

Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on discrimination against women and girls

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Excellency,

We have the honour to address you in our capacities as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on violence against women, its causes and consequences and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 41/18, 41/17 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **amendments to the Citizenship Act currently under debate in Parliament. While some of these changes appear as very positive and needed measures, we wish to express our concern regarding some aspects that seem to be discriminatory against women, trans and gender-diverse persons, not in compliance with international human rights norms and standards as outlined below.**

The Nepal Citizenship Act of 2006 is the legal instrument that currently regulates access to citizenship in the country. The issue is also addressed in Nepal's Constitution, promulgated in 2015. Civil society organisations and international human rights mechanisms have consistently highlighted that both the Citizenship Act and the Constitution contain provisions that discriminate against women with regard to nationality and the ability to transmit citizenship through marriage and to their children.

On 7 August 2018, a bill to amend the Citizenship Act was registered in the House of Representatives. On 21 June 2020, its Parliamentary Committee on State Affairs and Good Governance passed the bill with amendments and presented it to the House of Representatives for deliberation. The bill is expected to be discussed in the House in the upcoming weeks.

While we acknowledge that the current bill, if approved, could have significant impact in increasing access to citizenship in Nepal and reducing the number of people who are currently stateless in the country, we express our concern about the persistence of discriminatory provisions affecting women and their children, as well as trans and gender-diverse persons. Such provisions may continue to severely impact the enjoyment of their human rights, including a broad range of their civil, political, economic, social and cultural rights.

Overview of international human rights law standards applicable

A number of provisions contained in the draft law relate to Nepal's obligation to eliminate discrimination against women, in particular to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations,

customs and practices which constitute discrimination against women, as set out by article 2(f) of the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW Convention), ratified by Nepal on 22 April 1991. They also concern the State's obligation to grant women equal rights with men to acquire, change or retain their nationality, and with respect to nationality of their children (article 9, 1 and 2 of the CEDAW Convention). Nepal is also obligated to take measures to eliminate gender stereotypes rooted in social and cultural patterns, which underlie discriminatory provisions (article 5 of the CEDAW Convention). The provisions also impact children's right to acquire a nationality, and to preserve his or her identity, including nationality, as protected by articles 7 and 8 of the Convention on the Rights of the Child (CRC), ratified by your Excellency's Government on 14 September 1990, and article 24 of the International Covenant on Civil and Political Rights (ICCPR; ratified by Nepal on 14 May 1991). The bill also relates to the right to recognition as a person before the law, as included in Article 6 of the Universal Declaration of Human Rights and Article 16 of the ICCPR, Article 15 of the CEDAW Convention and Article 8 of the CRC. Finally, the bill addresses the obligation to eliminate racial discrimination, as established by article 2(d) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), acceded to by Nepal on 30 January 1971.

The comments made in the present letter are not intended to provide an exhaustive analysis of the draft bill, but rather to address the provisions that we consider particularly relevant in relation to the right to nationality and non-discrimination, in accordance with Nepal's obligations under the ICCPR, CEDAW, CRC and CERD.

Positive aspects and concerns relating to the compatibility of the bill to amend the Citizenship Act with international human rights law

1. Access to citizenship by orphans

In the case of orphans or persons whose parents have not been identified, the bill introduces clearer procedures for children raised in institutions, by a legal custodian or in some other context to access citizenship by descent (in the amendment proposed to Section 8).¹ As the legislation in force provides now, an investigation is necessary, and the person would have to be identified by at least three Nepali citizens residing in the same ward (Section 8, Sub-section 4). Instead, the bill proposes that, in cases where the father or mother is not identified, the child could be identified by a foster care institution or legal guardian and based on the recommendation from local level authorities. We welcome these provisions as they increase compliance with children's right to acquire a nationality, and to preserve their identity, including nationality, as protected by articles 7 and 8 of the CRC.

2. Protections regarding caste discrimination

¹ According to the Citizenship Act, there are three types of citizenship: citizenship by descent, citizenship by birth and naturalised citizenship. Only citizens by descent may hold certain public offices, as established by Article 289 of Nepal's Constitution. The current bill to amend the Citizenship Act would eliminate the category of citizenship by birth as it describes only citizenship "by descent or naturalised".

The bill introduces the possibility for an individual to request a change in the citizenship certificate of their surname to another from their community (Section 8B, Sub-section 6), whenever the surname indicated their caste, which can help protect against stigma and discrimination associated with lower castes. We would welcome this development, which would promote compliance with Nepal's obligations under CERD to end racial discrimination. According to CERD General Recommendation No. 29 on the term "descent", "discrimination based on 'descent' includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights". In that sense, the Committee has condemned descent-based discrimination on the basis of caste and analogous systems of inherited status as a violation of the Convention, and urged States to adopt appropriate measures to combat it.

3. Provisions regarding women's ability to access and transmit citizenship

The bill would introduce a positive change regarding the requirements of proof for obtaining citizenship for children of non-identified Nepali fathers. The new provision would require only the self-declaration of the mother or by the person acquiring citizenship (in case the mother is deceased or is mentally impaired) in that regard (Section 3, Sub-section 7). This would simplify access to citizenship for the children of single mothers. In addition, the bill would allow for divorced women to request a new citizenship certificate removing the details of her former husband and including her father's or mother's details instead (Section 17, Sub-section 3).

It is worth noting that the current legislation discriminates against women eligible for Nepali citizenship by birth who were married to foreigners, barring them from accessing citizenship by descent (Section 8, Sub-section 1, clause a). The bill would eliminate those discriminatory provisions by applying the same rule to both men and women married to foreigners, requiring proof that they have not acquired the nationality of their spouse's country or, if they have, to produce proof of having renounced to it since (Section 6, Sub-section 1, clause a1).

However, we are worried that the bill would continue to discriminate systematically against women, regarding their ability to transmit citizenship through marriage and to their children. In the case of single mothers conferring citizenship to their children, Nepali women who reside in Nepal could confer citizenship by descent if the child's father is Nepali and the mother declares so; if the father is foreign, the child could only have naturalised citizenship (Section 3, Sub-section 6 of the bill). On the other hand, a Nepali father would always confer citizenship by descent to his children regardless of the mother's nationality. These discriminatory provisions, present in the current legislation, would remain in the bill (Section 3, Sub-sections 1, 5, 6, 7 and 8). In 2014, the Working Group on Discrimination against Women and Girls issued a communication to the Nepali Government raising its concern on the nationality law which discriminates against women in that a child born to a Nepalese father acquires citizenship under all circumstances whereas children born in Nepal to Nepali mothers and foreign citizen fathers have to apply for citizenship through a naturalization process.

Likewise, there remain discriminatory provisions regarding the ability of Nepali men and women to confer citizenship to a foreign spouse. Whereas a foreign woman married to a Nepali man can obtain citizenship after seven years of residence in the country (Section 5, Sub-section 1), there are no provisions that would set similar conditions to a foreign man married to a Nepali woman. Therefore, in such cases, the general provisions for all foreigners regardless of marital status would apply, i.e., being a resident for 15 years in order to access citizenship (Section 5, Sub-section 4, clause d of the Citizenship Act).

The elimination of discrimination regarding access to citizenship by descent to individuals married to foreigners is undermined by the fact that the bill would require that they produce proof of not having acquired the spouses' nationality or having renounced to it (Section 6, Sub-section 1, clause a1). Producing such proof may be difficult and time-consuming and stands in contrast to other provisions in the bill that limit such burden by accepting self-declarations or proof of having initiated the corresponding procedures (as for instance on Section 5, Sub-section 1A).

The progressive new Constitution adopted in Nepal in 2015 explicitly prohibits discrimination on the basis of origin, sex and several other grounds, in its Article 18. However, the same Constitution in Article 10 establishes different rules for Nepalis and foreigners to access citizenship based on sex, therefore placing discriminatory provisions against women at the heart of the highest law of the country and in contradiction with the principle of non-discrimination enshrined in it.

The CEDAW Convention requires putting an end to practices which discriminate against women, including by taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women, as set out by its Article 2 (f). In 2018, in its Concluding Observations (CEDAW/C/NPL/CO/6), the Committee on the Elimination of all Forms of Discrimination against Women welcomed the fact the new Constitution prohibited discrimination on the basis of sex. However, it expressed its concern that discriminatory laws and provisions of the Constitution had not been repealed, including Article 11(3, 5, 7), which regulates access to citizenship. The Committee noted that women, in particular single mothers, were being denied citizenship certificates and registration of their children, preventing those women and their children from opening bank accounts, obtaining driver's licenses, voting, managing their property, gaining access to education, acquiring travel documents, applying for employment in the public sector and benefitting from social services. The Committee recommended that all discriminatory provisions in the Constitution be amended or repealed in line with Nepal's international human rights obligations, and that the bill to amend the Citizenship Act also be brought into line with the Convention.

The Committee on the Rights of the Child had expressed similar concerns in 2016 (CRC/NPL/CO/3-5) about the discriminatory provisions of Nepali legislation on citizenship. The Committee expressed its concern regarding the exclusion of children of unwed mothers, children of a Nepalese mother and a foreign or unknown father, children of refugees or of parents who are unable to prove citizenship, and children of same-sex parents. The Committee noted that the criteria for transmission of

citizenship from Nepalese mothers to their children remained discriminatory, as they require the mother to be a resident of Nepal, exclude children born to women who are not permanent residents, and make citizenship subject to revocation for children whose previously unidentified father is later proven to be a foreigner. To ensure full compliance of Nepal with the CRC, the Committee recommended making citizenship by descent accessible through proof of citizenship, regardless of their parent's sex, among other measures.

The Special Rapporteur on violence against women, its causes and consequences, had also expressed in a country report (A/HRC/41/42/Add.2) her concern that the Constitution and the Citizenship Act limited the autonomy of women with regard to nationality and their ability to transmit citizenship through marriage and to their children. She urged the Government to continue to reform legislation and ensure that the proposed amendments to the Citizenship Act of 2006 eliminated any discriminatory provisions against women, bringing it into line with Article 9 (1) of the CEDAW Convention.

The Working Group on discrimination against women and girls, in its thematic report on reasserting equality, countering rollbacks dated of 2018 (A/HRC/38/46) expressed its concerns on the fact that discrimination against women and girls and the backlash against their rights all too often start in the family where, for example, women and girls are undervalued, may be limited to certain roles, experience harmful practices and patriarchal oppression, and suffer other human rights abuses, including domestic violence and sexual abuse. As indicated by the Working Group, although discriminatory laws governing family life have been repealed in most countries, such laws are still in force in a few others. In some countries, women are deprived of their fundamental rights due to, inter alia, a lower minimum age of marriage for girls, guardianship systems, forced marriage, polygamous marriage, discrimination in nationality rights, divorce rights and unequal rights to custody, inheritance and access to property and land.

Similar concerns were raised during the Universal Periodic Review of Nepal by the Human Rights Council, in 2016 (A/HRC/DEC/31/106). Member States called on your Excellency's Government to eliminate discrimination against women in the country's citizenship laws and recommended Nepal to: "Amend the citizenship laws to allow citizenship laws to allow citizenship through either parent"; "Ensure that provisions in the revised Constitution guarantee the equal rights of women as well as their right to acquire, retain and transfer citizenship"; and "Implement measures to ensure that the rights to acquire, transfer and retain citizenship are extended equally to all women and their children". Nepal confirmed that these recommendations enjoyed its Government's support, while taking note of the recommendation to "Consider amending the Constitution to allow women to convey their citizenship to their children and foreign spouses on an equal basis with men".

4. Gender identity in citizenship documents

The bill takes a positive step by including the category of "other" as a possibility for gender identification in citizenship documents, providing an avenue for legal recognition for transgender people and gender-diverse people (Section 8B, Sub-section 2). However, only those who qualify for citizenship by descent would be

offered that option. This would not be the case for those who can only apply for naturalised citizenship. In addition, the selection of the “other” category would be conditioned to the presentation of a medical certificate that attested to it, without clarity as to the criteria for producing such a certificate (Section 8B, Sub-section 3).

In that regard, we wish to express our concern that the bill would not thoroughly ensure trans and gender-diverse people the right to gender recognition and to self-determination, which contravene international human rights standards. International human rights law acknowledges that everyone has the right to recognition as a person before the law, including persons of diverse gender identities. Such human rights standards are included in Article 6 of the Universal Declaration of Human Rights, Article 16 of the ICCPR, Article 15 of the CEDAW Convention and Article 8 of the CRC.

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity expressed concerns that trans and gender-diverse persons whose identity is not adequately recognized suffer denial of the right to health; discrimination, exclusion and bullying in education contexts; discrimination in employment, housing and access to social security; violations of the rights of the child; and arbitrary restrictions on the rights to freedom of expression, peaceful assembly and association, the right to freedom of movement and residence, and the right to leave any country including one’s own (A/73/152, para. 23). Also, he expressed concern that some States impose lengthy, costly and abusive requirements as a precondition of recognition of gender identity (*Ibid.*, paras 28-32). In light of these conclusions, he urged States to enact gender recognition systems concerning the rights of trans persons to change their name and gender markers on identification documents based on the procedures that ensure due respect for free and informed choice and bodily autonomy - in particular, based on self-determination by the applicant (*Ibid.*, para. 81 (d) (i)).

The United Nations High Commissioner for Human Rights also showed his concern regarding State regulations that allow changes in gender under abusive requirements (A/HRC/29/23, para. 70). Therefore, he recommended that States issue legal identity documents, upon request, that reflect preferred gender and eliminate abusive preconditions (*Ibid.*, para. 79 (i)).

Further, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) reaffirm that everyone has the right to recognition, and no one shall be forced to undergo medical procedures as a requirement for legal recognition of their gender identity (Principle 3). In light of this, States shall take all necessary legislative, administrative and other measures to fully respect and legally recognize each person’s self-defined gender identity, and ensure that such procedures are efficient, fair and non-discriminatory (Principle 3 (B) and (D)).

In that sense, the requirement of a medical certificate as a basis for selecting the category “other” would be contrary to international human rights standards, as well as the discriminatory provisions that do not extend this possibility to those only eligible for citizenship by birth and naturalised citizenship.

Procedural provisions

We wish to express concern that the draft legislation leaves untouched the issue of access to remedies in case of denial of issuance of citizenship. Even though there are provisions that allow for requesting a review of a rejected application, there is no clarity as to the Government institution responsible for it (Section 18 of the Citizenship Act). We wish to recall that the obligation to provide remedies for victims is set out in a number of international instruments, including article 2 of ICCPR and article 39 of the CRC.

Final observations

We would also like to remind your Excellency's Government that the right to a nationality is a fundamental right recognized in the Universal Declaration of Human Rights and a number of international legal instruments, such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities, all of which have been ratified by your Excellency's Government. The lack of legal identity, which affects approximately 6.3 million people in Nepal, severely impacts access to rights and services, and is particularly prejudicial in the context of the COVID-19 pandemic, as it may restrict individual's ability to access relief aid and to engage in efforts to build back better. In that sense, addressing the legal gaps that currently place millions of individuals in a situation of statelessness becomes an even more urgent task.

We therefore call upon your Excellency's Government to address the bill's shortcomings during the upcoming discussion of the bill in the House of Representatives, by promoting further amendments to it in order to eliminate discriminatory provisions and to reduce unnecessary burdens of proof, in accordance with relevant international human rights standards and the recommendations issued to Nepal by the Special Rapporteur on violence against women, the CEDAW Committee, the Committee on the Rights of the Child and by the members of the Human Rights Council during its last Universal Periodic Review. Likewise, we urge your Excellency's Government to initiate the process to amend the Constitution and other pieces of legislation that affect access to citizenship, to ensure that all discriminatory provisions are eliminated before passing into law. Finally, we reiterate the call by the CEDAW Committee for your Excellency's Government to accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.

2. Please provide the full details of how the bill complies with your obligations under the international legal framework of human rights law and standards including, among other things, ICCPR, CEDAW Convention, CRC and CERD.
3. Please provide information on any measures that your Excellency's Government has taken or intends to take in order to implement the recommendations by UN human rights mechanisms, referred to above, and to bring its legislation into compliance with international human rights law.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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