

## Understanding Statelessness

*Understanding Statelessness* offers a comprehensive, in-depth examination of statelessness. The volume presents the theoretical, legal and political concept of statelessness through the work of leading critical thinkers in this area. They offer a critique of the existing framework through detailed and theoretically-based scrutiny of challenging contexts of statelessness in the real world and suggest ways forward.

The volume is divided into three parts. The first, 'Defining Statelessness', features chapters exploring conceptual issues in the definition of statelessness. The second, 'Living Statelessness', uses case studies of statelessness contexts from States across global regions to explore the diversity of contemporary lived realities of statelessness and to interrogate standard theoretical presentations. 'Theorising Statelessness', the final part, approaches the theorisation of statelessness from a variety of theoretical perspectives, building upon the earlier sections. All the chapters come together to suggest a rethinking of how we approach statelessness. They raise questions and seek answers with a view to contributing to the development of a theoretical approach which can support more just policy development.

Throughout the volume, readers are encouraged to connect theoretical concepts, real-world accounts and challenging analyses. The result is a rich and cohesive volume which acts as both a state-of-the-art statement on statelessness research and a call to action for future work in the field. It will be of great interest to graduates and scholars of political theory, human rights, law and international development, as well as those looking for new approaches to thinking about statelessness.

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# **Understanding Statelessness**

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*Photo 1* Abul Kalam by the Naaf river in Bangladesh.

Source: © Saiful Huq Omi/Counter Foto.

My home is not far from here, you just cross the Naaf river and my home is on the riverside. It is just two miles but for me it feels more like two million miles which I will never be able to cross.

My Rohingya guide, Abul Kalam points towards the other side of the river as we return home after a long day of work.



Photo 4 Three Stateless Dalit in Nepal.

Source: © Greg Constantine.

For decades some 4 million people in the Terai region of southern Nepal could not acquire Nepali citizenship certificates, as the government claimed the people were from India, not Nepal. While citizenship was extended to millions of people in 2007, it is estimated that several hundred thousand in the region are still excluded from Nepali citizenship, primarily those from lower castes, specifically the Dalit, or untouchables. Walking several hours from their remote village, three Dalit carry bundles of firewood to sell in the dusty markets of Lahan.

## 9 Citizenship, gender and statelessness in Nepal

Before and after the 2015 Constitution

*Subin Mulmi and Sara Shneiderman*

### Introduction<sup>1</sup>

Nepal's limited definition of citizenship has the potential to exacerbate existing problems of statelessness, and has been one of the most hotly debated issues in recent years. Nepal has experienced ongoing sociopolitical transformation since the 1950s. Most recently, a decade-long civil conflict between Maoist and state forces ended in 2006 with a Comprehensive Peace Agreement. This began a period of what is often called 'post-conflict' state restructuring. After two Constituent Assembly elections in 2008 and 2013, the second Constituent Assembly promulgated a new constitution in September 2015 (for more information on Nepal's recent history see Adhikari and Gellner 2016; Einsiedel *et al.* 2012; Hutt 2004; Shneiderman *et al.* 2016; Thapa with Sijapati 2003; Whelpton 2005). This contentious document sparked months of protest and violence (on the part of both state actors and protestors), in which over 50 people lost their lives. Central to the constitutional debate were the constraints placed on the conferral of citizenship by women and by naturalised citizens of all genders to their offspring. These constitutional ambiguities, along with difficulties often experienced in obtaining citizenship certificates even in cases where the legal framework should grant such a certificate, have the potential to render significant numbers of people stateless. This chapter explores the history and current context surrounding these issues of citizenship, gender and statelessness in Nepal.

The country's formal legal framework for designating citizenship was introduced through the enactment of the Nepal Citizenship Act in 1952. Pursuant to this Act, distribution of citizenship certificates began to those aged 16 and above. Absence of the citizenship certificate results in the person being unable to exercise basic rights inherent to the citizens of Nepal. Currently, the document serves as the foundation of legal identity and often as the prerequisite for obtaining other identity documents such as passports, driving licences, voter ID cards, birth registration certificates, children's minor ID cards, land ownership certificates and Permanent Account Number certificates. People without such certification cannot open bank accounts, pursue higher education, register to vote (*Saroj Nath Pyakurel v. Office of the Prime Minister and Council of Ministers et al.* 2011), obtain social security allowances, file for a change of address or even

get a mobile phone card. Indeed, the Equal Rights Trust has concluded that such persons cannot live a decent life (Equal Rights Trust 2015). Additionally, these documents serve as the basis for social inclusion and a common national identity.

Article 10 of the *Constitution of Nepal* states that 'No citizen shall be denied the right to citizenship'. This may seem like a circular statement, but what it means is that no one who is entitled to citizenship shall be denied access to his or her citizenship rights due to the lack of documentation. However, there have been consistent attempts by the state since its unification in 1769 to limit accession into the category of 'Nepali citizen', for reasons that will be described in the next section. The citizenship certificate, or *nagarikta pramanpatra* in Nepali, is the primary document that confers citizenship to an individual in Nepal. However, while the Supreme Court of Nepal in the case of *Ashok Kumar Shah v. Ministry of Home Affairs et al.* (2010) stated, '[t]he mere absence of a citizenship certificate of Nepal does not mean that the person concerned is not a citizen of Nepal', many persons in Nepal in fact find themselves unable to access citizenship rights because they lack the citizenship certificate. Where such persons do not have another state upon which to call for citizenship, this renders them effectively stateless. According to a survey conducted by Forum for Women, Law and Development (hereafter FWLD) (2015), there are currently 4.6 million people without citizenship certificates in the country. Since the reasons for non-acquisition of citizenship certificates are not explained, it is difficult to prove that those people are stateless in the strict legal sense. Consequently, the government of Nepal has repeatedly expressed its explicit dissatisfaction when this number is linked with the issue of statelessness.

Interestingly, the Supreme Court of Nepal in the case of *Raju Ahmed v. Government of Nepal* (2013) held that citizenship by descent is a right, whereas citizenship by naturalisation depends on the discretion of the state. Considering the fact that children born to Nepali mothers and foreign fathers are only eligible to acquire naturalised citizenship, and as of now none of them have been able to do so, their nationality status is also questionable, thereby raising the issue of statelessness yet again. Additionally, patriarchal bureaucratic practices that ignore existing legal provisions result in the non-acquisition of citizenship certificates for the children of single mothers. This is another significant reason behind the massive number of people without citizenship certificates in Nepal. The case of orphans without legal guardians and those raised without proper documentation is no different, as the regulations deprive them from even applying for citizenship certificates, despite the constitution clearly recognising them as citizens.

### History of the citizenship law of Nepal

To understand the current context of statelessness in Nepal, we must understand the history of the country's citizenship law. As a country of nearly 30 million, geographically sandwiched between India and China, two of the most populous countries in the world, Nepal has always faced challenges in recognising and

defining its own citizens. This is in part due to the country's ethnolinguistic diversity: Nepal is home to over 100 languages and over 60 indigenous nationalities (*adivasi janajati*), in addition to a large number of Hindu caste groups. Given this complexity, many erstwhile citizens of Nepal share cultural and linguistic practices with those across borders, both southwards in India and northwards in China's Tibetan Autonomous Region. While this diversity is sometimes positively highlighted in nationalist visions of Nepal's unique identity vis-à-vis its two neighbours, it can also be seen as a negative attribute that challenges a homogenous vision of the Nepali nation-state unified around the concepts of the Hindu religion, the Nepali language and the cultural practices of hill communities, rather than plains or mountain communities (for more on the dynamics of national identity and nation-state formation in Nepal, see Burghart 1984; Lecomte-Tilouine 2009; Pigg 1992; Rupakheti 2016; for discussion of the notion of 'nation State' itself see Tonkiss, this volume). The fact that Nepal and India have shared one of the longest open borders in the world since the 1950 Indo-Nepalese Friendship Treaty means that mobility between the two countries is widespread, creating at once great openness and a constant concern about differentiating Nepali and Indian citizens. While the border between Nepal and China's Tibetan Autonomous Region is subject to greater regulation, there is still regularised cross-border mobility for residents of border areas, as mandated by treaty between China and Nepal (for more on cross-border mobility between Nepal and its neighbouring countries, and its impact on citizenship, see Middleton 2013; Richardson *et al.* 2009; Shneiderman 2013, 2015 Ch. 4).

Nepal's 1854 Muluki Ain (Country Code), as promulgated by the Rana oligarchy, first distinguished between citizens and non-citizens, mainly for the purpose of registering land and other fixed assets. Koirala (2014) points out that rules for issuing passports were made even before the adoption of substantive provisions on citizenship certificates. However, there is no evidence that formal legal provisions regulating citizenship existed before 1950. At that time, the more fluid understanding of how people enter and leave citizenship, and the narrower understanding of which rights should be associated with citizenship, meant that the forms of statelessness, both *de facto* and *de jure*, that we currently see in Nepal were not yet evident.

### Citizenship law from 1951 to 1990

The first Citizenship Act was drafted on 8 May 1952, laying down formally for the first time the qualifications for becoming a Nepali citizen. The Act specified that the following persons whose domicile was within Nepal could acquire the citizenship of Nepal:

- persons born in Nepal;
- persons whose father or mother is born in Nepal; and
- persons with permanent residence in Nepal living with their families.



Naturalised citizenship could be acquired by the following persons, though their country of domicile was not Nepal:

- persons born in another country to a Nepali father or mother born in Nepal, who could not acquire the citizenship of the foreign country;
- women born to Nepali parents and married to foreign men in the following cases:
  - death of the husband;
  - separation of the couple;
  - failure of the husband to take proper care of the wife; and
  - divorce.

The Citizenship Act of 1952 remained effective even after the promulgation of the Constitution of 1959. With the dissolution of the multi-party system and the introduction of the Panchayat regime in 1963, another constitution was promulgated in the same year. Under the new constitution, the law on citizenship came in the form of the Nepal Citizenship Ordinance, 1963 which was enacted on 15 December 1963, repealing the previous Act of 1952. The same Ordinance was adopted in 28 February 1964 as the Citizenship Act, 1964.

This Act made some drastic changes to the citizenship law of Nepal. Citizenship by descent could only be acquired by persons whose fathers were Nepali citizens at the time of the child's birth. With regard to naturalised citizenship, the residency requirement was increased from five to 15 years and the mandatory requirement of being able to speak the national language was also added. Foreign women married to Nepali men could acquire Nepali citizenship if they provided evidence that they had initiated the process of rescinding citizenship of the foreign country. This was an indication of the more restrictive understanding of citizenship that was to come and paved the way for the current context of statelessness.

### Citizenship law from 1990 to 2006

Despite the restoration of multi-party democracy in 1990, after 30 years of authoritarian monarchical rule under the Panchayat system the Citizenship Act of 1964 was retained. The Second People's Movement of 2006 led to the adoption of an interim constitution in 2007. This constitution had the same provisions regarding naturalised citizenship, but regarding citizenship by descent, it allowed citizenship to persons born to a father *or* mother who were Nepali citizens at the time of the child's birth. However, a prohibitory clause superseded this provision stating that persons born to Nepali mothers and foreign fathers could only acquire a naturalised citizenship certificate. This provision resulted in preventing children of single mothers and those whose fathers refused to acknowledge their paternity from obtaining citizenship certificates. The prerequisites for today's situation of statelessness were therefore created in 2006.

### Citizenship provisions in the new constitution

After the 2012 failure of the first Constituent Assembly to promulgate the constitution, the second Constituent Assembly promulgated the constitution on 20 September 2015. Though not significantly progressive compared to the previous constitution, the final provisions removed the restrictive requirement that both a person's 'father *and* mother' be Nepali citizens at the time of citizenship acquisition, which was included in the draft constitution.<sup>2</sup> If it had been allowed to proceed, this provision would have rendered a huge population stateless due to the large numbers of individuals who either do not have information about their father's identity, or were born to a foreign father but also do not have access to citizenship in the father's country.

Widespread protests and pervasive expressions of public opinion that women should be able to confer full citizenship broke out during the consultation process on the draft constitution. As a result, the citizenship by descent provision was amended to the more liberal 'father *or* mother' (this issue was covered widely in both national and international media at the time, e.g. see Rajbhandary 2015; Sharma 2015; Thapa 2015). However, the provisions still discriminate between men and women, thereby continuing the frailties of the previous constitution. Specifically, Articles 11(5)<sup>3</sup> and 11(7)<sup>4</sup> of the constitution outline special conditions for children to acquire citizenship through mothers, despite Article 11(2)(b)<sup>5</sup> providing equal rights to women to confer citizenship. Considering that there are 898,800 (Central Bureau of Statistics 2012) children below the age of 16 living with single mothers, their nationality status is made uncertain by these provisions and they are at risk of statelessness. Indeed, as the provisions discussed below indicate, it is in fact persons who are already the most vulnerable in society that may find themselves unable to assert their Nepali citizenship.

### Citizenship through mothers only if the father is unidentified

Article 38(1) of Part 3 of the constitution has ensured: 'Every woman shall have equal right to lineage without any gender discrimination.' However, the right of women to confer citizenship only when the father is unidentified not only undermines the independent identity of women but also denies their unquestionable biological role in birthing children. The law also requires that children must be born in Nepal and reside in the country as well. This requirement restricts children born to Nepalis working or resident in other countries and children born to rescued trafficked women from acquiring the citizenship of Nepal. Furthermore, the phrase 'if the father is unidentified' is ambiguous. There are many cases in Nepal where the children have been abandoned by the father and have not been able to acquire the citizenship of Nepal or any other country. In the absence of a clarification in the constitution and the related laws, it cannot be unquestionably asserted that the aforementioned cases fall under this provision. In fact, it is entirely unclear as to what kinds of cases fall under this category. In the meantime, this lack of clarity leaves individuals effectively stateless.

### Naturalised citizenship

According to Article 11(7), the children of Nepali women and foreign men can acquire Nepal's naturalised citizenship if they have resided in Nepal and have not acquired the citizenship of their fathers. However, according to several civil society organisations of Nepal, the practice of distributing these naturalised citizenship certificates has been limited.<sup>9</sup> Since 2006, no one has been able to acquire citizenship through this process. Such citizenship certificates are issued by the Ministry of Home Affairs after receiving a recommendation from the District Administration Office. However, the Ministry has not decided upon the case of a single applicant. A writ petition was filed in the Supreme Court of Nepal by Raju Ahmed in 2010 against the Ministry, demanding that a decision be made on his application for naturalised citizenship. Accordingly, the Supreme Court issued a directive order on 10 July 2013 to the Ministry to fulfil the petitioner's demand. The Ministry is yet to comply with the order. It is unknown how many such applications have been submitted to the Ministry. In any case, the law and the subsequent practice of law makes such applicants incapable of acquiring the citizenship certificate of Nepal, again rendering them stateless.

### Citizenship of orphans

Article 11(4) of the constitution addresses the citizenship of persons whose parents (both father and mother) are unidentified, stating that such persons must be accorded citizenship by descent until their father or mother is identified. However, the Nepal Citizenship Regulation, 2006 includes additional conditions that must be fulfilled to acquire the citizenship certificate. Only those children who have been legally adopted or who have been raised in government-approved Child Care Centres are allowed to apply for such citizenship certificates. Street children and children who have grown up working as domestic helpers, or have been raised in school hostels, are deprived from even applying for such citizenship certificates and may find themselves stateless.

### Case studies of individuals unable to acquire Nepali citizenship

The following case studies represent real-life situations where citizenship certificates could not be acquired despite legal provisions stating otherwise, due to the legal and constitutional problems mentioned above. Names have been changed to protect anonymity. The information was collected through face-to-face interviews with these individuals conducted by co-author Subin Mulmi and other members of FWLD, at the FWLD office premises in Kathmandu. All details are presented with permission of the interviewees. The case studies presented below were selected to represent the diverse cases of statelessness that FWLD is currently pursuing before the Supreme Court of Nepal.

### Sharmila Rai and Shabnam Rai

Sharmila Rai and Shabnam Rai were born to a Nepali mother and a Nepali father. Their father abandoned them when they were two and six years old, respectively. Shabnam always wanted to become a doctor but in order to enrol for the entrance examinations, the concerned office required her citizenship certificate. Thus, she applied for a recommendation letter from the Ward Office in order to get her citizenship certificate in the year 2014. Their mother Shanti Rai was humiliated by officials in the District Administration Office who rejected her application, yet asked personal questions about Shabnam's biological father. She took her case to the Home Minister, the Prime Minister and the President, but her case was not heard. In the absence of the father's citizenship documents, it could not be verified if the father was a citizen of Nepal or a foreigner. All the concerned offices refused to process her application, and she could not apply for the medical entrance examination.

The younger daughter Sharmila was in Grade 9 when her birth registration certificate was requested by the Examination Board in order to complete the registration form for the School Leaving Certificate (government exams at the Grade 10 level). The Ward Office rejected the application to register her birth without her father's documentation. A writ petition was filed in the Supreme Court seeking an interim order to grant Sharmila the permission to complete the application form without the birth registration certificate. The plea was heard by the Court and the Court also issued a directive order to the concerned Ward Office to issue Sharmila's birth registration certificate. After acquiring birth registration certificates which specifically mentioned that their father is 'unidentified', they applied for their citizenship certificates invoking Article 11(5) of the new constitution in October 2015. However, their application was rejected, stating that the new law would not apply to earlier cases such as theirs.

### Reshma Thapa

Reshma's mother Sita Thapa married Keshav Thapa at the age of 15 in May 1995. Reshma was born in the same year. A few months after the birth of Reshma, her father left the family to live separately. Sita acquired her citizenship certificate in 2004 via her father (rather than her husband). After almost ten years of separation, Keshav and Sita both agreed to divorce, with Sita securing legal guardianship of Reshma. Reshma was raised by Sita without any assistance from the father or his family. Reshma applied for the citizenship certificate in the Ward Office where Sita's citizenship was issued on 24 February 2012. The Ward Office rejected her application, stating that citizenship certificates can only be acquired in the location of the father's residence, and also sought the citizenship of the father. The father refused to support Reshma's application. Reshma is now 21 years old, without a citizenship certificate, and is unable to apply for entry to higher education.

*Hari Bista and Gorakh Bista*

Hari and Gorakh's father died when Hari was five and Gorakh was only one year old in 1980. Their father Diwas Bista died without having acquired a citizenship certificate. Their mother Sharmila Bista married Fadanand Kumar six years after the death of their father. Since then both Hari and Gorakh were raised by their stepfather and mother. Hari and Gorakh went to the concerned office to apply for their citizenship certificates with all the necessary documents including the death certificate of their father, the marriage registration of their parents and the citizenship certificates of their stepfather and mother, but their applications were rejected. Sharmila was even humiliated by the government officials. The reason for denying their application was stated as the mother's decision to get married to another man. The citizenship certificate of the dead father was requested. Hari is now 40 and Gorakh is 36. Both of them work in places where a citizenship certificate is not required. Hari has worked all his life as a teacher, frequently shifting schools when asked for a citizenship certificate. Gorakh is a designer who works for an IT company but is not recognised as a formal staff member of the company and thus gets paid off the record.

*Ram Krishna Yadav*

Ram Krishna Yadav's mother is a Nepali citizen and his father, Dhiraj Krishna Yadav, though having resided in Nepal all his life, has not acquired citizenship of Nepal. Dhiraj's father and his grandfather also both resided in Nepal all their lives without acquiring the citizenship of Nepal. In accordance with the law, Ram could only apply for naturalised citizenship, which he did in 2007. In order to initiate the process, the Ward Office asked for a document certifying that Ram had not acquired citizenship of India. For years Ram struggled to obtain this piece of evidence. Without a Nepali citizenship certificate, Ram could not even travel to India in order to inquire about the document. Though Nepal shares an open border with India and requires no visa or passport to travel, officials on both sides may still legally request to see a legal identity document that certifies the nationality of the person before allowing cross-border travel. After three years of struggle, Ram was able to procure a letter from the Indian Embassy certifying that he was not a citizen of India. As naturalised citizenship certificates are only provided by the Home Ministry, his application was sent to the Ministry. His case has remained undecided for five years. Ram has been offered several working positions but has not been able to accept employment without a citizenship certificate. At the age of 32 with two children, he is still economically dependent on his mother.

*Hitesh Pradhan*

Hitesh was born in western Nepal. At eight years old, he left his home town and went to Kathmandu, where he worked as a domestic helper in an ethnic Newar

household (the indigenous community of the Kathmandu Valley, with relatively high socio-economic status). The homeowners allowed him to adopt their last name. When he came of age, he applied for a citizenship certificate in order to obtain a driving licence. He had learnt to drive and had been offered a job as a taxi driver. In the District Administration Office, he stated that he had no idea where his parents were and tried to apply as an orphan. But he was not even allowed to file an application, as he needed to furnish evidence of having grown up in a government-certified child care centre, or the citizenship certificate of his legal guardian. Without either document, his claim was not heard. He is still working as a domestic helper in another household.

These individuals share a genuine claim to citizenship of Nepal. Indeed, in every case Nepal is the primary and only appropriate state upon which they can call for citizenship. They are trapped by the gender-based discrimination in Nepali citizenship law and by the implausible requirements of proof needed to demonstrate that they in fact fall into appropriate categories of persons eligible for Nepali citizenship. While each case is different, taken together the denial of citizenship in these cases demonstrates the denial of citizenship to precisely those most vulnerable members of society for whom citizenship protections are primarily intended. These individuals are rendered effectively stateless, though it is contentious to argue this due to their self-identification with the state of Nepal.

**Statelessness in Nepal**

Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons sets out the definition of a stateless person as follows:

For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law

The International Law Commission (2014) has concluded that the definition in Article 1(1) is part of customary international law (UNHCR 2014a, p. 9), thus making it binding even for non-parties to the treaty like Nepal. Since Article 1(1) is to be interpreted in line with the ordinary meaning of the text, read in context and bearing in mind the treaty's object and purpose, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (United Nations 1969), also indicated in the preamble and in the *Travaux Préparatoires*, the object and purpose of the 1954 Convention is to ensure that stateless persons enjoy the widest possible exercise of their human rights (see also de Chickera and van Waas, this volume).<sup>7</sup>

Establishing whether persons like Sharmila and Shabnam Rai, Reshma Thapa, Hari and Gorakh Bista, Ram Krishna Yadav and Hitesh Pradhan are 'considered as a national under the operation of its law' is a mixed question of fact and law (UNHCR 2014a, p. 12). The reference to 'law' in Article 1(1) of the Convention encompasses not just the legislation, but also regulations, orders, judicial case



law and customary practice (UNHCR 2014a, p. 12). It requires a careful analysis of how a State applies its nationality laws in an individual's case in practice along with any review/appeal mechanisms that may impact the individual's status.<sup>8</sup> Since a state may not practise the law in its entirety, as evidenced in the cases of Reshma Thapa and Hari Bista, even going so far as to ignore the provisions, applying this approach in practice may lead to a different conclusion than one deduced from a purely legal analysis of the nationality laws. Hence, the analysis of the legal provisions in the constitution and the relevant Acts, Regulations and Directives will not suffice. Their implementation must also be studied in order to determine whether the laws have resulted in the creation of stateless persons.

### *Role of the competent authority*

The competent authority to confer, distribute or withdraw nationality documents must thus be identified in order to determine the nationality status of the individual. Competence in this context also refers to the authority responsible for clarifying the nationality status where nationality is acquired or withdrawn automatically (Hague Convention 1930). District Administrative Offices, Municipalities, Village Development Committees, Ward Offices and the Ministry of Home Affairs are the competent authorities to provide citizenship certificates in Nepal.

Where the competent authorities treat an individual as a non-citizen even though he or she would appear to meet the criteria for automatic acquisition of citizenship under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national (Hague Convention 1930, p. 16) or citizen (hereafter used interchangeably, though for a problematisation of this approach, see Tonkiss, this volume). This scenario frequently arises where discrimination against particular groups is widespread in government departments or where, in practice, the law governing automatic acquisition at birth is systematically ignored and individuals are required instead to prove additional ties to the State (Hague Convention 1930).<sup>9</sup>

In addition to the cases mentioned in this chapter, there are ample further cases in Nepal where citizenship certificates by descent have been denied to applicants applying through their mothers without the details of their fathers (the list of cases can be found in National Women Commission and Forum for Women, Law and Development 2014, pp. 4–19; Equal Rights Trust 2015, pp. 12–14; IWRAW 2011, p. 7), despite the law specifically addressing their rights to acquire citizenship.

According to a study by FWLD (2015), the number of persons without citizenship in Nepal is expected to rise to a staggering 6.7 million by 2021 (out of 25 million eligible population<sup>10</sup>) from the already appalling figure of 4.6 million (out of 20.4 million eligible population) (FWLD 2015, p. 2). Another study, however, found that about 95 percent of those without citizenship certificates in the surveyed districts had not applied for such documentation with the concerned

authorities (FWLD 2014, p. 8). Without having applied to the competent authority for the citizenship certificate, it cannot be deduced that such people are not nationals of Nepal. Conversely, however, without the citizenship certificate, they cannot be *formally* recognised as nationals of Nepal.

### *Cases of non-application for acquiring nationality*

In all the cases mentioned above, applications for nationality were made to the competent authorities. However, in Nepal there are also cases where individuals have never come into contact with the State's competent authorities for various reasons, including geographical inaccessibility or lack of awareness. We must therefore analyse the State's general attitude towards the nationality status of persons in such cases. If the State has a good practice of recognising, in a non-discriminatory manner, the nationality status of all those who appear to come within the scope of the relevant law, this indicates that the person concerned is considered as a national by the State (UNHCR 2014a, p. 16). However, if the individual belongs to a group that is generally denied identification documents issued only to nationals, this indicates that he or she is not considered a national by the State and is thus stateless (UNHCR 2014a).

Despite the overwhelming list of international obligations that Nepal holds with regard to citizenship, as mentioned in the next section, the provisions are still discriminatory, certifying the intent of the state to deny citizenship to children of single mothers, children born to Nepali mothers and foreign fathers, and orphans. It is uncertain whether the nearly 900,000 children of single mothers will be able to acquire citizenship when they attain the age of 16. Though these groups of people have been addressed by the Constitution in Articles 11(4), (5) and (7), respectively, the general practice has been to refuse their applications for citizenship certificates and thus it can be said that these groups of people in Nepal are in fact stateless.

### *Review or repeal proceedings*

In cases where an individual's nationality status has been the subject of review or appeal proceedings, whether by a judicial or other body, its decision must be taken into account (UNHCR 2014a). However, a different approach is justified in countries where the executive ignores the positions of judicial or other review bodies (even though these are binding as a matter of law) with impunity (UNHCR 2014a). In such cases, the declaration by State authorities that such groups are not nationals would be decisive rather than the decision of the judicial bodies that disagree with the statement (UNHCR 2014a, p. 20).

The previous constitution as well as the current constitution have allowed the filing of public interest litigation in the Appellate and Supreme Court of Nepal in cases where the competent authority has denied citizenship certificates to those who are deemed citizens by the constitution of Nepal. Sabina Damai, a resident of Dolakha district whose father abandoned her and was thus raised by her

mother, filed a writ petition in the Supreme Court in 2010 seeking citizenship through her mother. The Court decided in Damai's favour (*Sabina Damai and FWLD v. Government of Nepal* 2011), ordering the District Administration Office to provide a citizenship certificate to her. The precedent held that children of single mothers whose fathers are unidentified must be provided with a citizenship certificate through the mother in all similar cases. The Ministry of Home Affairs even issued a circular<sup>11</sup> dated 23 January 2013 to all the Regional Administrative Offices and the District Administrative Offices to distribute citizenship through mothers when the father of the child is untraceable or unidentified. Even then, applicants with similar cases were not provided with citizenship certificates through their mothers as evidenced in two more cases (*Shanti Nagarkoti and Bhola Nagarkoti v. Government of Nepal* 2014; *Barsha Sharma v. District Administration Office Banke* 2014) where such applications were made after the circular mentioned above was issued. Sharmila Rai and Shabnam Rai also applied for their citizenship certificates after the circular was issued, but their applications were rejected. Thus, the position of the competent authorities that deny citizenship certificates without proof of the father's citizenship is decisive and so these groups are deemed stateless.

### Role of the international community in addressing statelessness in Nepal

During the 2006–2015 constitution writing process, Nepal was repeatedly reminded by the international community to adhere to the international human rights standards on nationality. Though not a party to either of the Statelessness Conventions, Nepal has ratified other treaties that protect the right to nationality. Specifically, Nepal has the obligation to comply with Article 15 of the Universal Declaration of Human Rights (UDHR), 1948 which states that, 'every individual has the right to nationality and nobody shall be arbitrarily deprived of nationality' (UNGA 1948). The International Covenant on Civil and Political Rights, 1966, to which Nepal is a party, also states that nobody shall be arbitrarily deprived of nationality (UNGA 1966). Nepal has also ratified the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), 1979 which in Article 9 states that women have equal rights to men to confer citizenship on their spouse as well as their children. In addition to these two treaties, Nepal has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 and the Convention on the Rights of Children (CRC), 1989.

The CEDAW Committee, in the Concluding Observations on 29 July 2011, strongly urged Nepal to 'ensure that the new Constitution provides for equal and full citizenship rights for women, including by exerting their right to transfer citizenship to their children and foreign husband'.<sup>12</sup> The Concluding Observations of the Human Rights Committee in March 2014 recommended Nepal to 'ensure that citizenship provisions of the new Constitution guarantee the equal right of women to acquire, transfer and retain citizenship'. Even the Committee on

Economic, Social and Cultural Rights raised concerns regarding the provision in the constitution that restricted 'transmission of nationality by a Nepalese woman to her child'.<sup>13</sup> The CRC Committee, in its Concluding Observations of 9 June 2016, recommended that Nepal amend its legislation on transmission of nationality by '[m]aking citizenship by descent accessible through proof of citizenship of one of the parents, regardless of parent's sex'.<sup>14</sup>

Nepal also received recommendations from five states (Canada, Hungary, Sierra Leone, Spain and New Zealand) during the 23rd Session of the Universal Periodic Review (UPR) regarding the need to amend existing citizenship law to ensure equal nationality rights between men and women.<sup>15</sup> All of these recommendations were accepted by Nepal as already implemented or in the process of implementation. Despite these international obligations, the laws of Nepal are still discriminatory towards women and also restrict certain groups of people from obtaining citizenship, in many cases due to their perceived ethnic identification with either populations to the south in India or populations to the north in China's Tibetan Autonomous Region. The issue of statelessness is hardly discussed by policy makers in Nepal, even though, as this chapter has demonstrated, there are certain groups who are indeed stateless.

### Role of UNHCR in Nepal

Though the concerned Committees of the various Human Rights Treaties have addressed the problems related to nationality, the issue of statelessness has not been adequately tackled by any international body. Quantitative data on the stateless population of Nepal is not available as necessary efforts to identify stateless persons have not been carried out. UNHCR has been involved in statelessness issues and with stateless persons since its inception in 1950. The organisation's mandate is to protect refugees and to help them find solutions to their plight. Since 1995, the mandate of the Office has been expanded by the UN General Assembly to include responsibilities relating to non-refugee stateless persons and prevention and reduction of statelessness more broadly. According to the Handbook for Parliamentarians (2014), these resolutions do not affect UNHCR's activities in those states that are party to the statelessness conventions (for more on UNHCR's role relating to statelessness see Staples, this volume).

According to the *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons* (UNHCR 2006), UNHCR clearly has the mandate to identify populations with undetermined nationality residing within designated territories, in cooperation with other UN agencies. In November 2014 UNHCR launched the #IBelong Global Campaign that aims to end statelessness globally by 2024. The High Commissioner stated in his 2014 End of Year Message that this

was just the first step in what will have to be a sustained effort, working closely with governments and civil society across the globe, to bring about

the necessary legislative changes to prevent new cases of statelessness and resolve existing situations by 2024.

The *Global Action Plan to End Statelessness 2014–24 (GAP)* (UNHCR 2014b) was published at the time of the 2014 campaign launch. It sets out ten key actions to achieve the goal of ending statelessness by 2024, alongside global milestones for assessing interim progress. The GAP primarily focuses on persons of concern under UNHCR's statelessness mandate who are not refugees.

Consequently, the 4.6 million people who do not have citizenship certificates in Nepal fall under this statelessness mandate. Nepal also has the international obligation to comply with the ten actions to end statelessness, and similarly UNCHR is obligated to assist the State. Even though Nepal does not recognise any population as stateless, Actions Two (Ensure that no child is born stateless), Three (Remove gender discrimination from nationality laws), Seven (Ensure birth registration for the prevention of statelessness), Eight (Issue nationality documentation to those with entitlement to it), Nine (Accede to the UN Statelessness Conventions) and Ten (Improve quantitative and qualitative data on stateless populations) are applicable to Nepal irrespective of the non-recognition. UNHCR Nepal has currently prepared the Strategy for Implementing GAP, addressing Actions Three, Eight and Ten, which is a welcome change to their approach in tackling the problems related to statelessness in Nepal.

### Conclusion

The term 'stateless' is seldom used in public discourse in Nepal. Since the constitutional and legal provisions have embodied a wide group of people under the category of citizens, it is generally presumed that there are no 'stateless' persons in the country. However, a proper comparative analysis of the international standards of statelessness with the situation of Nepal proves that there are certain groups of people who are effectively stateless. Citizenship certificates distinguish Nepali citizens from non-citizens of Nepal, and the refusal to provide citizenship certificates according to the laws of Nepal thus deems a person stateless. A study of the historical development of the country's citizenship laws shows that they have been constructed to discriminate against women. As a result of this, children of Nepali mothers and unidentified/foreign fathers have not been able to acquire citizenship certificates. The new constitution contains similar provisions, and continues to leave orphans, children of single mothers and other vulnerable individuals at risk of statelessness.

The open border with India and widely prevalent tradition of cross-border marriage has been cited by the government as the rationale for these restrictive citizenship provisions. Patriarchal assumptions embedded in the legal code have deprived women of the right to confer citizenship to their children independently. This has resulted in clear discrimination in the legal provisions and the practice of denying citizenship certificates to certain groups of people by the competent authorities, despite orders of the supreme judicial body. Such groups

of people have thus become stateless, and thus command the protection of international law pursuant to the provisions of the 1954 Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness (UNGA 1961). The role of UNHCR is subject to much scrutiny in a context in which efforts to identify stateless populations in Nepal are not yet adequate. However, statelessness in Nepal has garnered wider attention as a result of the Global Campaign to end statelessness, which has led to efforts to improve quantitative and qualitative data on stateless populations by 2024. However, the efforts to bring this discussion into the public realm, and into policy discussion at the state level, remain insufficient. Statelessness has existed in Nepal for more than half a century, but national and international attention to this problem has been largely absent. The first step would be to identify the number of stateless people in the country and maintain a strong database of such people. This would strengthen advocacy efforts and demonstrate the severity of the problem.

The problem of statelessness in Nepal is primarily of non-migratory nature, which means that persons become and remain stateless within their 'own country' (see also Vlieks, this volume). Thus, a key remedy will be swift and accessible nationality verification efforts. Since the existing number of people without citizenship is huge, and many are impaired in accessing citizenship because they live in geographically inaccessible areas, special programmes to provide citizenship certificates to people living across the country's varied terrain must be conducted. In the past, integrated mobile camps were organised before national elections in order to ensure nobody was deprived of voting. Such efforts should be initiated regularly. Vital information such as birth registration, death registration, marriage registration and migration status, which serve as necessary evidence for citizenship applications, are poorly recorded in Nepal. Thus, vital registration systems must also be strengthened.

Finally, it is time for a deeper questioning of the exclusionary vision of Nepali nationalism based on patriarchal frameworks for understanding lineage and descent. Nepal's ethnic and linguistic diversity should be understood as an asset, and citizenship granted through the appropriate procedures to all those who qualify regardless of their parentage or ethnolinguistic, cultural or regional heritage. In this way, Nepal's particular context of statelessness could be addressed.

### Notes

- 1 The authors are grateful for support from the Wenner-Gren Foundation, the UBC Hampton Faculty Fellowship, and the Forum for Women, Law and Development. We are indebted to the stateless people of Nepal whose situation we seek to document here. We also thank the editors of this volume for their helpful suggestions along the way.
- 2 The first draft of the constitution prepared by the Constitution Drafting Committee of the Constituent Assembly in July 2015, Article 12(1)(b) included: 'Any person whose either father or mother was a citizen of Nepal at his or her birth and both father and mother are citizens of Nepal at the time of receiving citizenship.'



- 3 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 naturalised citizenship according to the Federal law.
- 4 Notwithstanding anything contained elsewhere in this Article, in case of a person born to a Nepali woman citizen married to a foreign citizen, he/she may acquire naturalised citizenship of Nepal as provided for by a Federal law if he/she has permanent domicile in Nepal and he/she has not acquired citizenship of the foreign country.
- 5 Any person whose father or mother was a citizen of Nepal at the time of the child's birth.
- 6 Nepal Civil Society Network of Citizenship Rights, the Global Campaign for Equal Nationality Rights and the Institute on Statelessness and Inclusion 2015, *Joint Submission to the Human Rights Council at the 23rd Session of the Universal Periodic Review: Nepal*, p. 6. This report states that 'research conducted by FWLD reveals that in the first six years of the implementation of these provisions, not a single naturalisation application was successful'.
- 7 See the second and fourth paragraphs of the Preamble of the 1954 Convention Relating to the Status of Stateless Persons United Nations, Treaty Series, vol. 360.
- 8 This approach reflects the general principle of law set out in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.
- 9 Ibid.
- 10 Eligible population means people 16 and older, since the citizenship certificate can only be acquired after reaching that age.
- 11 Circular of the Department of Citizenship and Weapons issued on 23 January 2013, Ref. No. 180/2069/70, p. 1.
- 12 Recommendation of the CEDAW Committee to Nepal in 2011, para. 25, 26 and 49 (CEDAW/C/NPL/CO/4-5); See also Concluding Observation of the CEDAW Committee to Nepal, para. 198, A/59/38 (2004).
- 13 Recommendation of the Committee on Economic, Social and Cultural Rights on the Third Periodic Report of Nepal in 2014, para. 12 (E/C.12/NPL/3).
- 14 Recommendation of the Committee on the Rights of Children on the third to fifth periodic reports of Nepal in 2016, para 27 (CRC/C/NPL/3-5).
- 15 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Nepal, 8 July 2013, A/HRC/25/9. Available at [www.upr-info.org/sites/default/files/document/nepal/session\\_23\\_-\\_november\\_2015/recommendations\\_and\\_pledges\\_nepal\\_2015.pdf](http://www.upr-info.org/sites/default/files/document/nepal/session_23_-_november_2015/recommendations_and_pledges_nepal_2015.pdf) [Accessed 7 October 2016].

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## 10 Members of colonised groups, statelessness and the right to have rights

### *Tendayi Bloom*

Now, we had no choice. We did not request this citizenship, did not want it, and opposed it.

How can a citizen have a treaty with his own government?  
Chief Clinton Rickard (Rickard 1973, p. 126 and p. 56 respectively)

### Introduction<sup>1</sup>

Indigenous political theory offers an important critical resource in developing more nuanced broader understandings of citizenship and thereby also nuanced practice in the area of statelessness. Citizenship of a recognised State is often seen uncritically as the first and most important step in addressing the deprivations experienced as a result of statelessness. However, considering analyses offered by those contesting aspects of their citizenship can help to demonstrate problems with this approach. Nothing in this chapter should be seen as denying the obligation of a State to offer citizenship or as suggesting any individuals *should* reject it. Indeed, in the contemporary world such citizenship is in fact often needed both to pursue human rights claims and to be heard through standard political and legal spaces. Instead, this chapter argues that alongside supporting individuals to access their rights in whichever way necessary, there needs to be a significant re-examination of the liberal theoretical understanding of the State system itself in the light of the claims *both* of stateless persons *and* of members of Indigenous Nations. While acknowledging potential problems in this terminology, this chapter adopts the word 'Indigenous' here because it is one of the terms used in theorising in this area.<sup>2</sup>

Contexts of colonisation vary widely, as do individual responses to them (e.g. see Bruyneel 2004). Sometimes citizenship of a dominant society has been sought by members of colonised groups as a means of accessing rights. Sometimes it has been opposed as a colonising tool that reinforces inequalities and weakens rights obtained in other ways. Then there is the role of the memberships of the colonised groups themselves, whether they are conceived as citizenships or otherwise, which are recognised to different extents within the system of