

The Malawi Human Rights Resource Centre, Institute on Statelessness and Inclusion and Global Campaign for Equal Nationality Rights

Joint Submission to the Human Rights Council at the
36th Session of the Universal Periodic Review

Malawi

Introduction

1. The Malawi Human Rights Resource Centre (MHRRC), Institute on Statelessness and Inclusion (ISI) and Global Campaign for Equal Nationality Rights make this joint submission to the Universal Periodic Review (UPR), on the right to a nationality and human rights challenges pertaining to statelessness in Malawi.
2. This submission focuses on gender discrimination, the right to nationality and statelessness.
3. The Malawi Human Rights Resource Centre (MHRRC) was established in September 1997 with an overall objective of promoting and strengthening a culture of human rights in Malawi. The MHRRC works with civil society organizations to effectively support the developing democracy in the country and contributes towards the consolidation of channels of free expression and other rights for the citizens by working with and building the capacity NGOs and CSOs working on human rights.
4. ISI¹ is an independent non-profit organisation dedicated to promoting an integrated, human rights-based response to the injustice of statelessness and exclusion. Established in August 2014, it is the first and only global centre committed to promoting the human rights of stateless persons and ending statelessness. The Institute has made over 50 country specific UPR submissions on the human rights of stateless persons, and also compiled summaries of the key human rights challenges related to statelessness in all countries under review under the 23rd to the 35th UPR Sessions.
5. The Global Campaign for Equal Nationality Rights mobilizes international action for the removal of gender-discriminatory provisions from all nationality laws, through its coalition of national, regional and international organizations and activists, including steering committee members Equality Now, Equal Rights Trust, the Institute on Statelessness and Inclusion, UNHCR, Women's Learning Partnership and Women's Refugee Commission.

Previous UPR of Malawi under the First and Second Cycle

6. Malawi was previously reviewed during the 9th and 22nd sessions of the UPR, in 2010 and 2015 respectively. During the first cycle, Malawi received two recommendations related

1 For more information about the Institute on Statelessness and Inclusion, see: www.institutesi.org.

to citizenship and statelessness, by Austria to “repeal legislation that causes Malawian women to lose their citizenship when marrying a foreign national” and by Brazil to “consider revising its national legislation in order to prevent situations of statelessness”, both of which it noted.

7. During the second cycle, Malawi received eight recommendations on gender discrimination in nationality laws, statelessness and birth registration as follows:
 - I. Algeria: “continue efforts in the area of gender equality, in particular regarding acquisition, loss and transfer of nationality”;
 - II. Austria: “allocate financial and human resources to the implementation of the Gender Equality Act and amend all laws that discriminate against women, in particular the Citizen Act”;
 - III. Canada: “amend sections 9 and 16 of the Citizenship Act to ensure that nationality provisions are applied equally to men and women”;
 - IV. Kenya: “take steps to fully harmonize the nationality law to provide women the right to acquire, change or retain their nationality, on an equal basis with men, in line with the provisions of the Convention on the Elimination of Discrimination against Women”;
 - V. Germany: “withdraw all reservations to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and accede to the 1961 Convention on the Reduction of Statelessness”;
 - VI. Mexico: “ensure the proper registration of all new-borns in order to ensure recognition of their legal personality”;
 - VII. Namibia: “take all necessary measures to protect and promote the right of children, including their right to acquire a nationality and to be registered at birth, combat child marriages and finalize the implementation of the national plan of action for vulnerable children for the period 2014-2018”; and,
 - VIII. Portugal: “bring legislation governing the acquisition, retention or transfer of citizenship in line with article 9 of the Convention on the Elimination of Discrimination against Women, by removing any remaining discrimination”.
8. Malawi accepted seven of these recommendations. The only recommendation it did not accept was the German recommendation, which it noted.

Malawi’s International obligations

9. Malawi is acceded to the *1954 Convention Relating to the Status of Stateless Persons* in 2009, but has not acceded to the *1961 Convention on the Reduction of Statelessness*. Malawi has international obligations to protect the right to a nationality and protect the rights of stateless persons on the basis of other UN and regional treaties to which it is a party. These include, among others, the International Covenant on Civil and Political Rights (ICCPR - article 24.3), the International Covenant on Economic, Social and Cultural

Rights (ICESCR - articles 2.2 and article 3), the Convention of the Rights of the Child (CRC - articles 2, 3, 7 and 8), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW - article 9), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD - article 5(d)(iii)), the Convention on the Rights of Persons with Disabilities (CRPD - article 18), and the International Convention for the Protection of All persons from Enforced Disappearance (CED - article 25). Furthermore, the right to a nationality is protected under Article 15 of the *Universal Declaration on Human Rights*.

10. On the basis of the Article 9 of the CEDAW, the Committee on the Elimination of Discrimination against Women stated its concern that Malawi's Citizenship Act still contained discriminatory provisions that are incompatible with the Treaty, and urged Malawi to "*expeditiously revise the Citizenship Act to ensure that women and men enjoy equal rights to acquire, change, transfer and retain nationality and to introduce safeguards to ensure that children born in its territory who would otherwise be stateless are granted nationality.*" The Committee also recommended that Malawi accede to the 1961 Convention on the Reduction of Statelessness.²
11. The Committee on the Rights of the Child, in accordance with the Articles 7 and 8 of the ICRC, stated its concern that "*despite enacting in its Citizenship Act a provision that guarantees that children born on its territory who would otherwise be stateless have the right to nationality, there are still cases where children born outside of Malawi or born to a non-Malawian father are at risk of being stateless*". Taking note of target 16.9 of the Sustainable Development Goals, the Committee recommended Malawi to scale-up its efforts on birth registration, and to "*consider ratifying [...] the 1961 Convention on the Reduction of Statelessness, and bring its national legislation in line with these international instruments*".³ Women's inability to confer nationality on non-national spouses on an equal basis with men can also negatively impact the child's right to know and be cared for by each of their parents, with the obstacles confronted by non-Malawian fathers who cannot access nationality through marriage.
12. Malawi also has relevant regional obligations, including through ratification of the African Charter on the Rights and Welfare of the Child, which provides for the right to a name and nationality for every child in its Article 6. Malawi has also ratified the Maputo Protocol, which calls on States Party to eliminate gender discrimination in law in Article 2, stating:

Article 2 (1): States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

.... d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

National Law

13. Malawi's 1994 Constitution provides that every child has the right to a nationality, and that citizenship shall not be arbitrarily deprived or denied. Malawi's nationality legislation is regulated by the 1966 Citizenship Act, as amended in 2018.

² CEDAW, Concluding observations on the seventh periodic report of Malawi (2015), CEDAW/C/MWI/CO/7,

³ CRC, Concluding observations on the combined third, fourth and fifth reports of Malawi (2017), CRC/C/MWI/CO/3-5.

14. According to the 1966 Citizenship Act, Malawian men have the right to confer nationality on non-national spouses, while women are denied this same right under Part IV of the Citizenship Act:

Part IV Citizenship by registration and naturalisation, Section 16 Registration of wives of Malawi citizens

(1) Subject to subsection (2), any woman, being a person of full capacity, who has been married to a citizen of Malawi or to a person who would but for his death have become a citizen of Malawi on 6th July, 1966, may be registered as a citizen of Malawi, notwithstanding that she is an alien, on making application therefor to the Minister in the manner prescribed by section 28, if she satisfies the Minister that she fulfils all the requirements specified in section 13 (1) (a), (b), (c) and (d).

(2) A woman shall not be registered as a citizen of Malawi under this section unless at the time of application she makes a declaration in writing—

(a) of her willingness to take an oath of allegiance in the form specified in the Second Schedule; and

*(b) of her willingness to renounce any other nationality or citizenship she may possess; and
or citizenship she may possess; and*

(c) in the case of a woman who is widowed, divorced or separated from her husband, of her intention to continue to reside permanently in Malawi.

15. In 2018, Parliament passed a bill to allow for dual citizenship. While previously, Malawian women who acquired another nationality through marriage to a foreigner would lose their Malawian nationality, the bill passed in Parliament allows women who marry a foreigner to retain their Malawian citizenship, while also not barring them from obtaining the nationality of their spouse.
16. Although Malawi has not yet acceded to the 1961 Convention on the Reduction of Statelessness, the Malawian Ministry of Home Affairs & International Security co-hosted a national roundtable in July 2018, and reportedly agreed to work towards accession.⁴

Gender discrimination

17. Under Malawian law, women and men can confer nationality to children on an equal basis. However, women cannot confer nationality to spouses on an equal basis with men.⁵
18. However, there have been some legislative developments related to this discrimination, as well as other legislative developments related to addressing gender discrimination in other spheres. Collectively, this contributes to an environment where there are both

⁴ <https://www.refworld.org/docid/5bb214c54.html>.

⁵ <https://equalnationalityrights.org/countries/sub-saharan-africa>.

openings for eliminating gender discrimination in the nationality law, as well as barriers, including lack of transparency around ongoing processes and lack of implementation of specific Gender Equality Act provisions.

19. The special law Commission on the Review of the Citizenship act finalised its work and a report has been compiled and submitted to the relevant Ministry of Home affairs and Ministry of Justice for further processes to take place, including a cabinet paper that must be produced before it can be presented to Parliament. As of now, the status of and progress on these internal processes is unclear.
20. The Gender Equality Act (GEA) implementation guidelines have been developed and published and a standalone committee has been established to monitor the implementation and enforcement of the Act.
21. There are indications in the 2019/2020 budget that the Malawi Human Rights Commission which is mandated to oversee the implementation of the Act has been allocated additional funds to assist in this work.
22. There has been progress in the area of legal reforms pertaining to gender equality, i.e the amendment of Section 22 of the Constitution, which previously allowed girls to marry at the age of 16 years with consent of her parents. The Constitutional amendment followed the enactment of the Marriage, Divorce and Family Relations Act (2015) which set the legal age of marriage at 18 years, removing consent of parents.
23. Secondly, enactment of the Land Law, especially the customary Land Act, resulted in further progress with a provision recognizing women as having the ability to own and register family land, which in the past only applied to male children. Similarly, married women jointly own and register family land with their spouses, and continue to own the property in the event of the death of the husband
24. The passing of Trafficking in Persons Act has further supported legal protection for women and girls at risk of being trafficked.
25. However, implementation of the GEA remains a challenge as many institutions have demonstrated a lack of commitment to its implementation. For example, the Act stipulates that recruiting authorities must ensure that public sector recruitment ensures a 40/60 ration of either sex, but this has yet to be applied, including at the level of Executive at Public Enterprises. The lack of implementation of the GEA, including in areas as critical as employment, demonstrates persistent, systemic gender discrimination by the state.

Recommendations

26. Based on the above information, the co-submitting organisations urge reviewing States to make the following recommendations to Malawi:
 - I. Expeditiously revise the Citizenship Act to ensure that women and men enjoy equal rights to acquire, change, transfer and retain nationality, in line with Article 9 CEDAW, and to introduce safeguards to ensure that children born in its territory who would otherwise be stateless are granted nationality;
 - II. Accede to the 1961 Convention on the Reduction of Statelessness.