

## **SECURING THE RIGHTS OF NON-RESIDENT NEPALIS IN THE NEW CONSTITUTION OF NEPAL**

-Khagendra Gharti Chetry\*

Emigration of Nepalis to foreign countries to seek livelihoods, or in search of knowledge, skills, training and professional opportunities, has been an undeniable fact. With the lack of economic as well as educational opportunities in Nepal, the trend of emigration out of Nepal will continue for a foreseeable future. According to the Nepalese Ministry of Labor and Transportation Management about 656 Nepalis leave Nepal on a daily basis to seek employment abroad with official permission from the Ministry. Emigration via India is still unaccounted for because of the open border.<sup>1</sup> An estimated 300,000 Nepalis have settled in U.S.A, Canada, Wester Europe, Australia, New Zealand and other developed countries.<sup>2</sup> Acquiring citizenship of the adopted country becomes almost a necessity for various practical considerations—enjoy privileges of employment, education with ease, participate in various activities, enjoy privileges for children, enjoy social benefits, pensions, ease of travel, etc. The term Non-Resident Nepali (“NRN”) refers to Nepalis who live in foreign lands who once held Nepali citizenship. Another term Persons of Nepali Origin (“PNO”) refers to people who are born outside Nepal and can prove Nepali origin at least one generation before.

The NRNs who acquire citizenship of their adopted countries nonetheless always wish to maintain strong emotional ties to their country of origin—Nepal, which they usually consider their motherland. The NRNs stay in regular touch with their families back in Nepal, travel to Nepal frequently, constantly keep updated on the changes/news, assist in development work and support the country to the best of their abilities. Most importantly, NRNs who’ve succeeded overseas are now vying to reconnect and engage in a meaningful ways in the reconstruction of Nepal. Therefore an effort to unite the NRN

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<sup>1</sup> Comment by Secretary of Ministry of Labor and Transportation Management during the Interaction Program held in celebration of 18<sup>th</sup> International Migrant Day, December 17<sup>th</sup>, 2008.

<sup>2</sup> *A Perspective on Allowing Dual Nationality for Non-Resident Nepalis*, by Dr. Ambika P. Adhikari.

has led to the formation of Non Resident Nepali Association (“NRNA”) in 2002. The NRNA has become an institutional conduit for NRNs to forge stronger ties with Nepal with a more united front.

As Nepal embarks on a journey to write a new constitution, the rights of NRNs should be incorporated in this Constitution. Granting dual citizenship to NRNs who’ve taken up citizenship of their adopted countries, is the optimal way to ensure the rights of NRNs. It should be noted that such a grant should not be viewed as a one way benefit to NRNs. On the contrary, the accrual of benefits runs both ways. In addition to the issue of dual citizenship, several other issues should be addressed in this transitional phase to promote rights of NRNs and PNOs. Such issues include, *inter alia*, i) constitutional provisions on investment related laws ii) NRN’s inheritance rights, including that of women, and iii) constitutional provisions for gender, employment and age discrimination. This paper seeks to promote the rights of NRNs and PNOs vis-à-vis the new Nepali Constitution.

### 1. Dual Citizenship

Dual citizenship arises, not out of explicit bilateral agreements between nations, but because each country makes its own laws respecting who is or not its citizen, often without regard for whether a given person is considered a citizen by more than one country.

Each country uses its own individual rationale for citizenship. In practice the citizenship is given at birth to persons with a parent who is one of their nationals (*jus sanguinis*)<sup>3</sup>, or to persons born on their territory (*jus soli*), or through marriage to persons wedding their nationals (*jure matrimonii*). There are different ways to acquire a

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<sup>3</sup>Jus sanguinis (Latin for "right of blood") is a social policy by which nationality or citizenship is not determined by place of birth, but by having an ancestor who is a national or citizen of the state. It contrasts with *jus soli* (Latin for "right of soil") by birth on the territory.

citizenship; it is possible to be considered a citizen under the laws of two (or more) countries at the same time.

The existing Nepali law proscribes any Nepali to hold dual citizenship. Section 10 of the Nepal Citizenship Act 2063 (2006 A.D.) contains the termination clause, which provides that any citizen of Nepal who voluntarily acquires the citizenship of any foreign country shall automatically lose the citizenship of Nepal. However, in the recent time, especially after the formation of the NRNA, the debate of granting dual citizenship to NRNs has come to fore. Since the NRNs who've embraced new citizenship still wish to maintain close ties to Nepal, the issue of dual citizenship has likewise taken the front seat on the NRNA agenda. The controversy surrounding the issue of dual citizenship has centered on the fear that if dual citizenship is allowed, it would open the doors for Indians to become Nepali citizens. The open border between Nepal and India is the root cause of this fear. However, this fear is misplaced and further there are ways to circumvent such a specter.

The advocacy for dual citizenship for NRN is based on the premise that NRNs have at one point in their life held a Nepali citizenship. Since NRNs are those Nepalis who have migrated out of Nepal, their claim to citizenship, in essence, is equated to Nepalis reclaiming their citizenship to Nepal once again. Therefore, the fear that Indian citizens will come to Nepal and procure Nepali citizenship, in the event of the provision of dual citizenship, is wholly misplaced. Dual citizenship is granted to only those NRNs who can prove that they once were Nepali citizens and lost that citizenship because they acquired citizenship of their adopted countries. Thus an Indian citizen will not be able to avail himself/herself of this provision. However, this problem can arise if the dual citizenship is to be granted to PNOs as well. PNOs who are born outside Nepal usually are citizens of the country of their birth. Therefore granting dual citizenship to PNOs can open the gates for Indians wanting to claim citizenship in Nepal. However, this problem can be circumvented by restricting citizenship to certain geographical areas. As provided in NRN Act, the most plausible way would be to exclude the PNOs of SAARC countries from procuring dual citizenship. Another solution would be to grant dual citizenship only

to NRNs and provide an alternative benefit to PNOs, which would also foster ties between PNOs and Nepal.

It could take the similar shape as the “*Overseas Citizen of India*” which grants a list of rights and privileges to Non Resident Indians and People of Indian Origin without granting them dual citizenship.<sup>4</sup> The provisions of the Indian Citizenship Act allows OCIs to have i) a multiple entry, multi-purpose life long visa for visiting India; ii) Exemption from registration with local police authority for any length of stay in India (iii) Parity with Non-resident Indians (NRIs) in respect of economic, financial and educational fields except in relation to acquisition of agricultural or plantation properties.<sup>5</sup> Though this solution should be the last resort since PNOs wanting to have strong ties to Nepal would be deprived of the privileges accorded to a person with dual citizenship status.

In this regard, the Canadian Citizenship Act is a helpful document in providing some guideline provisions that can be adopted in Nepal vis-à-vis the PNOs. The Canadian Citizenship Act has a provision of “derivative citizenship” which grants automatic citizenship to children of Canadian parent/s.<sup>6</sup> However, the second and the subsequent generations born abroad can procure Canadian citizenship unless by age 28 they have registered and have either lived in Canada for one year immediately prior to the application or have established a substantial connection to Canada.<sup>7</sup> In the similar vein, the PNOs who are second or subsequent generation can be granted Nepali citizenship in addition to their citizenship of their birth countries, in the event they show substantial ties to Nepal. Some other conditions can be put in place as well in granting dual citizenship to PNOs.

The Nepal government has promulgated a Non-Resident Nepali Act (2007), which provides some privileges to NRNs and PNOs.<sup>8</sup> Sections 10 through 14 of the NRN Act lists the benefits accorded to the NRNs and PNOs, which include—i) right to

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<sup>4</sup> §§ 7A-7B of Indian Citizenship Act (1955) as amended in 2005.

<sup>5</sup> *Ibid.*

<sup>6</sup> Clause 3 of Canadian Citizenship Act.

<sup>7</sup> *Ibid.*

<sup>8</sup> §§ 6-14, Non Resident Nepali Act (2007).

purchase limited property ii) intestate inheritance right iii) visa provision for investment purposes iv) tax benefits v) right to operate industry or profession and vi) benefits of convertible currency while investing in Nepal.

Though NRN Act is a positive step towards acknowledging the contribution NRNs and PNOs can and have made towards Nepal, this is inadequate in the present context. The movement of NRNs has taken momentum since 2002 and the NRNs have become more vocal and active in solidifying their ties to Nepal.

The contributions made by NRNs and PNOs are undeniable. Statistics show that NRNs sent about \$1 billion in remittance in 2007 alone.<sup>9</sup> There have been a sizable number of philanthropic works undertaken by NRNs, both on an individual and organizational level. Whenever the country is hit by natural disasters, the NRNs and PNOs have come together to raise funds and help the victims in Nepal. In the recent years, at every political junctures, the NRNs have showed their solidarity with Nepalis at home important role in garnering international pressure against the royal regime and in support of April uprising. During the April uprising, the NRNs held protests, conducted seminars and discussions, published articles and created internet networking to bring back democratic system in Nepal.

All these efforts are testimony of the connection NRNs and PNOs feel towards Nepal. And, NRNs aspire to contribute more and become part of Nepal like any other Nepali citizen. In this context, granting dual citizenship is therefore a mutually beneficial undertaking for both Nepal and the NRNs.

Many countries around the globe have dual citizenship provisions—either in unrestricted or unrestricted forms. Most developed countries like U.S, Canada, UK, Australia, New Zealand, Israel, France, and Russia grant unrestricted dual citizenship.

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<sup>9</sup> *A Perspective on Allowing Dual Nationality for Non-Resident Nepalis*, by Dr. Ambika P. Adhikari.

Some developing countries like Bangladesh, Brazil, Colombia, Mexico, Philippines etc also allow dual nationality for their citizen<sup>10</sup>.

If we are to look at the provisions in the US law regarding citizenship rights, the Constitution of the United States provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

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<sup>10</sup> Jus sanguinis and ethnic ties have been used to confer citizenship. Armenia: Article 14 of the constitution provides that "individuals of Armenian origin shall acquire citizenship of the Republic of Armenia". Bulgaria: Article 25 of the 1991 constitution specifies that "person[s] of Bulgarian origin shall acquire Bulgarian citizenship through a facilitated procedure." Croatia: Article 11 of the Law on Croatian Citizenship allows emigrants and their descendants to acquire Croatian nationality upon return. Finland: Finnish law provides a right of return to ethnic Finns from the former Soviet Union, including Ingrians. Germany: Article 116(1) of the German Basic Law (constitution) confers a right to citizenship upon any person who is admitted to Germany as "refugee or expellee of German ethnic origin or as the spouse or descendant of such a person." Greece: Ethnic Greeks can obtain Greek citizenship by two methods under the Code of Greek Nationality. Pursuant to Article 5, ethnic Greeks who are stateless (which, in practice, includes those who voluntarily renounce their nationality) and who "really behave as Greeks" may obtain citizenship upon application to a Greek consular official. In the late 19th century, Greece had a wider diasporas because of poverty and limited opportunities. Hungary: Section 4(3) of the Act on Nationality permits ethnic Hungarians (defined as persons "at least one of whose relatives in ascendant line was a Hungarian citizen") to obtain citizenship on preferential terms after one year of residence. In addition, the "Status Law" of 2001 grants certain privileges to ethnic Hungarians living in territories that were once part of the Austro-Hungarian Empire. It permits them to obtain an identification card but does not confer the right to full Hungarian citizenship. Israel: In addition to Israeli citizenship being granted to all ethnic groups and religions (a) by virtue of birth in Israel or (b) by naturalization after 5 years' residency and the acquisition of a basic knowledge of Hebrew, (c) the Law of Return confers an automatic right to citizenship on any immigrant to Israel who is Jewish by birth or conversion, or who has a Jewish parent or grandparent. Italy: Possibly alone in this respect, bestows citizenship *jure sanguinis*. There is no limit of generations for the citizenship via blood, but the Italian ancestor born in Italian territories. Japan: A special visa category exists for foreign-citizen descendants of Japanese nationals up to the third generation, allowing long-term residence, unrestricted by occupation. Poland: The Statute on Polish Citizenship, as amended in 2000, permits the descendants of Poles who lost their nationality involuntarily between 1920 and 1989 to take up Polish citizenship without regard to ordinary naturalization criteria. Rwanda: Article 7 of the Rwandan constitution provides that "Rwandans or their descendants who were deprived of their nationality between 1st November 1959 and 31 December 1994 by reason of acquisition of foreign nationalities automatically reacquire Rwandan nationality if they return to settle in Rwanda." In addition, "[a]ll persons originating from Rwanda and their descendants shall, upon their request, be entitled to Rwandan nationality." Slovakia: A person with at least one Slovak grandparent and "Slovak cultural and language awareness" may apply for an expatriate identity card entitling him to live, work, study and own land in Slovakia. Expatriate status is not full citizenship and does not entitle the holder to vote, but a holder who moves his domicile to Slovakia may obtain citizenship under preferential terms. Spain: Regardless of place of birth, or how far removed one is from an ancestor born in Spain, those born to an *original* Spaniard (whether or not your parent still retains Spanish citizenship, or is still living) are entitled to *original* Spanish nationality. They also cite many other countries with similar laws, including Poland, Hungary, Slovakia, the Czech Republic, and Croatia. Liberian constitution (currently defunct and being rewritten) allows only people "of their descent" (regardless of ethnic, cultural or national affiliation) to become citizens.

of the State wherein they reside.”<sup>11</sup> Further, the citizenship provisions are codified in the United States Immigration and Citizenship Act (“INA”). The INA sections 301 and 337, reaffirms the provision as provided in the 14<sup>th</sup> Amendment, but expounds more on the meaning of “birth” and “naturalization” respectively. With regards to dual citizenship, though there is no explicit provision, the US Supreme Court has interpreted the 14<sup>th</sup> Amendment to prohibit the government from revoking person’s U.S. citizenship without evidence of his or her *intent* to give up said citizenship.<sup>12</sup> In sum, citizenship in a different country will not revoke U.S. citizenship automatically unless the citizen intends to do so affirmatively. However, section 349 of the INA does specify certain conditions under which US citizenship may be lost, nonetheless the actions warranting the revocation must be done with the intention of giving up the US citizenship.<sup>13</sup> While U.S. policy of dual citizenship is embedded in the interpretation of the U.S. law, Philippines law, for example, explicitly allows dual citizen in its statutory language. The Philippines Republic Act (R.A.) No. 9225, states, “It is hereby declared the policy of the State that all Philippine citizens who become citizens of another country shall be deemed not to have lost their Philippine citizenship under the conditions.”<sup>14</sup>

NRNs desire to be afforded similar privilege—i.e. to retain/regain their Nepali citizenship after acquiring citizenship of their adopted countries. As argued above, NRNs can get dual citizenship without opening the floodgates to Indian citizens. Allowing NRNs to retain/regain Nepali citizenship will grant them host of rights that are currently unavailable to them, such as maintaining absolute property rights on par with Nepali citizens, make investment and work in Nepal like any other Nepali, entering Nepal whenever they please without regulatory requirements etc. Though the current NRN Act does provide some rights and privileges, it nonetheless puts restrictions on those rights. The NRN Act allows NRNs wishing to invest in Nepal<sup>15</sup>, and provides 10 years visa that can be renewed as necessary<sup>16</sup>. However, most importantly, the Nepal immigration Act

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<sup>11</sup> U.S. Constitution, Amendment 14

<sup>12</sup> *Afroyim v. Rusk* (1967)

<sup>13</sup> INA §349

<sup>14</sup> Citizenship Retention and Re-acquisition Act of 2003, §2

<sup>15</sup> § 13 of the NRN Act

<sup>16</sup> *Ibid.*, § 11

puts travel restrictions on NRNs—NRNs are still required to get visa to travel to Nepal like any other foreigner<sup>17</sup>. The Act also has an inconsistent provision regarding the cancelation an identity card if one acquires the citizenship of another country<sup>18</sup>, whereas another provision<sup>19</sup> specifically authorizes to issue identity card for ten years to a foreign citizen of Nepali origin. Similarly, the NRN Act allows purchasing real estate property for personal use only<sup>20</sup>. It significantly discourages NRN to purchase real estate property because such property cannot be rented out when it is not being used as a personal residence.

A dual citizenship would allow an unfettered right to travel in and out of Nepal. The provision for dual citizenship in Nepal can be in restricted form to make it more feasible. For example, NRNs with dual citizenship can be proscribed from holding government jobs, running for political office and exercising any political right.

With regards to PNOs, the first generation PNOs—whose parents/NRNs hold dual citizenship, should be granted some form of derivative citizenship affording the same rights and privileges as their parents. However, from second generation forward, those PNOs who could prove their origin to a Nepali citizen and can provide evidence of substantial connection to Nepal, they can avail themselves of the benefit of dual citizenship. As argued above this form of derivative citizenship to PNOs can have additional restrictions so as to grant this benefit to only the deserving PNOs and not establish a blanket grant. This would foster ties between Nepal and persons who can trace ancestry to Nepal.

Given the vast resource that can be tapped from the Nepali Diaspora living abroad, granting dual citizenship and other benefits to NRNs and PNOs would indubitably create a win-win situation. Nepal is at a juncture where economic and social development is direly needed. And, the professional skills, technical know-how,

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<sup>17</sup> Nepal Immigration Act, 1992; Immigration Rules, 1994

<sup>18</sup> § 17 of the NRN Act

<sup>19</sup> § 4 of the NRN Act

<sup>20</sup> §10 of the NRN Act.



educational services and financial investments that the NRNs and PONs can bring to Nepal are undeniably immense and necessary for the country.

Under these circumstances, the Government of Nepal should amend the Citizenship Act to void the termination clause and in turn add a provision allowing dual citizenship to NRNs, which as stated above can be restricted. A similar language as Philippines (as cited above) can be adopted in the Nepali Citizenship Act, which would also list the proscriptions. Most importantly, this provision should be reflected in the New Constitution of Nepal to secure the rights provide of NRNs.

## 2. Other Rights

While the issue of dual citizenship takes the foremost precedence in the priority list for NRNs, the NRNs aspire that the Government of Nepal undertake measures to secure rights of NRNs in other areas as well. Such rights are briefly discussed below.

### a. *Investment Related Laws*

As more and more Nepalis have ventured out of the country in search of better economic opportunities, their opportunities somehow become limited by virtue of their citizenship. This is primarily because Nepal does not have treaties with other countries that allow Nepalis to avail themselves of benefits that such treaties would provide. One visible example is the Treaty Traders and Treaty Investors provision of U.S. Immigration and Nationality Act.<sup>21</sup> This provision permits nonimmigrant visa status for a national of a country with which the United States maintains a treaty of commerce and navigation who is coming to the United States to carry on substantial trade, including trade in services or technology, principally between the United States and the treaty country, or to develop and direct the operations of an enterprise in which the national has invested, or is in the process of investing a substantial amount of capital. SAARC countries like Bangladesh, Pakistan and Sri-Lanka are Treaty countries. However, Nepal is not. Therefore, even if Nepalis are capable of undertaking ventures as traders or become investors in the U.S., they still cannot avail themselves of this non-immigrant visa because of the absence of

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<sup>21</sup> INA § 101(a)(5)(E); Sec. 214.2(e) of INA Regulation (8 CFR § 214.2(e))

treaty between Nepal and the U.S. Similar treaty benefits may be available to Nepalis in other developed countries but the absence of Treaty would result in the loss of those opportunities. Other such treaties that would be beneficial to NRNs and Nepalis living abroad would be treaties avoiding double taxation, treating allowing Nepalis to recover income cuts which they lose in the event they leave the host country (e.g. Nepalis pay for social security benefit from their paychecks in the U.S. but get no benefits at the end when they leave the country). Thus investment related treaties are important to ensure that Nepalis rights are protected and promoted overseas.

b. *NRN inheritance Right*

Though the current NRN Act provides some benefit to NRNs and PNOs on inheritance rights, it is nonetheless very limited in nature.<sup>22</sup> This section only provides for intestate inheritance of the property belonging to a deceased NRN to their heirs (whether NRN, or POI). However, there is no provision of NRNs' rights to inherit property in the event of death of their Nepali citizen relatives. Therefore, in the inheritance provisions of Nepali law, as reflected in the *Muluki Ain*, the NRNs should have inheritance rights on par with Nepali citizens. Though this right would by default be granted to NRNs in the event they are granted dual citizenship, this argument is nonetheless incorporated here to argue for the alternative.

c. *Equal Treatment (Anti-Discrimination Laws)*

While procuring dual citizenship right is of paramount significance to the NRNs and PNOs, anti-discrimination laws are equally important to enforce the rights derived from the dual citizenship. In other words, it is important to have laws in place that would discourage, if not penalize, any discriminatory treatments towards NRNs and PNOs with dual citizenship because of their status as a holder of foreign citizenship as well. Priority to Nepalis holding solely Nepali citizenship is often the trend but this should be discouraged with an equal treatment provision in the new Constitution for those NRNs and PNOs, who hold dual citizenship. Without such anti-discriminatory provision/s, the NRNs and PNOs will continue to feel like foreigners despite being granted Nepali citizenship.

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<sup>22</sup> See §10(3), NRN Act.

## Conclusion

Nepal has come out of a war that has ravaged the nation for more than a decade. With all the changes that have occurred in the past couple of years, it can be surmised that efforts of economic and social development in Nepal is urgently needed. Against this backdrop, the role of NRNs in this effort cannot be gainsaid. The pool of highly skilled and financially well off NRNs and PNOs is an immense asset Nepal has at its disposal to tap to further its goal of development. In the same vein, the NRNs also wish to remain connected to Nepal and contribute meaningfully in the reconstruction of the country. Therefore, it is imperative that the Government of Nepal change/adopt laws that would facilitate this process of reverse brain gain. Amending the current Nepali Citizenship Act to provide dual citizenship, albeit with restrictions, is the first step. Allowing dual citizenship to NRNs is mutually beneficial to both the country and the NRNs. This provision for dual citizenship must be incorporated in the new Constitution of Nepal to ensure protection of the rights to the NRNs. In addition, the Government must undertake measures to promote rights of NRNs and overseas Nepalis in other countries, especially by signing Treaties that affords benefits to nationals of treaty countries.

In sum, NRNs want to be part of Nepal and the new Constitution of New Nepal should embody this wish, for the benefit of both the country and the NRNs. Given the political upheaval and the frequent changes in Nepali laws, the only way to secure the rights of NRNs is by granting dual citizenship in the Constitution of the Democratic Republic of Nepal.

Thank you.