

## Gender Audit Summary of the Constitution of Nepal 2015 Preliminary Draft

(Unofficial translation by International IDEA)

### 1. Introduction

The emergence of initial draft of the new Constitution of Nepal, 2015 after prolonged impasse is an important achievement in itself. The endeavours of political parties and their top brass are commendable in this front. Primarily, the departure points of a democratic constitution comprise of institutionalization of minimum basic norms such as limited government, rule of law, judicial review and constitutional supremacy and to make ground for the guarantee, protection and fulfillment of rights and interests of individuals, communities and classes.

While discussing women's rights in the upcoming Constitution, we have to observe its various dimensions. Basically, the problems of women rest on multi-sectoral discrimination. The issues of women may be properly addressed only if we proceed through analyzing them in conjunction with and not in isolation of class problems, gender discrimination, inequality, ethnic, religious, cultural and geographical identity.

Hence, while reviewing the initial draft of the new Constitution of Nepal, 2015 from the standpoint of women's rights, apart from the fundamental norms of constitution, the following focal principles, norms and concepts have been assimilated:

- Substantial equality, positive discrimination not amounting to discrimination
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- Concept of equal citizenry
- Equal rights for citizenship
- Self determination and right of physical as well as mental integrity of women
- Equal participation
- Elimination of violence against women

### 2. Initial Draft of the Constitution of Nepal, 2015 and Some Issues of Women's Rights

The initial draft of the Constitution of Nepal, 2015 has addressed some significant issues of Nepali women, which is surely a welcome initiative. However, the draft has failed to include some of the serious and crucial issues of women. If these concerns are not addressed then the rights gained by Nepali women, viz. the status if equal citizenry, matters of women's participation in political and public life,



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substantive equality, self determination of women, right of physical as well as mental integrity of women shall also be impaired, which shall be a regrettable thing not only for women but for the State as a whole. As such, in the present context forwarding the initial draft for discussion among entire Nepali people and amending the draft by incorporating public inputs and suggestions for making a full and final draft, the Coordination Group of Former Women Parliamentarians (Women's Forum), Nepal Law Society and International IDEA, Nepal have submitted the following suggestions in point wise format upon studying the draft Constitution from a gender perspective:

Part and Article of the Constitution	Problem	Suggestion
Preamble	The preamble of the draft has failed to incorporate equality, to prohibit gender discrimination prevalent in Nepali society, to end unequal power sharing in every sector for centuries, through institutionalized patriarchal regimes. The preamble also fails to incorporate the concept of equal citizenry, equality in opportunities, goal of an egalitarian society and the contribution of women in nation building.	<p><b>Revise the Preamble as follows:</b></p> <p>By recalling the historical movements, armed struggle waged by Nepali people time and again for national interest, democratic republic and forward looking change, the glorious legacy of historical struggle, contribution, sacrifice and redemption rendered by women, Dalits, Indigenous ethnicities, Madhesi and the backward communities as well as by the overall Nepalese people for the formation of an equitable State,</p> <p>By eliminating all forms of discrimination and persecution generated by feudal, autocratic, centralized, unitary and <i>patriarchal</i> State system,</p> <p>By pledging towards economic equality, prosperity, the building of an equitable society based on the proportional, inclusive and participatory principles through addressing the multiethnic, multilingual, multi-religious, and characteristics of geographical</p>



		<p>diversity, elimination of all forms of discrimination including the linguistic, religious, gender based ones, By committing towards the building of socialist base by adopting the democratic norms and values including the concepts of competitive adult franchise, multiparty democracy, competent judiciary and rule of law based on constitutionalism,</p>
<p>Part 2: Citizenship</p>	<ul style="list-style-type: none"> <li>• The provisions of Articles 11 and 12 do not appear to discriminate between men and women, on the basis of gender, as regards the attainment, sustenance and alteration of citizenship. However: <ul style="list-style-type: none"> <li>○ In order to confer citizenship by descent, both the father and mother have to be Nepali citizens. In order to obtain citizenship through the mother's name, where the father is unknown this non-identification must be verified. This provision deprives women of independently conferring citizenship to her offspring.</li> <li>○ There is no provision for a woman to confer citizenship to her husband on the basis of marriage, in equal footing with men. This has rendered the independent citizen status of women as well as their relationship with State fragile.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• In case either the father <i>or</i> mother of a child is a Nepali citizen, his or her offspring shall be a Nepali citizen by descent.</li> <li>• While granting naturalized citizenship to men and women on marital basis, same and equal provisions have to be entertained.</li> </ul>

<p>Part 3, Fundamental Rights and Duties, Article 43-Rights of Women</p>	<p>The proposed special Article on women has ensured separate set of fundamental rights which seems to have addressed the issues of women to some extent. However, the rights conferred under the Rights of Women seem to be in conflict with other Articles of the Statute. As such, though women's rights are designated as fundamental rights, their enforcement remains an uphill task. For instance, under the Rights of Women, it has been provided that the women shall have equal rights of lineage, without any gender discrimination. However, the special provision on citizenship in Part 2 of the Constitution has deprived women of the lineage right of independently conferring citizenship which has resulted that this right may exist in paper only. Likewise, it has been provided that women shall have the right of participation in entire bodies of State mechanism on the basis of principle of proportional representation. However, it has curtailed the right of participation in judiciary, legislature, executive and constitutional organs based on the principle of proportional representation. Hence, these measures are in conflict with one another. These are just some of the examples. The other rights of women are also left out which need to be added.</p>	<p><b>Commentary</b></p> <p>The Constitution itself shall have to provide in unequivocal terms such provisions that would enable women to enjoy the Rights of Women as real fundamental rights.</p> <p>The right of lineage should be adjusted within the other parts of Constitution as per the spirit of principle of proportional representation. Otherwise, the rights granted under the Rights of Women can never be enjoyed in real terms. Consequently, it shall create much confusion in implementation and invite conflict in future.</p> <p><b>The following provision should be added in the Rights of Women under Article 43:</b></p> <ul style="list-style-type: none"> <li>• Employed women shall have the right of paid maternity leave during the period of delivery. No one will be fired from her work on the premise of pregnancy and delivery.</li> <li>• Authorized officials in the State or State mechanism shall be prohibited from inflicting any form of physical, mental, sexual, psychological, or any other kind of violent act or exploitation. Such acts shall be punishable by law and the victim shall be entitled to compensation as provided in the law.</li> </ul>
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<p>Part 3: Fundamental Rights Article 23: Right of Equality</p>	<p>Discrimination against women has not been defined. Discrimination against women is not linked to its effect and outcome. This is limited only to the extent of State discrimination. It has not covered the direct and indirect discrimination in private and public life. It has prohibited discrimination on the basis of gender. However, it has not sufficiently addressed gender based discrimination.</p>	<p><b>Revise Article 23(3):</b> Sub Article 23(3) has provided that nobody shall discriminate against anyone on the basis of religion, caste, race, religion, gender, sexual orientation, physical condition, age, disability, health and marital status, pregnancy, financial situation, origin, language or <i>gender-based traditions, rituals or customs</i> or any other similar grounds. “Discrimination against women” means any type of discrimination, expulsion or prohibition meted out with a view to or with an effect of impeding the use and enjoyment of human rights and fundamental freedoms by women in political, economic, social, cultural, civic or any other sector, irrespective of the marital status of men and women.</p>
	<p>With an exception of equality before law laid down in Article 23, no Article on fundamental rights has expressed any commitment on equality, substantive equality and gender equality. However, under Part 4, Directive Principles, Policies and Responsibilities of State, Article 54 (1) it has been provided that the State shall have an objective of maintaining gender equality. However, this provision cannot be enforced by courts and no question may be raised in courts even when the State objectives are not met.</p>	<p><b>Revise Article 23(2) and (3) as follows:</b> The words <i>Gender Discrimination</i> have to be included in Article 23(2) and (3) under the Rights of Women. <b>Revise Article 23 reference to special provision as follows:</b> However, The State shall make special provisions by law for <i>ensuring substantive equality</i> of the economically, socially and culturally <i>backward communities</i>, women, Dalits, Indigenous ethnicities, Khas Aryas, Madhesis, Tharus, peasants, workers, oppressed classes, Muslims, downtrodden groups, minorities,</p>

		<p>marginalized, on the verge of extinction communities, youth, children, senior citizens, sexual and gender minorities, disabled, incapacitated or helpless or citizens from backward regions, through their protection, empowerment and development.</p> <p><b>Add a new Sub Article 23 (6):</b> Each citizen shall have equal rights in economic, social and political opportunities.</p>
	<p>The proposed provision on discrimination has covered multi discrimination but not the gender and cultural discrimination rife between men and women.</p> <p>Another important matter is that though it has assimilated discrimination based on religion and race, it has failed to comprehensively address the end of continuing discrimination triggered by the patriarchal norms and values, discriminatory norms and values, their exercise and practice, that are inherent in every religion and culture.</p> <p>Likewise it has been mentioned in Article 60 (3) that the state restructuring and state power sharing should be done on the basis of caste/community ... cultural identity. And Serial No. 22 of Schedule 5 under distribution of state power article 61(2) refers to the right to protection and use of language, culture... and religion shall be as per this constitution and provincial law.</p> <p>As a result, in the pretext of protecting the rights granted by the Right to Religion such as the</p>	<p><b>Revise Article 23 (2) and (3) as follows:</b> There shall be no discrimination in the application of general laws on the basis of religion, caste, race, religion, <i>gender, sexual orientation</i>, physical condition, age, disability, health and marital status, pregnancy, financial situation, origin, language or gender-based traditions, rituals or customs or any other similar grounds.</p> <p>(3) The State shall not exercise discrimination among its citizens on the basis of religion, caste, race, religion, gender, sexual orientation, physical condition, age, disability, health and marital status, pregnancy, financial condition, origin, language or area, belief, <i>gender-based traditions</i>, rituals or customs or any other similar grounds.</p>

	<p>fundamental right of every person to adopt, follow and protect his or her religion as per their faith and the right to identity, the provinces may ignore the discriminations embedded in religion and culture which may become continual and institutionalized while exercising and enjoying the fundamental rights.</p> <p>This may happen also because though the inequality caused by caste or ethnicity may be easily diagnosed, it would not always be easier to detect inequality rooted in gender basis. It is because though we may consider the caste based discrimination improper and unjust even as per our culture, the gender induced discrimination may appear to be proper for us even now. Or, the gender induced inequality may appear to be less significant than the caste based inequality. The reason for why the gender induced inequality may remain hidden is that we have easily grasped such odds in our daily lives or we have shrugged them off as natural happenings.</p>	
	<p>As the principle of substantive equality observes both the impact and outcome of law, it focuses on the interests and concerns of women. It advocates for an understanding of historical background that women have lagged behind men owing to the existing inequality, exploitation and discrimination in every sector such as family, society, arts, literature, culture, law, religions and so forth. This norm lobbies for recognition of positive discrimination in case of women since the social and physical responsibilities of men and women are</p>	

	different. By not considering the social status and needs of women, formally declared equality cannot take women on par with men is social status. The proposed provision has overlooked this rudimentary issue.	
Article 43: Rights of Women	The tenets of end of discrimination and right to equality are divergent notions with separate theoretical bases. Hence, it cannot be said that the end of discrimination will at once guarantee equality. The Constitution has overlooked this fact also. The equality provision has been limited to formal equality. There is no mention that women shall have equal rights in political, economic and social sectors.	<b>The following needs to be added under Rights of Women article 43:</b> There shall be equal rights for women in political, economic and social sectors and special measures may be undertaken for ensuring <i>substantive</i> equality.
Part 3, Article 23: Right to Equality Part 4, Article 55(h): Directive Principles, Policies and Responsibilities of the State	Article 23(4) of the Right to Equality has ensured non-discrimination on the basis of gender for equal and same work. Under Article 55(h) of the Policies of State, within the Basic Needs of Citizens Policy, it has been provided that the chores and contributions such as care and upbringing of children and family shall be assessed financially. However, the State has been silent in managing the informal labour sector where there is overwhelming presence of women.	<b>The following needs to be added under Article 55(h) pertaining to Basic Needs of Citizens Policy:</b> The informal labour sector, where there is overwhelming presence of women, shall be managed.
	Though Right to Labour and policies on labour and employment have been stated in the fundamental rights and directive principles of State, there are no provisions that would have exclusively offered women equal	<b>The following needs to be added under the Policies of State:</b> An environment shall be created for protecting, fostering and supplementing the rights of women in



	opportunity, special protection and promotion in employment or other economic activity.	trade, business, employment or any other economic activity.
	No rights related to marriage have been recognized as fundamental rights. Thus, the violence against women relating to marriage and conjugal life could not be prohibited constitutionally.	<p><b>Right relating to Marriage needs to be added:</b></p> <ul style="list-style-type: none"> <li>• No one shall be allowed to maintain more than one spouse.</li> <li>• Each person shall have the right to marry and divorce subject to the prevailing laws.</li> <li>• No marriage shall be consummated in the absence of full and free consent of parties to marriage.</li> <li>• The acts against the first and third provisions shall be punishable by law.</li> </ul>
Part 3: Fundamental Rights and Duties Article 36: Right to Education	The provisions on education are positive. However, women's right to free higher education is not addressed.	<p><b>The following needs to be added under the Right to Education in Article 36:</b></p> <ul style="list-style-type: none"> <li>• Women shall have the right to free higher education.</li> </ul>
Part 3: Fundamental Rights and Duties Article 25: Right relating to Justice	The Right to Justice enshrined in Article 25 has primarily provided for rights relating to criminal justice. Hence, it so seems that the right of free legal aid to the incapacitated parties as stated in Sub Article (10) is available only in criminal cases. As such, the provision is obscure on whether the right of free legal aid is available in family or civil cases or not.	<p><b>The following needs to be added in Article 25:</b></p> <ul style="list-style-type: none"> <li>• There shall be a right to free legal aid in family cases or cases of civil nature.</li> </ul>
Part 31: Political Parties	The proposed Constitution has no provisions for enhancing the representation and participation of	<b>The following needs to be added in Article 55(b) under the Directive Principle sand Policies of</b>



<p>Article 264: Provisions on Political Parties</p>	<p>women in political parties. Hence, the politics, which is the foundation for ensuring women's participation in elections and other forms of governance system, may witness diminished practices of women's involvement. Political parties may be less motivated to increment women's participation in polity and the State policies as well as actions may pay less attention in this subject.</p>	<p><b>State:</b> “A policy of promoting equal participation based on proportional inclusion in political and governance system by promoting the women's participation, capacity and leadership skills in political parties and organizations.” <b>The following needs to be added in Article 264(4), Part 31 regarding Provisions on Political Parties:</b> (d) There should be proportional participation of women in all levels of organization and a minimum of 1/3 women members in executive committees.</p>
<p>Election System Part 8 Article 88: Federal Legislature Part 13 Article 175: State Judiciary</p>	<p>Mixed election system is endorsed at the formation of federal and State assemblies while direct election system is proposed at the assembly of local bodies. As a minimum quota has been allocated for women, their participation is reserved in local legislature. However, this does not secure women's representation at the executive posts. There should be separate lotteries for selecting the tenure of National Assembly on the basis of strata of representation.</p>	<p><b>Commentary:</b> In order to ensure women's equal participation there should be provision of proportional, inclusive participation. Further, political parties should make necessary provisions to ensure representation of both men and women as Heads/Vice heads and Chair/Co-chair in local legislature and local elections. <b>The following provisions should be made to Article 175:</b></p> <ul style="list-style-type: none"> <li>• A woman shall be elected to the Head of State or Vice Head of State in the federal and provincial executive.</li> <li>• A woman shall be elected to the Prime Minister or Deputy Prime Minister in the</li> </ul>



		<p>formation of federal cabinet.</p> <ul style="list-style-type: none"> <li>• A woman shall be elected to the Speaker or Deputy Speaker in the federal and provincial legislature</li> </ul>
	<p>Various committees may be formed in the federal and State legislatures. Their total strength is also determined. However, no guarantee of minimum women's representation is made therein. As its result, the committees which are recognized as powerful, influential and active in the legislature that can cast more impact on state power may see reduced women's participation and the tendency to place women in committees of social concern may be retained. There is no provision for exercising the principle of proportional inclusive participation.</p>	<p><b>Revise Part 8, Article 101(2) as follows:</b> A Joint Committee shall be formed for managing the working system of two Houses, to iron out differences over a Bill, or if any House endorses a motion for the formation of a Joint Committee comprising both the Houses. There shall be a maximum of 25 members including <i>women members</i> on the basis of proportional inclusive participation, in a ratio of 5:1 from among the members of House of Representatives and National Assembly.</p> <p><b>Revise Article 192 of Part 13 as follows:</b> In order to manage the working system of Provincial Assembly, the Assembly may form a committee or special committee as per the Rules, also including women members on the basis of proportional inclusive participation.</p>
<p>Part 23: Election Commission Part 24: National Human Rights Commission Part 25:</p>	<p>Though the proposed Constitution has envisaged the principles of gender equality and inclusion, it is laid down that the principle of inclusion shall be adopted only at the federal and provincial cabinet. Even there, a fixed number of women's seats is lacking. Women's participation is also not made mandatory in the independently formed commissions and constitutional organs.</p>	<p><b>To be Added</b> A phrase needs to be added requiring that women's participation be mandatory in the formation of the federal and provincial cabinets, independently formed commissions and constitutional organs and in the appointment of ambassadors.</p>



<p>National Natural Resources and Financial Commission Part 26: National Women's Commission Part 27: National Dalit Commission Part 28 National Inclusive Commission Part 30: Provision on National Security</p>	<p>Though there is a mention of making the cabinet inclusive, the counter provision for a member of parliament to become a minister and the absence of any special measure has made the current provision unclear.</p>	
<p>Human Rights for Security Agencies</p>	<p>Though the protection of human rights and fundamental freedoms is being adopted as a national policy in the proposed Constitution, it is silent on making the security agencies accountable to human rights. While compensation for the loss incurred during emergency is provided for, there is no provision of making the security apparatus sensitive, conscious and committed towards human rights.</p>	<p><b>Revise Article 55(1) and Articles 262, 263:</b> In Article 55 (a) and Article 262 and 263 of part 30, it should be mentioned that the security force military, police and paramilitary force will be informed sensitive and responsible towards human rights.</p>



Part 11: Judiciary	Part 11 of the Constitution deals with provisions on judiciary. Though it has not deprived women from becoming judges at any level of court, there is no quota for women's seats for judges' posts. Hence, as currently written there shall be a possibility of only a modest number of women making it to the upper echelon of judiciary and that the judiciary may not be inclusive enough from the gender perspective.	<b>Revise Part 11:</b> Guaranteed seats for women on the District Court, Appellate Court and Supreme Court must be ensured on the basis of proportional inclusive participation.
Part 6: National Women's Commission	Part 6 of the proposed Constitution has established National Women's Commission as a constitutional organ which is a significant achievement in itself. The proposed provision has also tried to address the instrumental aspects of its independence, autonomy and continuity. Still, there are some factors that are worth considering such as: -The draft Constitution has envisaged federal Women's Commission as a constitutional organ and has remained silent on the Women's Commissions at the provincial level. Thus, it remains unclear whether the State has provided for autonomous Women's Commissions at the provincial level through respective laws or has envisaged a Commission of a unified nature. -If the provision of provincial Women's Commissions is not clarified, it may result in future disputes over their interrelation and jurisdiction. -The educational qualification of only the Chief of Women's Commission is prescribed but not of its members. This may affect the efficacy of Commission in	<ul style="list-style-type: none"> <li>• It should be clear in the Constitution itself whether it has proposed for autonomous Women's Commissions at the provincial level through respective laws or has envisaged a Commission of a unified nature.</li> <li>• The coordination and relation between the National Inclusive Commission, National Women's Commission and the National Dalit Commission should be included in the Constitution itself in a definitive manner.</li> <li>• The educational qualification of only the Chief of Women's Commission is prescribed but not of its members. This may affect the efficacy of Commission in future. Hence, the minimum qualification for other office bearers of Commission also needs to be stipulated in the Constitution itself.</li> </ul>

	future.	
Part 36: Definition and Interpretation	There are no special provisions on the interpretation of Constitution. While interpreting the rights and freedoms stated in the Constitution, a progressive approach ensuring the rights of persons should be adopted so that the rights and concerns of individuals as well as communities may be addressed in a dynamic fashion. However, the Constitution has failed to assimilate this stand.	<b>The following Sub Article (3) needs to be added in Part 36: Definition and Interpretation, of the Constitution:</b> <ul style="list-style-type: none"> <li>While defining Constitution or rights, a progressive interpretation shall be accorded as per the international norms, treaties and conventions and in pursuance of contemporary political and social values.</li> </ul>
	Nowhere has this Constitution mentioned anything about this matter. However, it does not infer that the agencies for interpreting law such as the courts could not take reference of laws and practices in other countries.	<b>Provision to be added:</b> The agencies for interpreting law such as the courts could take reference of laws and practices in other countries.  <b>The following needs to be added in Part 36 relating to Definition and Interpretation:</b> The agencies for interpreting law such as the courts may cite international laws or take reference of laws and practices, as required.
	The Constitution is silent on whether the international treaties and conventions on human rights shall apply directly or not.	<b>The following needs to be added in Part 36 relating to Definition and Interpretation:</b> The international treaties and conventions on human rights shall apply with the same force as domestic laws.
Article 40: Right to Health	Though the right to health of each citizen is guaranteed as a fundamental right, the right to reproductive health	<b>The following needs to be added to Article 40:</b>



	<p>is not ascertained.</p> <p>On one hand whereas the right to basic health has been established as a fundamental right, on the other hand it has been provided under the State Policies that the State shall gradually increase investment as regards these rights and Article 51 relating to the enforcement of fundamental rights has included a phrase that the rights shall be enforced within 3 years by framing relevant laws thereof. Thus, it seems that this provision has limited the right of obtaining remedy under the extraordinary jurisdiction of courts in case these rights are infringed upon.</p>	<p>There shall be a right to reproductive health.</p>
<p>Article 47: Right to Social Justice</p>	<p>The word 'inclusive' is only used in the fundamental rights while not addressing the right of proportional participation which needs to be addressed.</p>	<p><b>Revise Article 47 as follows:</b></p> <p>The socially backward women, Dalits, Indigenous, ethnicities, Khas Aryas, Madhesis, Tharus, peasants, workers, oppressed classes, Muslims, downtrodden groups, minorities, marginalized, on the verge of extinction communities, youth, children, senior citizens, sexual and gender minorities, disabled, incapacitated or helpless or citizens from backward regions, shall have the right in State structures and public service on the basis of <i>proportional participation</i>.</p>
<p>Gender Friendly Language</p>	<p>The language in proposed Constitution is not gender friendly. The words such as President, Vice President, etc. used in several parts and Articles of Constitution have reinforced the belief that powerful positions are associated with masculinity. The use of words such as President, Vice President, etc., for instance, has tried to</p>	<p><b>To be revised:</b></p> <ul style="list-style-type: none"> <li>• The word <i>helpless</i> should be removed from the term helpless women.</li> <li>• The terms President, Vice President should be substituted with the words Head of the State and Vice Head of the State.</li> </ul>

	<p>give continuity to the conventional knowledge that only males may fill in these posts. Moreover, the Constitution itself seems to restore and institutionalize the same orthodox thoughts, beliefs and practices.</p> <p>-The diction used in the Constitution has failed to convey a sense of feeling that the conservative attitude against women has changed for better.</p> <p>-The provisions of special protection for women have bolstered the belief that the women are helpless, weak and subject to pity.</p> <p>However, in the provisions relating to election system, formation of assembly and legislature, State policies on social and economic opportunities as well as rights and in measures of special protection for women, the terms women, sexual minorities and single women have been used pointedly.</p>	
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### Study and Preparation Team

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