
<https://www.britannica.com/event/Muller-v-State-of-Oregon>

The Editors of Encyclopaedia Britannica. (1999a, April 26). *Bradwell v. State of Illinois | Ruling & Facts*. Encyclopedia Britannica.  
<https://www.britannica.com/event/Bradwell-v-State-of-Illinois>