



EQUAL RIGHTS TRUST

Joint Submission: Equal Rights Trust and Focus Development Association

Suggested issues and questions to be adopted by the Country Report Task Force at the 118th session of the Human Rights Committee in relation to the fourth periodic report submitted by:

Madagascar

25 July 2016

Statement of Interest

1. The Equal Rights Trust and Focus Development Association (Focus) submits the following suggested issues and questions for adoption by the Country Report Task Force at the Human Rights Committee's (the Committee) 118th session, based on the fourth periodic report submitted by Madagascar.
2. The Equal Rights Trust exists to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. It focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice. The Trust is the only international organisation which focuses exclusively on the right to equality and which approaches equality from a unified human rights framework.
3. Focus Development Association (Focus) is a Malagasy civil society organisation focused on advancing gender equality. It works through research, capacity building, and advocacy. In 2014, it became the implementing partner of the United Nations High Commissioner for Refugees (UNHCR) for the initiative *Prevention and Reduction of Statelessness in Madagascar*. Focus is actively involved in advocacy with policymakers to reform the Malagasy nationality law to ensure conformity with international human rights standards.
4. This submission examines the enjoyment of the rights to equality and non-discrimination in Madagascar, focusing on the gender discriminatory provisions in the country's nationality law. As such, it examines the state's compliance with its obligations under Articles 2 and 26 of the International Covenant on Civil and Political Rights¹ (the Covenant), interpreted in light of the Committee's jurisprudence and General Comments, in particular General Comment No. 18 on Non-discrimination.²

¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 1966.

² Human Rights Committee, *General Comment No. 18: Non-Discrimination*, UN Doc. HRI/GEN/1/Rev.1, 1989, p. 26.

5. This submission also relies on the Declaration of Principles on Equality (the Declaration),³ a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as “the current international understanding of Principles on Equality”.⁴ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁵

Introduction

6. Throughout 2015, the Equal Rights Trust, with assistance from Focus, documented the nature and impact of gender discrimination in nationality laws in Madagascar, as part of a multi-country research project on gender discriminatory nationality laws. In September 2015, the Trust published the report *My Children’s Future: Ending Gender Discrimination in Nationality Laws*. The report is based on research conducted in four countries, two of which retain gender discriminatory nationality laws (Madagascar and Nepal) and two of which have reformed such laws in recent years (Kenya and Indonesia). The purpose of the report was to add to the existing body of knowledge on gendered nationality laws and thereby increase awareness as to the need for and nature of reform. In so doing, the report sought to contribute to the Global Campaign for Equal Nationality Rights, of which the Trust is a Steering Committee member. The report includes findings from interviews with 28 persons affected by gender discriminatory nationality laws in Madagascar, alongside interviews with state authorities, civil society actors, lawyers and experts.
7. This submission will argue that the nationality law of Madagascar breaches the State’s obligations arising under Article 2 – read in conjunction with Articles 12 and 24(3) of the Covenant – as well as Article 26 of the Covenant. Despite the recommendations of the Committee on the Elimination of Discrimination against Women, the nationality law continues to discriminate against Malagasy women, who “cannot transmit their nationality to their foreign or stateless spouse or to their children on an equal basis with men”.⁶ Although Madagascar has committed to reforming its discriminatory nationality provisions,⁷ it has yet to do so.

³ *Declaration of Principles on Equality*, Equal Rights Trust, London, 2008.

⁴ *Naz Foundation v Government of NCT of Delhi and Others*, High Court of Delhi, WP(C) No. 7455/2001, Para 93.

⁵ Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380.

⁶ Committee on the Elimination of Discrimination against Women, *Concluding Observations: Madagascar*, UN Doc. CEDAW/C/MDG/CO/6-7, 24 November 2015, Paras 26 and 27.

⁷ Human Rights Committee, *Fourth Periodic Report: Madagascar*, UN Doc. CCPR/C/MDG/4, 21 December 2015, Para 311.

Obligations in Respect of Non-Discrimination and Nationality

8. Research undertaken by the Equal Rights Trust and Focus for the report *My Children's Future: Ending Gender Discrimination in Nationality Laws* indicates that Malagasy nationality laws discriminate directly against women and, by association, against their children in respect of the right to acquire a nationality, contrary to the requirements of Article 26 and Article 24 in conjunction with Article 2(1) of the Covenant.
9. Under Article 26 of the Covenant, "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law"; to this end, the law "shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground". The Committee has emphasised that Article 26 provides an autonomous right to non-discrimination. That is to say:

*It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.*⁸

10. Under Article 2(1) of the Covenant, each State Party to the Covenant undertakes to ensure Covenant rights to all individuals within its territory without discrimination.⁹ This includes the right of children to acquire a nationality under Article 24(3).¹⁰ The Committee, in its General Comments, has explained that whilst this provision does not "necessarily" require States to confer nationality on all children born within its territory, States are required to adopt appropriate measure to ensure that every child has a nationality when he is born.¹¹ Consequently, as the Committee has noted, Article 24(3), read together with Article 2, gives rise to an obligation of non-discrimination in the acquisition of citizenship by children:

*[N]o discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.*¹²

11. Principle 5 of the Declaration of Principles on Equality recognises associative discrimination, providing that any discrimination "when it is on the ground of the association of a person with other persons to whom a prohibited ground applies"

⁸ See above, Note 2, Para 1.

⁹ See above, note 1, Article 2(1).

¹⁰ *Ibid.*, Article 24(3).

¹¹ Human Rights Committee, *General Comment No. 17: Article 24 (Rights of the child)*, UN Doc. HRI/GEN/1/Rev.1, 1989, p. 23, Para 8.

¹² *Ibid.*

must be prohibited.¹³ Although not expressly recognised by the Covenant, adopting a holistic approach to the concept of non-discrimination, and recognising the universality, indivisibility and interdependence of human rights¹⁴ suggests that non-discrimination “on any other grounds” would include discrimination by association. This view is supported by the concluding observations and general comments of several human rights treaty bodies, including the Committee on Economic, Social and Cultural Rights.¹⁵

12. Malagasy women are discriminated against in both law and practice as a consequence of discriminatory nationality laws. These laws are *prima facie* discriminatory, in contravention of the autonomous right to non-discrimination contained in Article 26 of the Covenant. Moreover, many children are denied the right of nationality as a result of gender discrimination in the law – constituting direct discrimination by association in the enjoyment of a Covenant right, thus contravening Article 24(3) when read in conjunction with Article 2.

Discriminatory Provisions in the Nationality Code of Madagascar

13. The Nationality Code (the Code) was adopted in 1960. Whilst Article 7 of the Code provides that the provisions of international law – presumably including the right to non-discrimination – are to apply, this provision is contradicted by Articles 9 and 10, which concern the automatic acquisition of nationality at birth. These articles only apply to children born within marriage to a Malagasy father or to a Malagasy mother and a father who does not have nationality (Article 9); and to children born outside of marriage to a Malagasy mother or those born outside of marriage to a mother whose nationality is unknown and a Malagasy father (Article 10).
14. These provisions clearly demonstrate an unequal approach to the nationality rights of men and women, as well as significant discrimination between children born in and out of wedlock. In most cases, children will automatically acquire citizenship through their father, whereas the opportunity to acquire it through their mother is more limited. Only if the father is stateless or of unknown nationality, or if the child is born out of wedlock, can a Malagasy woman automatically confer her nationality according to the main provisions of the law. Malagasy men also enjoy rights not enjoyed by Malagasy women with regard to conferral of nationality to a foreign or a stateless spouse.¹⁶
15. Where excluded from the above provisions, Malagasy nationality can be conferred to a “legitimate child born to a Madagascan mother and a foreign father” up until the age

¹³ See above, note 3, Principle 5.

¹⁴ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, Para. 5.

¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20, 2009, Para 16.

¹⁶ Nationality Code of Madagascar, Article 22.

of majority by way of application.¹⁷ However, under Article 18 of the Code, government may oppose an individual's acquisition of nationality for reasons of their "indignity, default or inadequate assimilation, or serious physical or mental disability".¹⁸ This provision allows unwarranted government discretion in the determination of citizenship, and facilitates direct discrimination against children on the grounds of disability.¹⁹ For those outside of the purview of Articles 9, 10 and 18, nationality may only be acquired through naturalisation after the age of 18; requiring at least 5 years residency in Madagascar preceding the application, a "good moral character", no danger to the community due to disease, no convictions for one of a number of offences (or incarceration for more than one year), and a demonstration of their "assimilation" to the Malagasy community.²⁰

16. In those limited circumstances where Malagasy women are able to pass on their nationality, evidence suggests that women still face difficulties in practice. Many of those interviewed by the Trust discussed problems in acquiring nationality even where they were eligible.²¹ In order to apply for a national identity card, a birth and residency certificate must be provided, however, officers may request further documentation. This discretion is often exercised where an individual is perceived as possessing a "foreign" name,²² or where individuals are suspected of not being a national, they have been refused documentation. In particular, children with Arab, Muslim or Comorian sounding names encounter difficulties in the application process.²³
17. Families are additionally burdened by a lack of knowledge or understanding of the relevant legal rules, including in particular that an application must be made before reaching the age of majority.²⁴ In many cases, bribes may be required in order to complete the procedure to obtain a national identity card.²⁵ For those without money,

¹⁷ *Ibid.*, Article 16. Under Article 5 of the Code, the age of majority is 21. Those born outside of marriage to a Madagascar father are similarly eligible to acquire nationality by application.

¹⁸ *Ibid.*, Article 18.

¹⁹ This discrimination is also applicable for a child adopted by a person of Madagascar nationality (Article 17) and for a foreigner or stateless woman who wants to acquire the nationality of her spouse (Article 24).

²⁰ *Ibid.*, Article 27.

²¹ Equal Rights Trust, *My Children's Future: Ending Gender Discrimination in Nationality Laws*, 2016, p. 12, available at: <http://www.equalrightstrust.org/ertdocumentbank/My%20Children%27s%20Future%20Ending%20Gender%20Discrimination%20in%20Nationality%20Laws.pdf>.

²² Information provided by United Nations Development Programme Madagascar in their review of *My Children's Future*.

²³ See above, note 21, p. 12.

²⁴ *Ibid.*, p. 13.

²⁵ *Ibid.*, p. 14.

including those who cannot afford to return to their district of permanent residence, completing the application process can be prohibitively expensive.²⁶

18. The aforementioned provisions in Madagascar's nationality law breach the autonomous right to non-discrimination provided under Article 26 of the Covenant, and also violate Article 24 read in conjunction with Article 2(1). By distinguishing between men and women and creating a narrower set of circumstances in which women can confer citizenship, the law directly discriminates against women on the basis of their sex, contrary to Article 26. In addition, the effect of the gender discriminatory provisions is to ensure that certain children are less likely to gain Malagasy nationality, and are subjected to a separate, more arduous procedure to gain access to citizenship. As the Committee has considered in its General Comment 17, such differential treatment can constitute a violation of Article 24 read together with Article 2(1) of the Covenant. Beyond the law itself, there is also – as illustrated above – evidence of discrimination in its application, which may constitute further violations of Article 26 and Article 24 in conjunction with Article 2.
19. As a consequence of Madagascar's discriminatory nationality law and the practices in its implementation, many children have been made stateless, severely circumscribing their enjoyment of established convention rights, such as freedom of movement.²⁷ As has been recognised by regional courts, stateless individuals – being by definition without nationality – are not granted access to the same legal rights relied upon by citizens.²⁸ Moreover, stateless persons in Madagascar may face discrimination on account of their status as stateless, being seen as illegal immigrants who do not deserve to become citizens. Persons interviewed by the Trust in Madagascar often reported feeling shunned by society, including non-governmental organisations (NGOs), as well as state authorities. As one interviewee described, “[s]tateless people have no value, no NGOs are taking care of them, they have lived their whole lives like this and no-one cares.”²⁹

Discriminatory Denial of Freedom of Movement (Articles 2 and 12 of the Covenant)

20. Although freedom of movement under Article 12(1) of the Covenant are restricted to those individuals “lawfully within the territory of a State”, no such restriction exists in relation to Article 12(2) (freedom to leave the country).³⁰ The Committee has also recognised that the right to return, under Article 12(4), may include “an individual who, because of his special ties to or claims in relation to a given country cannot there

²⁶ *Ibid.*

²⁷ See above, note 21, p. 31.

²⁸ *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights, 8 September 2005, Paras 137 and 142.

²⁹ Equal Rights Trust interview with Hussein, 23 January 2015, Majungha, Madagascar.

³⁰ See above, note 11, Para 8.

be considered to be a mere alien".³¹ This right may extend to stateless persons. In *Stewart v Canada* the Committee held:

*In short, while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13. The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.*³²

21. In Madagascar, freedom of movement, as protected under Article 12 of the Covenant, is restricted for those made stateless by the gender-discriminatory nationality laws; both within and outside of the country. With the potential of being caught and denied re-entry, travel for stateless persons is difficult. Several individuals interviewed by the Trust and Focus discussed difficulties moving freely within the State. Speaking on behalf of his uncle who was denied citizenship on account of gender discriminatory nationality laws, one participant noted how a lack of nationality has limited his willingness to move:

My uncle is scared to do anything. He always has been. He lives underground, he doesn't leave the mosque or the surrounding areas much as he worries someone will ask him for his documents.

22. Other interviewees discussed difficulties leaving Madagascar, either for work or travel. As Mahmoud explained:

Risking the travel can come with grave consequences – I can no longer travel abroad as, if I get caught by the French authorities, they will put me in jail. This has huge effects on my work. If you do not have citizenship you can buy travel documents, but if they catch you abroad without the other documents you will get into trouble. I do not want to have to do this.

23. Similarly, for Jacqui:

At this age our main desire from citizenship is to be able to travel. Also we really want to go on pilgrimage. I cannot go to hajj and do the pilgrimage because I cannot get a passport. It is a very serious and sad thought for both of us that we may never be able to go to Mecca.

³¹ *Stewart v Canada*, Human Rights Committee, Communication No. 538/1993, 16 December 1996, UN Doc. CCPR/C/58/D/538/1993, Para 12.4.

³² *Ibid.*

24. By failing to facilitate the free-movement of stateless persons beyond its borders, it appears likely that Madagascar is acting in contravention of Articles 12 and 2(1) of the Covenant.

Other Examples of Discrimination as a Consequence of Discriminatory Nationality Laws (Article 26)

25. Statelessness in Madagascar is a direct consequence of discriminatory nationality laws; arbitrarily restricting the rights of women to confer their nationality upon their children. Both the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of the Child have recognised the discriminatory impact of Madagascar's nationality legislation, recommending immediate legal reform,³³ retroactively applicable to ensure that all those currently made stateless through the discriminatory provisions are granted nationality,³⁴ and that the state take measures to ensure that children born in the country are not left stateless.³⁵
26. As stated above, Madagascar's nationality provisions directly discriminate on the basis of the marital status, statelessness and nationality of the parent. These provisions have the effect of rendering individuals stateless, with a number of detrimental impacts on the livelihoods and living conditions of such persons. To the extent that stateless persons in Madagascar experience direct or indirect discrimination arising on the basis of their statelessness, these practices will constitute violations of Article 26, of the Covenant which, as noted above, provides an autonomous and free-standing right to non-discrimination, beyond the prohibition of discrimination in the enjoyment of Covenant rights provided by Article 2(1).
27. Testimony received by the Equal Rights Trust from individuals made stateless as a consequence of the Nationality Code highlight a number of negative impacts of the law. As one interviewee attested:

My daughter is workinG. Her boss asks her for her ID card but she just tells him it is in process. He knows her situation so he will wait, but there is always the risk that he might lose patience and employ someone who has citizenship instead.³⁶

28. Likewise, parents may struggle to provide for their children; lacking the necessary documents required to work and purchase property. Following the passing of her

³³ Committee on the Rights of the Child, *Concluding Observations: Madagascar*, UN Doc. CRC/C/MFG/CO/3-4, 8 March 2012, Para 32.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Equal Rights Trust interview with Shavana from the Karana community, 23 January 2015, Majungha, Madagascar.

husband, Layla, a woman from the Karana Community, who was left stateless despite the fact that her mother possessed Malagasy nationality, could not purchase her family home:

It is not possible for me to buy land or property without nationality, which makes things difficult for us. The land which I live in now is not in my name. I do not even have anyone under whose name I could put the land in, we are all stateless.³⁷

Moves to Reform the Nationality Code

29. In November 2015, the Equal Rights Trust, together with Focus, the Global Campaign on Equal Nationality Rights and the office of United Nations High Commissioner for Refugees, engaged with members of the National Assembly of Madagascar on the need for reform of the country's nationality law. During this period, Jean Max Rakotomamonjy, President of the National Assembly, met with the Trust, Focus and our partners and as a result of this meeting, proposed a *proposition de loi* (a draft law that emanates from a Member of Parliament rather than the government), which would reform the Nationality Code to allow mothers to pass on their nationality even where the father's nationality is known. The draft law would also deal with other issues of gender inequality and statelessness in Madagascar. Twenty members of the National Assembly signed a Statement of Commitment backing the *proposition de loi*, acknowledging deficiencies in the current law and advocating reform.
30. However, the *proposition de loi* has recently been displaced by a *projet de loi* (a bill put forward by government) which proposes separate reforms to the Code, focusing almost exclusively on the nationality issue. The *projet de loi* proposes a change to the wording of Article 9 of the Code, abolishing the previous discriminatory provision by stating that: "Malagasy is the child born of a father or a Malagasy mother."³⁸ This provision would allow for women to pass their nationality onto their children, regardless of their marital status. Although the proposed change to Article 9 of the Code would be a step forward, it would leave issues of nationality regarding foreign spouses and statelessness unaddressed. It retains other discriminatory provisions: for example, Article 23 only concerns situations where a "woman intends take the Malagasy nationality", and does not extend to a foreign man wishing to adopt the nationality of his wife. Concerns that the Code may retain provisions which discriminate against persons with disabilities are also not addressed. Likewise, statelessness is not discussed in the draft law. If the *projet de loi* moves forward then separate legislation will be required to deal with the issue.
31. At the Istanbul Humanitarian Summit in May 2016, President of the Republic, Hery Rajaonarimampianina, set out a timeline for the adoption of the *projet de loi*, stating:

³⁷ Equal Rights Trust interview with Layla, 23 January 2015, Majungha, Madagascar.

³⁸ Bill No. 025/2016 of 15 June 2016, Amending and Supplementing Certain Provisions of Order No. 60-064 of 22 July 1960 on the Malagasy Nationality Code, Article 9.

The process of adoption of the nationality bill, its enactment and application will be accelerated. The text in question will be implemented by the end of this year. The nationality code will take into account all the provisions of the Convention on the Elimination of All Forms of Discrimination against Women.³⁹

32. However, there is also little certainty that the government will effect these reforms. The Council in Government have rejected bills related to discrimination in nationality law before, due to a reluctance to deal with statelessness in Madagascar. Moreover, in its current form however, the *project de loi* does not make all of the reforms necessary for full gender equality in nationality law in Madagascar.

Recommended Questions for the List of Issues

33. We urge the Committee's Country Report Task Force to pose the following questions:
- (1) How does Madagascar plan to amend its nationality law in order to remove its discriminatory impact, including on the grounds of gender and disability?
 - (2) When does Madagascar propose to amend its nationality law?
 - (2) What current measures are being undertaken by the State to reduce corruption and discrimination in the application of nationality law?
 - (3) What measures are being taken by the State to inform individuals of current rules, particularly those rules regarding the age of majority?
 - (4) Regarding proposed amendments to the nationality law, is Madagascar planning to apply changes retroactively to those made stateless through discriminatory nationality provisions?
 - (5) What short-term measures does the State intend to adopt in order to allow effective freedom of movement for stateless persons, particularly those wishing to leave and return to the country?
 - (6) What short-term measures does the State intend to adopt in order to ensure, *inter alia*, non-discrimination on the basis of nationality or citizenship in access to work, education and land?

³⁹ Unofficial Translation. Rajaonarimampianina, H., *Statement at the Istanbul Humanitarian Summit*, 2016.