

Legal landscape: Gender-biased Sex Selection in Nepal

Policy Brief, December 2020

Interventions to address GBSS should include recognizing women's independent identity, their bodily autonomy, ending impunity for violence against girls and women, and eliminating discrimination against girls and women in all sectors.

Gender Biased Sex Selection (GBSS) generally refers to selecting the sex of one's offspring. However, GBSS takes place before birth and after birth as well. GBSS in favour of sons is a manifestation of gender inequality in Nepal. This inequality is deeply embedded in the tradition, culture, religion, social, economic and legal injustices that undervalue girls and women. The historically prevailing gender stereotype prioritizes sons and considers them to be a source of economic support and old age security for parents. Also, the prevailing religious belief allows only sons to perform last rites for parents. Consequently, having a son in a family is socially perceived as a matter of pride.

Moreover, in a patriarchal power structure, Nepalese women lack autonomy and bodily integrity, which is further crippled due to their economic and legal dependency upon their male counterparts. Nepalese women also bear the burden of a growing social trend to limit the size of family for reasons such as government's population control strategies that encourage low fertility.¹

The prevailing discrimination against girls and women, and emerging fertility control policies, together with growing concerns over their security such as fear of gender-based violence (GBV) also often leads women to choose between deciding to not give birth to a girl child or face social discrimination and stigmatization.

Status of GBSS in Nepal

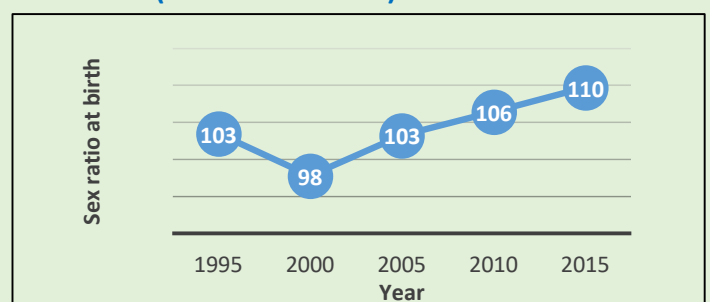
Nepal has been identified as a country with a strong preference for son ever since the World Fertility Surveys first documented the phenomenon in the 1980s.²

Married women are often pressurized to bear children until they produce a son regardless of their number of daughters. Strong son preference can disproportionately increase the ratios of male population leading to discriminatory treatment of girls in terms of resource allocation, leading to female disadvantage in mortality and morbidity. The true sex ratio at birth is biologically stable, remaining around 105-107 male births per 100 female births in the absence of social and behavioural interference.³

Nepal has been showing signs of skewed or distorted sex ratios at birth in some districts of Terai and Hilly regions. Among children below 10 years of age in Nepal, male children exceeded female children by 2.2 per cent. In urban Nepal, 5.6 per cent more male than female children were recorded as compared with 1.7 per cent more male than female children in rural Nepal.⁴

Figure 1 shows the trends of sex ratio at birth (SRB) in Nepal between 1991 and 2015. As evident from the graph, there is an increasing skewedness in SRB for the country from 98 males per every 100 female new-borns in 2000 to 110 male new-borns in 2015.

Figure 1: Sex ratio at birth 1995-2015 Nepal (NDHS 1996-2016)



Source: CREHPA and UNFPA 2018

Legal Guarantees on Gender Equality

The Constitution of Nepal (2015) guarantees the right to safe motherhood and reproductive health of women as a fundamental right. In addition, the Safe Motherhood and Reproductive Health Rights (SMRHR) Act (2018) was enacted to guarantee the fundamental right which comprehensively cover all matters pertaining safe motherhood, family planning, reproductive health related morbidity, and safe abortion.⁵

Legal Provision against Sex Selective Abortion

The Constitution of Nepal also guarantees the right to equality as one of the fundamental right and specifically prohibits discrimination in the application of the general laws including on the grounds of sex, marital status and pregnancy.⁶ The Act relating to Children (2018) also specifically prohibits any type of discrimination between son and daughters.⁷

Under the Nepalese legal system, Sex Selective Abortion (SSA) was made a punishable offence when exceptions for legal abortion were introduced by the eleventh amendment to the Nepal's Muluki Ain in 2002.

Currently, there are two specific laws that address the issue of SSA, i.e., the Safe Motherhood and Reproductive Health Rights (SMRHR) Act, 2018 and the Chapter on Crime against Protection of the Pregnancy in the Penal Code. According to the law, no one shall commit or cause to commit any act of identifying the sex of the foetus.⁵ Thus, any woman undergoing sex determination test and the physician/medical personnel conducting such a test shall be imprisoned for a term ranging from three to six months. The law also prohibits forceful sex identification by using intimidation or fear or duress or threat or enticement or allurement through coercion or compulsion to pregnant women.⁸ Accordingly, if a woman undergoing the sex determination test is doing so as a result of family or third party's pressure, the person who is exerting such pressure on the woman and the medical personnel conducting the test to reveal the sex of the foetus is also liable for imprisonment.

In addition, the law also provides punishment for sex selective abortion based on the gestational age of the pregnancy, which are as follows:

- Abortion of fetus of up-to 12 weeks of pregnancy after sex identification - Imprisonment for a term up-to two years and maximum fine of Rs. 10,000
- Abortion of fetus above 12 weeks and up-to 25 weeks of pregnancy after sex identification - Imprisonment for a term up-to four years and maximum fine of Rs. 30,000
- Abortion of fetus of above 25 weeks of pregnancy after sex identification - Imprisonment for a term up-to six years and maximum fine of Rs. 50,000

SMRHR Act (2018) further safeguards women's rights to safe, legal and free abortion.

Prevailing Legal Issues Contributing to the Continuation of Gender-biased Sex Selection

Despite legal guarantees and government's commitments to save the girl child, sex-selective abortion and discrimination against female infants are widely prevalent. Discrimination on the areas of citizenship, inheritance and matters pertaining to marriage and family relations still deny equal status to women, and links women's rights based on their marital status perpetuating secondary status of women and strong son preference in the society.

Citizenship: Nepal's law doesn't recognize the independent identity of a Nepalese woman in matters pertaining to conferring citizenship to her spouse and children. Despite the constitutional guarantee of right to equality and non-discrimination on the basis of sex and gender as fundamental rights, the Constitution by itself has discriminatory provisions against women. A Nepali mother can only confer the citizenship to their children when the father of the children remains unidentified.⁹ While a Nepalese man can confer the Nepalese citizenship to his foreign spouse and their children,¹⁰ there is no such provision for conferral of Nepalese citizenship by Nepalese woman to foreign spouse through marriage and their children.

Inheritance: The Constitution guarantees “equal right to the ancestral property without discrimination on the ground of gender”¹¹ and further ensures that “every woman shall have equal lineage right without gender-based discrimination.”¹² However, in practice, the current legal provisions fail in ensuring equal property rights of married daughters. Although the law recognizes daughters as coparceners,¹¹ and it is mandatory to take consent from all coparceners while performing the partition of the ancestral property, in practice the Land Revenue Offices do not seek consent of daughters while registering the partition document in their office.¹³

Marriage and family relations: The Constitution guarantees equal rights between spouses on matters pertaining to property and family affairs.¹⁴ However, though bigamy is prohibited under both the Penal and Civil Codes,¹⁵ these Codes ambiguously give recognition to conditional bigamous relationship.¹⁶

Furthermore, in matters pertaining to partition of the property during divorce, the Civil Code prevents women from claiming their share in the partition property upon divorce if the wife is the reason behind the divorce.¹⁷ However, if husband applies for dissolution of marriage on grounds that his wife doesn’t provide food, banish him from home, inflict physical or mental harm against him or plan to do so, or in cases the wife has had extra conjugal relations,¹⁸ he is not obliged to provide the share of property or maintain her.¹⁹ Such discrimination in law and practice against daughters and wives reiterates the inferior status of women, and thereby reinforces the superiority of men in the family and the community.

Dowry and Domestic violence: The practice of dowry is also linked with the issue of GBSS as it reinforces the notion that a girl child is a “family burden”. The instances of dowry harassment, including dowry-related death are regularly reported in the media. Even though there are laws in place that prohibits demanding or taking of dowry, there are laws that consider dowry up to a maximum of Rs. 10,000 as not an offence.²⁰ Also, the offenses related to demanding dowry, including demanding or forcing someone to pay a

dowry or ill-treatment for not paying a dowry, is recognized as economic violence within the definition of domestic violence.²¹ However, the Domestic Violence (Crime and Punishment) Act provides mediation as one of the primary avenues of recourse for victims of domestic violence.²² Due to unequal power dynamics, the victim’s perspective and rights are generally undermined during the mediation process.

Physical and sexual violence against girls and women:

The Constitution prohibits “physical, mental, sexual, psychological or other forms of violence or exploitation on grounds of religion, social, cultural tradition, practice or on any other grounds” against woman.²³ However, occurrences of violence against women in various forms including physical violence, rape and sexual abuse, acid attacks, dowry-related deaths, accusation of witchcraft, practice of menstrual segregation (*chaupadi*), bigamy and trafficking among others are disturbingly reported. Even though there are certain laws to address such crimes against women, there are remarkable gaps in the effective implementation of these laws and thereby poses significant challenges to the security of women in general.

Recommendations

Eliminate all discriminatory laws against women

Systemic steps must be taken to review and identify all discriminatory laws against women across all sectors. Immediate actions need to be taken to amend and reform discriminatory legal provisions based on the concept of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Such legal reformation process must include the revision of constitutional provision on citizenship that places Nepalese women as secondary citizens and perpetuates strong son preference.

Ensure effective implementation of affirmative laws

Steps must be taken to prevent, investigate and prosecute cases of violence against girls and women. Instead of using mediation as a remedy on cases related to violence, the state

mechanisms should focus on ending impunity and on providing remedies to the victims of such violence. Similarly, effective implementation of affirmative laws in favour of women should be immediately executed as per the code of the law.

Ensure equality of women and girls in family relations

The dual approach against women on matters pertaining to inheritance rights and family matters under the Nepalese legal system needs revision to achieve *de facto* gender equality.

Amend SMRHR Act

There are certain areas of the SMRHR Act 2018 that need revisions from the women's rights perspective. Such revision must include providing legal recognition and recourse for genuine medical cases (for example: genetic disorder affecting particular sex²⁴) that require sex identification and/or abortion. Secondly, abortion-related provisions should be removed from the Penal Code ensuring that women are not prosecuted or imprisoned for undertaking abortion. Thirdly, the legal restrictions that prohibit abortion beyond 28 weeks of pregnancy should be removed in cases where woman's life is at risk or her physical or mental health can be affected or in cases of foetal abnormalities.

References:

1. National Population Policy 2071 B.S., Ministry of Health and Population, Government of Nepal, p. 4 and 7.
2. Cleland, J., Verrall J., & Vaessan, M. (1983). Preference for the sex of children and their influences on Reproductive Behavior World Fertility Survey: Comparative Studies, No. 27. International Statistical Institute, Voorburg, Netherlands.
3. Johansson, S. & Nygren, O. (1991). The missing girls of China: A new demographic account. *The Population and Development Review*:35-51.
4. Nepal Population and Housing Census, 2012, Central Bureau of Statistics, p. 40 and 41.
5. Safe Motherhood and Reproductive Health Rights Act (2018).
6. Article 18 (1) and (2), the Constitution of Nepal (2015).
7. Section 5, the Act relating to Children (2018).
8. Article 11(5), the Constitution of Nepal (2015).
9. Article 11(6), the Constitution of Nepal (2015).
10. Article 18(5), the Constitution of Nepal (2015).
11. Article 38(1), the Constitution of Nepal (2015).
12. Section 205, Chapter 10 on Provision relating to Partition, Muluki Civil (Code) Act, 2017.
13. FWLD and UNDP, Study on Women's Property Ownership and its Impact, 2018. Source: Shadow report on sixth periodic report of Nepal on CEDAW, 2018, p. 32.
14. Article 38(6), the Constitution of Nepal (2015).
15. Section 175(1), Chapter on Offense relating to marriage, Muluki Penal (Code) Act, 2017; Section 70 (1) (c), Chapter on Provisions related to Marriage, Muluki Civil (Code) Act, 2017.
16. Section 175(3), Chapter on Offense relating to marriage, Muluki Penal (Code) Act, 2017; Section 209(3), Chapter on Provision relating to Partition, Muluki Civil (Code) Act, 2017.
17. Section 99, Chapter on Provision relating to Partition, Muluki Civil (Code) Act, 2017.
18. Section 94(b)(C)(d), Chapter on Provision relating to Partition, Muluki Civil (Code) Act, 2017.
19. Section 99 (6), Chapter on Provision relating to Partition, Muluki Civil (Code) Act, 2017.
20. Section 5(2), the Social Practice (reform) Act, 1976.
21. Section 2(f), the Domestic Violence (Crime and Punishment) Act 2066.
22. Section 4(8), the Domestic Violence (Crime and Punishment) Act 2066.
23. Article 38(3), the Constitution of Nepal (2015).
24. Lewis, C., Hill, M., Skirton, H., & Chitty, L. S. (2012). Non-invasive prenatal diagnosis for fetal sex determination: benefits and disadvantages from the service users' perspective. *European journal of human genetics: EJHG*, 20(11), 1127–1133. <https://doi.org/10.1038/ejhg.2012.50>