THE COMMITTEE ON THE RIGHTS OF THE CHILD

72nd Session (17 May – 3 June 2016)

NEPAL

Additional Information for the consideration of the Committee in relation to the right of every child to acquire a nationality under Article 7 CRC

15 April 2016

Introduction

1. The Forum for Women, Law and Development (FWLD),¹ the Institute on Statelessness and Inclusion (the Institute),² and the Global Campaign for Equal Nationality Rights (the Campaign)³ welcome the opportunity to submit additional information for the consideration of the Committee on the Rights of the Child regarding Nepal’s compliance towards every child’s right to acquire a nationality under Article 7 CRC.

2. This submission builds on the joint submission made by the 3 organisations prior to the 69th Pre-Sessional Working Group of the Committee⁴ and the Universal Periodic Review of Nepal at the 23rd session of the UPR;⁵ and relates to the List of Issues on Nepal, published by the Committee. Its purpose is to share with the Committee, important updates for the Committee’s consideration before the 72nd Session of the CRC. In this regard, it must be noted with regret that the replies of Nepal to the List of Issues have not yet been made available for comment.

3. This submission comments on relevant aspects of the List of Issues, before providing updates in relation to the new Constitution of Nepal, the recent Universal Periodic Review of Nepal and important jurisprudence of the Supreme Court of Nepal. The submission also provides the Committee with a brief overview of the Nepal’s Citizenship Act and Rules, before concluding with recommendations for the Committee to bear in mind when reviewing Nepal at the 72nd Session.

¹ The Forum for Women, Law and Development (FWLD) was established in 1995 and has been working on citizenship rights from its inception, providing legal services to victims of discriminatory citizenship laws, delivering training and conducting research and advocacy.
² The Institute on Statelessness and Inclusion is an independent non-profit organisation committed to addressing statelessness and disenfranchisement in the world through the promotion of human rights, participation and inclusion.
³ The Global Campaign for Equal Nationality Rights mobilizes international action for the removal of gender discriminatory provisions from all nationality laws and is led by its Steering Committee of the Office of the UN High Commissioner for Refugees, UN Women, Equality Now, Equal Rights Trust, the Institute on Statelessness and Inclusion, and Women’s Refugee Commission, which houses the Campaign.
⁴ This submission can be found here: http://www.institutisi.org/CRC_Nepal_2015.pdf
⁵ A/HRC/31/9. See also, the joint UPR submission by the three organisations, available here: http://www.institutisi.org/NepalUPR2015.pdf
List of Issues

4. The List of Issues poses two relevant questions to the state:

5. Please indicate whether the State party intends to make birth registration compulsory, and describe the measures being taken to address the low rate of birth registration and to eliminate the obstacles encountered with respect to the registration at birth of children of single mothers, refugee and asylum-seeking children, children born to a foreign father and abandoned children.

6. Please clarify whether the new Constitution and relevant laws will allow children with only one Nepali parent to acquire Nepali nationality. Please inform the Committee of the measures envisioned to address the situation of statelessness of Tibetan refugee children.

5. While welcoming the inclusion of these two questions, we draw the Committee’s attention to the fact that it is possible to answer these questions in a manner which shows progress – as a result of Nepal’s Constitutional reform – but does not address remaining concerns related to prevailing gender discrimination under Nepali law, and its implications on the child’s right to a nationality. A question which directly raised the issue of gender discrimination in Nepal’s nationality law and its impact on the child’s right to acquire a nationality would have addressed this gap.

6. In the List of Issues, the Committee also has invited the state to provide updates on “new bills and laws and their respective regulations”. The relevance of this request to the right of every child to acquire a nationality, in light of the new Constitution of Nepal, is self-evident.

The new Constitution of Nepal

7. The new Constitution of Nepal was adopted and entered into force in September 2015. The Constitutional provisions related to citizenship are an improvement on the gender discriminatory provisions contained within the previous Interim Constitution. However, there remains overt discrimination based on the parents’ gender with direct implications for children’s access to nationality as well as other issues of concern, including ambiguity, a lack of clarity, and internal contradictions within the Constitutional text.

8. On a positive note, the Constitution contains the following provisions, which if implemented, will enhance gender equality in relation to the transfer and acquisition of nationality, enhancing the child’s rights under Article 7 CRC:

a. Article 18 (1) of the Constitution ensures that “all citizens shall be equal before the law. No person shall be denied the equal protection of the law”. Furthermore, Article’s 18(2) and (3) provide comprehensive protection from discrimination for all citizens, both in terms of application of general laws and prohibition of discrimination by the state. The non-exhaustive list of protected characteristics in these provisions include sex, race, caste, economic condition and language or geographical region, characteristics that historically have been the basis of discrimination against the parents and guardians of children in Nepal, resulting in the violation of the child’s rights under Article 7 CRC.

b. Article 11(2)(a) of the Constitution states that “any person whose father or mother was a citizen of Nepal at the birth of such a person” shall “be deemed to be citizens of Nepal by descent”.

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6 All Constitution provisions are taken from an unofficial English translation of the Constitution published by the Nepal Law Society, International Institute for Democracy and Electoral Assistance and UNDP, which is available here: http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/100061/119815/F-1676948026/NPL100061%20Eng.pdf
c. Article 11 (4) of the Constitution states that “every child found in Nepal whereabouts of whose paternity and maternity is not known shall, until the mother or father is traced, be deemed a citizen of Nepal by descent”.

d. Article 51(b)(3) of the Constitution obligates the state to pursue policies related to “implementing international treaties and agreements to which Nepal is a state party”.

9. However, as with the Interim Constitution, the new Constitution also contains ambiguous and internally self-contradictory provisions. Accordingly:

a. Article 11 (5) of the Constitution states that “a person born to a Nepali citizen mother and having his/her domicile in Nepal but whose father is not traced, shall be conferred the Nepali citizenship by descent. Provided that in case his/her father is found to be a foreigner, the citizenship of such a person shall be converted to naturalized citizenship according to the Federal law.”

b. According to Article 11 (7) of the Constitution: “notwithstanding anything contained elsewhere in this Article, in case of a person born to Nepali woman citizen married to a foreign citizen, he/she may acquire naturalized citizenship of Nepal as provided for by a Federal law if he/she is having the permanent domicile in Nepal and he/she has not acquired citizenship of the foreign country.”

10. Consequently, the Constitution, while on the one hand entitling Nepali citizenship to all persons whose father OR mother is a Nepali citizen and to foundlings, on the other hand restricts children of a Nepali citizen mother and foreign father to the lower class of ‘naturalised citizenship’ as opposed to citizenship by descent. Furthermore, while the new Constitution imposes no conditions on Nepali fathers, it states that Nepali mothers shall independently apply for citizenship on behalf of their child only if the father is ‘unknown’, a term with significant stigma attached. Even in such cases, if the father is later established to be a foreigner, the child loses citizenship by decent and is declared to be a naturalised citizen.

11. The added stipulation of “permanent domicile” of the mother also raises concern regarding access to even naturalised citizenship, for the children of Nepali mothers working in the migrant labour force, whose fathers are foreign.

12. There are various disadvantages to naturalised citizenship over citizenship by descent. For example, the Constitution restricts certain high public offices to those with citizenship by descent. Furthermore, historically, naturalisation has been a highly discretionary and difficult process. According to research carried out by FWLD and cited in our previous joint UPR submission, “the discretion wielded by state authorities in relation to naturalization is extremely wide, and the overwhelming majority of naturalization applications do not result in the conferral of nationality. Research conducted by FWLD reveals that in the first six years of the implementation of these provisions, not a single naturalization application was successful”. Naturalisation remains at the discretion of administrative authorities even after the new Constitution has come into place. There is no evidence that the process has become more accessible and fair over the last year.

13. These inconsistencies demonstrate that the Constitution maintains gender discrimination in relation to citizenship rights, despite guaranteeing gender equality in the law.

14. While disappointing, Article 304 of the Constitution specifies that “laws inconsistent with this Constitution shall, to the extent of inconsistency, ipso facto, cease to operate, one year after first session of federal legislature, in accordance with this constitution”. Consequently, the Constitution provides a grace period of 2 years within which existing laws are to be revised and brought into compliance with it. As stated

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7 According to Article 289 (1) of the Constitution, “A person shall have acquired a citizenship by descent to be elected, nominated and appointed as the President, Vice-President, Prime Minister, Chief Justice, Speaker of the parliament, Chairperson of National Assembly, Head of the province, chief minister, speaker of Provincial Assembly and chief of security bodies.”

above, despite its inadequacies, the new Constitution is an improvement on the interim Constitution and is significantly more in line with Nepal’s international obligations than the Citizenship Act and Citizenship Rules of Nepal. Consequently, there is a critical window of opportunity to promote reform of Nepal’s Citizenship Act and Rules, to bring them into compliance with Nepal’s Constitution and its international obligations – in particular, CRC Article 7.

Universal Periodic Review of Nepal at the 23rd Session of the UPR

15. Nepal was subject to Universal Periodic Review for the second time at the 23rd Session of the UPR in November 2015. The following recommendations that Nepal received are relevant to this submission:

<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Recommending state</th>
<th>Status</th>
<th>Reference</th>
</tr>
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<tbody>
<tr>
<td>Amend the citizenship laws to allow citizenship through either parent</td>
<td>Hungary</td>
<td>Accepted</td>
<td>A/HRC/31/9 122.67</td>
</tr>
<tr>
<td>Implement measures to ensure that the rights to acquire, transfer and retain citizenship are extended equally to all women and their children</td>
<td>New Zealand</td>
<td>Accepted</td>
<td>A/HRC/31/9 122.70</td>
</tr>
<tr>
<td>Ratify the conventions on refugees and stateless persons</td>
<td>Portugal</td>
<td>Noted</td>
<td>A/HRC/31/9 124.5</td>
</tr>
<tr>
<td>Ensure that provisions in the revised Constitution guarantee the equal rights of women as well as their right to acquire, retain and transfer citizenship</td>
<td>Sierra Leone</td>
<td>Accepted</td>
<td>A/HRC/31/9 122.68</td>
</tr>
<tr>
<td>Amend legislation on nationality in order to be able to grant Nepali nationality through either parent</td>
<td>Spain</td>
<td>Accepted</td>
<td>A/HRC/31/9 122.69</td>
</tr>
<tr>
<td>Consider amending the Constitution to allow women to convey their citizenship to their children and foreign spouses on an equal basis with men</td>
<td>United States of America</td>
<td>Noted</td>
<td>A/HRC/31/9 123.23</td>
</tr>
</tbody>
</table>

16. The acceptance by Nepal of recommendations by Hungary, New Zealand, Sierra Leone and Spain, is assumed to be based on the government’s position that the new Constitution had already brought the necessary changes in place. However, as demonstrated above, this is not accurate. The Constitution does not guarantee the “equal rights of women”, per the recommendation of Sierra Leone, but rather denies women the right to confer nationality on an equal basis with men. Further, it is only through the amendment of its Citizenship Act and Rules, in accordance with Nepal’s Constitution and international obligations, that Nepal will have implemented the recommendations of Hungary, New Zealand and Spain.

Update on jurisprudence of the Nepal Supreme Court

17. Two recent landmark decisions of the Supreme Court of Nepal, which further strengthen citizenship rights in the country for children who are at risk of statelessness, were published on 4 April 2016. Below is a brief account of each case:

18. The case of Bipana Basnet et al. vs. District Administration Office, Kathmandu et al.\(^9\) related to a child who was living with his mother, under her legal custody, after she had divorced his father. The applicant brought this case before the Supreme Court on behalf of her son Rijan, because while the Chief District Officer’s Office in Kathmandu (CDO) accepted his citizenship application, it granted him a citizenship certificate in his father’s surname, despite Rijan requesting this in his mother’s surname. The actions of

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the CDO were discriminatory and in violation of Nepal’s obligations under CRC Article 8. The applicant filed a writ before the Supreme Court, which ruled in his favour, issuing a mandamus order to the CDO to provide the applicant’s citizenship certificate in his mother’s family name. This is first time in Nepal that the mother’s family name will be used in a citizenship certificate despite father being known.

19. In the case of Jayanti Sikhari Khanak and et al. vs. District Administration Office, Kathmandu and et al., the applicant came from the district of Sunsari in the Terai belt and her husband came from Kathmandu. The Terai belt – due to its proximity to India and for reasons of caste and ethnicity – is the region in Nepal where the impact of gender discriminatory nationality law is most acute. The applicant’s husband had abandoned both her and his son, and refused to support his son’s citizenship application when his son turned 16 years old (the age at which Nepali children can apply for a citizenship certificate). Despite the lack of cooperation by his father, the son found his father’s citizenship number and filed an application for citizenship with a duplicate of his mother’s citizenship certificate and his father’s citizenship number as supporting documentation. The Kathmandu CDO office informed the applicant’s son that it could not find a record of his father’s citizenship with the number alone. The applicant filed a writ before the Supreme Court, which issued a mandamus order to the CDO to provide the applicant’s son with a citizenship certificate. The Court also issued a directive order for the systematic and scientific recording of citizenship certificates.

20. While welcoming both decisions, the co-submitting organisations are concerned about the implementation of these judgments. There is a long record of non-implementation or partial implementation (by limiting the judgment only to the case at hand and not following the principle established it in subsequent administrative decisions) of Supreme Court judgments by Nepali executive and administrative authorities, which has a detrimental impact on the child’s right to acquire a nationality.11

Concerns relating to the Citizenship Act and Rules and their implementation

21. As stated above, the new Constitution requires that all laws and rules are brought into compliance within a 2 year period. Consequently, we provide the Committee with a brief overview of our concerns related to the Citizenship Act and Rules of Nepal and the discriminatory manner in which the law is implemented by authorities, which further contribute to a reality which is discriminatory of women, with significant negative impacts on children’s ability to access nationality. Following is an exposition of the key issues in this regard:12

11 Previous landmark judgments of the Supreme Court include:
   - Forum for Protection of Public Interests v. HMG Nepal (2005), in which the discriminatory birth registration and denial of citizenship for the children of Badi women in the Birth, Death and Other Personal Events (Registration) Act, 1977, was successfully challenged.
   - Nakkile Maharjan v. Government of Nepal, decision 2064/1/4 Writ no. 0089 of 2063 BS, in which it was held that a married woman can obtain citizenship in her mother’s name (2011).
   - Sabina Damai and FWLD v. Government of Nepal, Writ no 06/0703 of 27 January 2011, decided on February 27, 2011, in which the Court issued an order of Mandamus to the District Administration Office requiring them to grant Nepali citizenship by descent to the plaintiff as her mother holds a Nepali citizenship.
   - Shanti Nagarkoti and Bhola Nagarkoti v Government of Nepal, Writ No. 0880 , March 24, 2014, in which the Court issued an order of Mandamus to the District Administration Office requiring them to grant Nepali citizenship by descent to the plaintiff as her mother holds a Nepali citizenship.
   - Lily Thapa v. Government of Nepal, Writ no. 34 of 2061 B.S, decided on 2062-8-30 B.S. (December 15, 2005), N.K.P. 2062, vol. 9, p. 1054, decision no.7588, in which the condition requiring a woman below the age of 35 to obtain the consent of her father, husband or guardian in order to obtain a passport was repealed by the Court.
22. **Women restricted in their right to convey citizenship to their children:** While Section 3 of the Citizenship Act states that a person can acquire citizenship by descent if their mother or father is a Nepali citizen, other discriminatory legal provisions and practices curtail the right of women to pass on their citizenship to their children. For example, according to the Citizenship Act and Rules of Nepal, the children of Nepali women and foreign men can only access citizenship through naturalization, and not by right, through descent. There is no similar restriction on men. One of the consequences of the law is that state authorities in practice refuse to accept citizenship applications submitted only by mothers, as they require proof of the father’s identity to establish that he is not a foreigner. Though the Supreme Court has set precedents recognising equal rights of women, including through establishing the rights of married women and single women to transfer citizenship to children, women continue to face discrimination both in law and practice.

23. Under the Citizenship Act, while there are no barriers to fathers independently securing citizenship for their children, it is extremely difficult for mothers to independently do so. This has led to cases in which children of single mothers are left stateless.

24. **Discriminatory impact on children of Nepalese mothers and foreign fathers:** Section 5(2) of the Citizenship Act and Section 7 of the Citizenship Rules, deny Nepali women the right to confer their citizenship to their children by descent. Instead, such children have only the option to seek naturalisation. However, as explained above, the discretion wielded by state authorities in relation to naturalisation is extremely wide.

25. **Gender discrimination in conveying citizenship to foreign husbands:** While Nepalese men can convey their nationality to foreign spouses and their children, Nepalese women are barred from doing so. The only path to Nepalese citizenship for foreign male spouses is through the residence-based naturalisation process. As fathers must be Nepali citizens in order to confer nationality by decent, women’s inability to equally confer nationality to spouses also impacts children’s ability to access citizenship by descent.

26. **Discriminatory attitudes of public servants:** In addition to the above examples of discriminatory law and policy, the attitudes of public servants and first instance decision makers in Nepal remain largely discriminatory towards women and patriarchal. As a result, despite the ongoing advocacy of civil society organisations and the positive jurisprudence of the Nepal Supreme Court, unfair and impractical administrative burdens and barriers continue to be imposed against women attempting to confer their citizenship to their children.

### Conclusions and recommendations

27. Based on the above updates and overview, as well as our collective and continuous research, advocacy and engagement on the issue of gender discriminatory citizenship laws in Nepal since 1995 (in the earliest instance), the following recommendations are made for the consideration of the Committee.

28. **Further information/clarification that may be sought from Nepal during the 72nd Session:** In addition to the questions currently in the List of Issues, we would like to take this opportunity to request the Committee to seek further information and clarification from Nepal on the following:

   a. Given that the new Constitution requires the reform of all laws and rules which are incompatible with it, and in the context of Nepal’s international obligations and its commitments under the Universal Periodic Review, what steps are Nepal taking to bring its nationality law into compliance with its obligations under Articles 7, 2 and 3 CRC? In particular, what concrete steps is Nepal taking to end gender discrimination in its nationality

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13 See above, note 9.
law and to ensure that all children born in Nepal who would otherwise be stateless, acquire Nepali nationality without undue delay?

b. What steps are Nepal taking to ensure full implementation of Supreme Court judgments relating to the child’s right to acquire a nationality and gender discrimination in nationality law, and for the implementation of existing laws and rules on nationality without discrimination and to the fullest extent possible, in compliance with the principle of the best interests of the child?

c. In light of the new Constitution, what steps are Nepal taking to make its naturalisation procedure more efficient, accessible and less subject to administrative discretion, in line with principles of equality and non-discrimination and the best interests of the child?

d. Is there any available data and statistics on stateless children or children born to Nepali mothers and foreign fathers that Nepal can share with the Committee? If not, why is this the case, and what steps can be taken to rectify this situation?

29. Suggestions of Recommendations that the Committee may consider making to Nepal: Based on this submission of additional information as well as our first joint submission on Nepal to the Committee, and drawing on relevant previous recommendations that the Committee has made to other countries which face similar challenges, we would like to propose the following recommendations to Nepal:

a. Urge the state party to review the provisions of its Citizenship Act and Rules, to bring them into compliance with the Constitution, the state party’s international obligations (including Articles 2, 3, 7 and 8 of the CRC) and its commitments to the Human Rights Council under the Universal Periodic Review. In particular, eradicate all gender discrimination in the law and its implementation, to ensure that women have equal rights with men to confer and transfer nationality, and to ensure that all children born in Nepal, including those with foreign or unknown fathers and those born out of wedlock have equal entitlement to nationality, on the same conditions as children born to Nepali fathers or within wedlock. Also ensure more accessible and fair naturalisation procedures for children born on the territory who would otherwise be stateless.

b. Recommend that the State party take measures to ensure that all children born in the State party have the legal right to be registered at birth with a name without discrimination and regardless of their parents’ citizenship status and/or country of origin, and have equal access to health care, protection, education and other social services.

30. Suggestions of Measures of Implementation that the Committee may consider proposing to Nepal: Based on this submission of additional information as well as our first joint submission on Nepal to the Committee, and drawing on relevant previous measures of implementation that the Committee has recommended to other countries which face similar challenges, we would like to propose the following measures of implementation in respect of Nepal:

a. Ensure that all persons have access to citizenship certificates and ensure that persons are not denied certificates on discriminatory grounds.


c. Collect and present data and statistics on stateless children and on birth registration.

d. Grant nationality expeditiously to those who have been wrongfully denied nationality due to the discriminatory implementation of the law.

e. Reform existing law, bringing it in line with the Constitution and the state party’s international obligations, to address gaps in national legislation that result in childhood statelessness contrary to Article 7 CRC.

f. Update civil records and registries in accordance with the Directive Orders of the Supreme Court.

g. Seek technical assistance for the implementation of birth registration and of nationality laws, from UN agencies including UNHCR and UNICEF.
h. Conduct campaigns to encourage universal birth registration and applications for citizenship certificates to end statelessness, including for children of refugees, foreigners, stateless persons and single mothers.

i. Monitor vulnerable groups exposed to discrimination in accessing nationality for their children, in particular, single mothers, refugees, foreigners, stateless persons and those from low castes and those living in the Terai belt.

j. Ensure widespread and non-discriminatory implementation of national law and of the decisions of the Supreme Court.

k. Allocate resources to ensure the right of all children born on the territory to acquire a nationality is respected, promoted and fulfilled.

l. Cooperate with civil society, in particular, the Nepal Civil Society Network of Citizenship Rights and networks of persons without citizenship to ensure full effectiveness of state policy and practice.

m. Enhance international cooperation in efforts to ensure every child’s right to a nationality, including through supporting and cooperating with the UNHCR Campaign to End Statelessness and the Global Campaign for Equal Nationality Rights, implementing the state party’s commitments under the Universal Periodic Review and including targets in its National Action Plan under the Sustainable Development Goals related to the achievement of universal birth registration and legal identity for all.