The interplay of citizenship, nationality and statelessness: Interrogating South Africa's legal framework in light of its international obligations

by

YEUKAI NYASHA DEBRA MAHLEZA

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DECLARATION

Name: Yeukai Nyasha Debra Mahleza

Student number: 66095387

Degree: LLD

Title: The interplay of citizenship, nationality and statelessness: Interrogating South Africa's legal framework in light of its international obligations

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DEDICATION

To my three mothers (the trio), Rennie, Biyoni and Tandiwe Mudarikwa, I LOVE YOU.

Nehuwandu hwenyu iwoyo,

Ropa rangu rine muchiso weumwe neumwe wenyu,

Muchiso wehupenyu hweumwe neumwe wenyu,

Ropafadzo yembereko inonzi amai,

Ropafadzo youpenyu weumwe neumwe wenyu,

Ndokutendai vana amai vangu.

‘so many women
so many women
whose blood I carry
so many glorious lives
living inside me.’
Questions for Ada~Ijeoma Umebinyuo

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ABSTRACT

This research examines the principle of belonging as a fundamental basis of existence as a human being. It seeks to show that non-recognition as a national of any country has led to many people being stateless and living with no form of identity or legal status. Being stateless means being invisible and is defined as not being considered as a national by any state under the operation of its law.

In light of the above, this thesis critically analyses two jurisdictions, Kenya and Myanmar, with the aim of seeking better practices that South Africa can emulate. It contends that, while South Africa has an obligation to protect the rights of everyone, including those of stateless people, it fails to protect stateless persons as it does not legally recognise them. As a result, reliance is placed on different sources to argue that there is a need for the formation of a statelessness determination procedure to identify and recognise stateless people.

If the identity of stateless and undocumented people is not legally recognised, it means that they will not have access to fundamental human rights. Most countries have laws that promote equality and non-discrimination, however, they lack laws that protect the stateless community. It is suggested that the lack of laws regulating statelessness and a statelessness determination procedure means that South Africa is non-compliant with international law that protects stateless people.

In addition, this research suggests that South African law should be aligned with international instruments that call for protection of individuals from becoming stateless and also prevent the crisis from becoming worse.This flows from the understanding that with no law in South Africa that recognises and identifies stateless people, it means that it is impossible for a country to protect a community it does not recognise.

Finally, the thesis recommends that South Africa enacts laws that recognise stateless people and make provision for the procedures to be followed in order for them to have a legal status. Furthermore, South Africa can amend and make changes in the policies, laws and the administration dealing with statelessness in order to prevent it.

Keywords Statelessness, undocumented, nationality, citizenship, determination procedure, recognition, South Africa, Kenya, Myanmar.

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Chapter 1 - Introduction

Having a sense of belonging is fundamental to being human. Once that is lost, the essence of who we are is also lost. Against this background, statelessness should be regarded as the most gruesome violation of human rights provided for in most constitutions and international instruments.[1] Statelessness is often the first opening to many other violations, both internationally and domestically.

To give more emphasis on the importance of belonging, one should be able to belong with their dignity being respected and honoured. In the *Minister of Home Affairs and Others v Watchenuka and Others*[2] the following was said about dignity and nationality:

> [25] Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights.
>
> [26] The inherent dignity of all people – like human life itself – is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights.

This shows that, despite being stateless, the South African Constitution provides for the protection of those that are stateless. The Constitution also provides for equality in section 9 and stipulates that rights are equal and should be enjoyed by everyone. This means that the rights of stateless people should not be regarded as unequal when compared to the rights of nationals. Therefore, having laws recognising stateless people establishes their protection and reduces statelessness in South Africa. There is a need for laws that protect stateless people to be put in place so that their dignity is recognised and honoured. This is because statelessness

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1 Constitution of the Republic of South Africa, 1996 (the Constitution) with specific reference to Chapter 2.

2 *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

deprives those who are classified as stateless of the chance to enjoy the rights in the Bill of Rights.

In this regard, the aim of this research is to point out the gaps in the legal framework dealing with statelessness in South Africa while doing a comparative analysis between Kenya and Myanmar. The reason for using these three countries is that Kenya has attempted to grant nationality to stateless people which is something that South Africa can emulate considering the fact that their constitutions are similar and are in the same region. In the case of Myanmar, '[a]round 40 per cent of the known global stateless population live in the Asia Pacific region, with Southeast Asia harbouring the largest populations. With over one million stateless people, the Rohingya from Myanmar – now displaced across Myanmar, Bangladesh and other locations in the region – remain the most prominent case'.[3]

Further, this research seeks to give recommendations that will help in addressing the crisis. These jurisdictions were selected in order to advance and discover better practices that South Africa could emulate from and also consider where it is better informed on the issue compared to other jurisdictions. Recommendations such as proposing that legislation be amended to improve recognition of statelessness, improve the enforcement of legislation that exists and clear legislative issues that are ambiguous will be included. In addition, this research will suggest that South African law should be aligned with international instruments that call for protection of individuals from becoming stateless and also prevent the crisis from becoming worse.

South Africa, like all other states, has an obligation to curb statelessness. This is in accordance with the 1961 Convention on the Reduction of Statelessness (1961 Convention on Statelessness). This convention requires granting nationality to anyone, including minors that find themselves stateless or who do not have documents. This obligation is binding upon South Africa through customary

[3] Sperfeldt C "Statelessness in Southeast Asia: Causes and Responses" https://globalcit.eu/statelessness-in-southeast-asia-causes-and-responses/ (Accessed 25-08-2021).

international law despite the fact that it is not a member to the convention.[4] The principle crystallised into customary law and this was reinforced in the case of *Anudo Ochieng Anudo v United Republic of Tanzania*[5] where the African Court on Human and People's Rights said the following:

> [N]either the Charter nor the ICCPR contains an Article that deals specifically with the right to nationality. However, the Universal Declaration of Human Rights (UDHR) which is recognized as forming part of Customary International Laws provides under Article 15 thereof that: "(1). Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality. . . ."

The court went further to say in this regard that '[a]lthough Tanzania has not ratified the 1954 convention, the International Law Commission (ILC) has stated that the definition of [a]rticle 1(1) "can without doubt be considered to have acquired a customary character"'.[6] Since the obligations provided for in the 1961 Convention on Statelessness bind South Africa even though it is not a member, it is therefore submitted that South Africa has to consider having legal mechanisms that allow stateless people to have a status and rights. This is because at this point in time South Africa lacks such mechanisms.[7]

While it is a common cause that South Africa has an obligation to protect and prevent statelessness, it is argued that a state is unable to fulfil the obligation if it does not recognise stateless people. It is in this regard that this thesis suggests that it is in the best interest of the stateless community for South Africa and other states to formulate stateless determination procedures (SDP) for the recognition and identification of stateless persons.

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4 See *Anudo Ochieng Anudo v United Republic of Tanzania* Application No. 012/2015 Judgment 22 March, 2018 paragraphs 76 and 103, Legal Resources Centre "Submissions on arbitrary deprivation of nationality" http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf (Accessed 09-04-2019).

5 *Anudo Ochieng Anudo v United Republic of Tanzania* Application No. 012/2015 Judgment 22 March, 2018 at 22.

6 See United Nations "Draft Articles on Diplomatic Protection with Commentaries 2006" 48-49 https://www.refworld.org/docid/525e7929d.html (Accessed 2-09-2021).

7 Lawyers for Human Rights "Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide" http://citizenshiprightsafrica.org/wpcontent/uploads/2016/05/LHR_PractitionersGuide-Statelessness_2014.pdf 29-31 (Accessed 16-10-2019).

1.1 Background

International law did not apply on the treatment of State's nationals '[u]ntil the emergence of human rights law in the era of the United Nations'.[8] Before this era, a State treated its nationals only through its domestic laws. However, this did not apply to foreign nationals belonging to another state, as they could be protected by their home states through nationality bond.[9]

In 1949, the United Nations (UN) undertook a study on statelessness and it came up with the notion that statelessness had been there for as long as the concept of nationality.[10] This led to the UN including statelessness in their work, with three instruments being adopted. The first instrument was the Convention relating to the Status of Refugees 1951 (1951 Refugee Convention), which focused on the treatment of people who were forced to flee their countries for clear fear of persecution and would have found themselves denationalised or not. The second convention was the 1954 Convention relating to the Status of Stateless Persons (1954 Convention on Statelessness). The latter aimed 'to regulate and improve the status of stateless persons by an international agreement'[11] and lastly the 1961 Convention on Statelessness which is aimed at avoiding statelessness. The 1954 Convention is important as it contains the definition of 'stateless person' while other conventions do not. It defines a 'stateless person' as someone who is not considered as a national by any state under the operation of its law.[12] This means that statelessness is a state of not belonging to any country, or not being recognised as a national of any country.

Statelessness tracks back to the colonial history of states and is caused in part by migration, the existence of borders, different kinds of discrimination and modernisation of the civil registry systems without proper access to administrative

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8 Shearer R and Oppeskin B "Nationality and Statelessness" in Oppeskin B, Perruchoud R and Red-Cross *Foundations of International Immigration law* (Cambridge University press 2015) 93 chapter 4.

9 Shearer R and Oppeskin B "Nationality and Statelessness" 93.

10 Peace Palace Library "A 100-year (Hi)Story of Statelessness" https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/ (Accessed 27-07-2019).

11 The Preamble.

12 Article 1 of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention on Statelessness).

justice and poverty.[13] However, lack of birth registration is the most notable reason for statelessness in the Southern African Development Community (SADC) region.[14] Therefore, 'withdrawal of nationality or refusal to grant nationality has led to conflicts which have caused severe human rights violations on the continent'.[15] Diplomatic extension can be extended to nationals after assessment of the surrounding issues between the two states involved. Such extension to protect can in some instances be supported by the national's state, however, this should be done with scrutiny.[16] It can now be seen that international law restricts state's sovereignty in matters regarding nationality in order to avoid statelessness through conventions.[17] State sovereignty means 'a manifestation of the exclusive, supreme and inalienable legal authority of states to exercise power within the area of governance . . . and [it] permits a state to possess and exercise legislative executive and judicial powers over subjects within its territory'.[18]

In relation to the above, legal and policy development should be called for in SADC. This will allow individuals to protect themselves by exercising their right to nationality, through a legal framework that allows for such.[19] Statelessness can only

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13 African Commission on Human and Peoples' Rights "The Right to a Nationality in Africa" https://www.refworld.org/pdfid/54cb3c8f4.pdf 5 and 7 (Accessed 10-04-2019). See also Muller L.H "Legal identity for all - Ending statelessness in SADC" http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf.140 (Accessed 19-04-2019).

14 Sustainable Development Knowledge Platform, "Sustainable Development Goal 16", https://sustainabledevelopment.un.org/sdg16 (Accessed 19-04-2019), see also Muller L.H http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf.140 (Accessed 19-04-2019). See also African Commission on Human and Peoples' Rights "The Right to a Nationality in Africa" https://www.refworld.org/pdfid/54cb3c8f4.pdf 5 (Accessed 10-04-2019).

15 African Commission on Human and Peoples' Rights "The Right to a Nationality in Africa" https://www.refworld.org/pdfid/54cb3c8f4.pdf 5 (Accessed 10-04-2019). See also Muller L.H http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf.140 (Accessed 19-04-2019).

16 See for example *Van Zyl and Others v Government of the Republic of South Africa and Others* [2008] 1 All SA 102 (SCA); (SCA); 2008 (3) SA 294 (SCA) and Shearer R and Oppeskin B "Nationality and Statelessness" 93.

17 Shearer R and Oppeskin B "Nationality and Statelessness" 93.

18 Dube A "Of neighbours and shared upper airspaces: the role of South Africa in the management of the upper airspaces of the Kingdoms of Lesotho and Swaziland" 2015 *CILSA* 219-253 224.

19 African Commission on Human and Peoples' Rights https://www.refworld.org/pdfid/54cb3c8f4.pdf 50 (Accessed 10-04-2019). The African Commission study found that 'the right to a nationality is still not fully recognised as a fundamental human right on the African continent, as the current legal framework does not allow individuals to effectively protect themselves in the exercise of their right to a nationality'.

be addressed if SADC states support and comply with conventions and protocols which are in place or are to be put in place to address the issue. States should therefore sign and pledge to these instruments.[20] If appropriate legal framework addressing this issue exists, then an end to statelessness would be seen. However, not only legal solutions are needed but practical solutions too.[21] In the instance that refusal to grant nationality would lead to an individual becoming stateless, a state is not allowed to refuse to grant nationality.[22] This is because with nationality denied, so are the rights and legal existence of those individuals. In other words, these individuals are and will experience an 'undignified existence'.[23] This issue can only be improved through actions by the SADC states and not through theory. Arguably, laws should be enforced rather than looking good on paper.

Therefore, nationality is the core of one's dignity and identification. In other words, having a nationality can be seen as a pass to accessing other rights within a state.[24] According to the African Commission on Human and Peoples' Rights (African Commission), statelessness has become a continuous trend as stateless people cannot transfer nationality to their spouses or register their children.[25] People who are at risk of being stateless and should have an entitlement to the right of citizenship include, migrants from neighbouring countries, people subjected to persecution around Africa and orphaned and abandoned children with no access to any form of documentation.[26] Such children include both children born to South African and non-South African parents.

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20 Muller L.H http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf.145 (Accessed 19-04-2019).

21 Ibid.

22 Legal Resources Centre "Submissions on arbitrary deprivation of nationality" http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf 4 (Accessed 09 April 2019).

23 Ibid 17.

24 Muller L.H http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf.140 (Accessed 19-04-2019).

25 African Commission on Human and Peoples' Rights "The Right to a Nationality in Africa" https://www.refworld.org/pdfid/54cb3c8f4.pdf 5 (Accessed 10-04-2019), see also Muller L.H http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf.140 (Accessed 19-04-2019).

26 The Committee on the rights of the child 73rd Pre-Sessional Working Group (1 – 5 February 2016) South Africa "Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC" https://dullahomarinstitute.org.za/women-and-democracy/south-africas-reporting-on-childrens-rights-to-the-un/lrc-submissions-on-documentation-and-nationality.pdf 2 (Accessed 10-04-2019).

These individuals still face challenges even in the countries where they seek protection as they are attacked by the strong and protected.[27] For those who are strong and protected, they do not consider the fact that 'no one leaves home unless home is the mouth of an open shark'.[28] Furthermore, the Department of Home Affairs (the DHA), instead of assisting with solutions, it continues to make the problem worse by taking 'advantage of the individuals' desperation and lack of knowledge of their rights as refugees'.[29] Statelessness is not a problem of foreigners only but a problem to South Africans too and it will need a collective strategy for it to be eradicated. The principle of Ubuntu[30] has guided many African societies and brought about unity which erases many divides within our societies and can be used to assist in eradicating statelessness.

1.1.1 Measures available to prevent statelessness

Article 1(1) of the 1961 Convention on Statelessness makes provision for one to be given nationality by birth, operation of law or when an application is made to the relevant authority in a case they would be stateless. [31] The difference and most important factor of the 1961 Convention on Statelessness is that it gives states positive obligations in terms of granting nationality compared to the earlier Convention on Certain Questions relating to the Conflict of Nationality Laws.[32] In addition, the 1961 Convention on Statelessness also prohibits states from granting nationality based on grounds of discrimination. Therefore, if all states would

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27 Msimang S "Eyes on the back of our heads: Recovering a multicultural South Africa" https://www.cbc.ca/radio/ideas/eyes-on-the-back-of-our-heads-recovering-a-multicultural-south-africa-1.4173628 (Accessed 12-08-2018), see also https://www.dailymaverick.co.za/opinionista/2017-04-20-eyes-in-the-back-of-our-heads-moving-forward-while-looking-back-diversity-division-and-a-world-of-difference/ (Accessed 02-09-2021).

28 Shire W "Home" https://www.facinghistory.org/standing-up-hatred-intolerance/warsan-shire-home (Accessed 02-09-2021).

29 Refugee Day Speech By Bambi Dibu, can also be accessed at http://www.cormsa.org.za/wp-content/uploads/2018/07/As-a-child-born-in-South-Africa-I-am-stateless-and-confused-because-I-don%E2%80%99t-know-do-I-belong-to-South-Africa-or-do-I-belong-to-Congo.-1.pdf (Accessed 0223-09-2021).

30 Ubuntu means 'I am because we are'.

31 Convention on the Reduction of Statelessness 1961 (1961 Convention on Statelessness) article 1(1) (b) and McAdam J and Wadley D "Part two: The prevention and reduction of statelessness in Australia — an ongoing challenge" https://law.unimelb.edu.au/__data/assets/pdf_file/0009/2369583/02-Foster,-McAdam-and-Wadley-Part-Two-402-Post-Press.pdf 471 (Accessed14-04-2019).

32 Goodwin-Gill S "Convention on the Reduction of Statelessness" http://legal.un.org/avl/pdf/ha/crs/crs_e.pdf 4 (Accessed 14-04-2019).

diligently follow the provision of the convention, statelessness would be reduced in an effective manner bearing in mind how stateless people face discrimination daily.[33]

To prevent statelessness means that the causes of future statelessness are dealt with now. These causes should be analysed and looked into as, 'legal provisions on the acquisition, loss, renunciation and deprivation of nationality, as well as implementation of these provisions in practice; determination of nationality status; and removing administrative obstacles to obtaining birth registration or identity documentation, among others'.[34] The causes of statelessness are not only confined to being legal and technical but include discrimination on different grounds as an important factor.[35]

Furthermore, statelessness can be caused by an act of the state of nationality or, more rarely, by extinction of the state, or acquisition of part of the state by another state and a voluntary act of the national.[36] Denying an individual of nationality is prohibited if loss of nationality leads to statelessness, generally this is provided for, with limitations included, in article 8 of the 1961 Convention on Statelessness.[37] Instruments that deal with human rights at an international level attempt to combat statelessness by means of recognising that everyone has the right to nationality; by facilitating the acquisition of nationality; and by reducing the power that states have in revoking nationality.[38]

According to the guidance note of the UN Secretary General, '[a]ction by the UN to address the causes and consequences of statelessness is an essential component of both conflict prevention efforts as well as social, economic, and legal development

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33 McAdam J and Wadley D https://law.unimelb.edu.au/__data/assets/pdf_file/0009/2369583/02-Foster,-McAdam-and-Wadley-Part-Two-402-Post-Press.pdf 465 (Accessed14-04-2019).

34 Handbook on Statelessness in the OSCE Area "International Standards and Good Practices" 51 https://www.osce.org/handbook/statelessness-in-the-OSCE-area?download=true (Accessed 16-10-2019).

35 Organization for Security and Co-operation in Europe Handbook on Statelessness in the OSCE Area International Standards and Good Practiceshttps://www.osce.org/handbook/statelessness-in-the-OSCE-area 51 (Accessed15-04-2019).

36 Shearer R and Oppeskin B "Nationality and Statelessness" 93.

37 Ibid 102.

38 Ibid 101-2.

agendas'.[39] It should be noted that in cases where statelessness is also a cause to conflict, giving nationality to the stateless could be an effective way in which justice, the rule of law and public administration can be upheld. Therefore, when there is a reduction in statelessness, there is a strengthening in the reconciliation process as a prevention to conflict which in turn can reduce poverty.[40]

1.1.2 Protection measures available for individuals who are stateless

Being stateless does not preclude one from enjoying the rights that are provided for in the international human rights treaties as well as national laws. The fact that many states are party to these treaties means that many provisions have become custom and binding on states regardless of ratification. This provides mechanisms for monitoring and enforcing compliance with existing instruments.[41]

In cases of deportation, an individual can only be deported to a particular destination and such deportation cannot be proceeded with in cases wherein the individual faces persecution in that national state. In such a case, the individual is protected by human rights principles, remaining in the deporting state until a willing state accepts the deportee.[42] Furthermore, with the nature of universality of human rights, everyone should be allowed to exercise the right to nationality.[43]

The precise figure of stateless persons is unknown as there are gaps in data collection, which is an issue that needs to be resolved so that the problem can be

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39 United Nations Guidance Note of the Secretary General https://www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20Secretary-General%20on%20the%20United%20Nations%20and%20Statelessness.pdf. 2-3 (Accessed 16-10-2019).

40 Ibid.

41 Shearer R and Oppeskin B "Nationality and Statelessness" 110.

42 Ibid 120.

43 See, for example, UN Sub-Commission on the Promotion and Protection of Human Rights, The rights of non-citizens: final report of the Special Rapporteur, David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283, 26 May 2003, E/CN.4/Sub.2/2003/23, available at: https://www.refworld.org/docid/3f46114c4.html (Accessed 16-04-2019), and Mandal R and Gray A "Out of the shadows: Statelessness under International law International" https://www.chathamhouse.org/sites/default/files/field/field_document/20141029StatelessnessMandalGray.pdf 2 (Accessed 16-04-2019).

brought to an end.[44] There is a need to improve the understanding and compliance of the existing laws instead of creating new ones, together with proper monitoring of such.[45]

Lack of identification has been a cause of constant detention of individuals who are stateless. Such detention in most instances is long as the states will be looking for states willing to admit the individuals. This kind of detention is prohibited by article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) as it is arbitrary. An exception to this section is when the detention follows due process and is reasonable to do so, the section will not apply. However, it should be noted that due process lacks in many cases involving statelessness.[46] In considering that statelessness is a violation of human rights, it should then not only be the subject of talk but should be fought for by all states, implemented in the laws they enact or are in existence already while respecting and dignifying stateless individuals as they are human before anything regardless of their religion, race or status.

1.2 Assumptions

This research project is based on the assumption that South Africa is in violation of international human rights law that protects the rights of stateless people. In addition, stateless people are often discriminated against because, without any form of nationality or identification, they lack the right to exercise the rights that are provided for in the Constitution of South Africa. In comparison to a person who has

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44 Nafees A "Migration and international law, The right to nationality and the reduction of statelessness - The responses of the international migration law framework" 2017 *Groningen Journal of International Law* 1-22 1.

45 Mandal R and Gray A "Out of the shadows: Statelessness under International law International" https://www.chathamhouse.org/sites/default/files/field/field_document/20141029StatelessnessMandalGray.pdf 1 (Accessed 16-04-2019).

46 See UNHCR "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1" https://www.unhcr.org/4d93528a9.pdf 25 and 48 (Accessed16-04-2019). See paragraph (w) of UNHCR Executive Committee Conclusion No. 106 (LVII) of 2006, which calls on states not to detain persons on the sole basis of their being stateless https://www.unhcr.org/41b4607c4.pdf (Accessed16-04-2019). See also *Danyal Shafiq v Australia*, CCPR/C/88/D/1324/2004, UN Human Rights Committee (HRC), 13 November 2006, available at: https://www.refworld.org/cases HRC, 47975af921.html (Accessed 17-04-2019). See *Kim v Russia*, Application no. 44260/13, Council of Europe: European Court of Human Rights, 17 July 2014, available at: https://www.refworld.org/cases, ECHR, 53c7957e4.html (Accessed 17-04-2019).

nationality, a stateless person is likely to have no rights at all. This is because, for instance, for one to receive health care or social services and other services, identification is required and being stateless means lack of identification. Stateless people are likely to always experience being arrested for lack of any form of identification. The challenge with regards to all this is that there will be no due process as the system itself may not even recognise the extent of how statelessness is a crisis in South Africa. This is because there is lack of a statelessness determination procedure and it escalates the situation.

The Constitution of South Africa provides for human rights that should be enjoyed by everyone who is within the Republic.[47] However, this protection seems not to apply to the stateless, meaning the laws are ineffective towards those who really need them. In addition to this, the thesis emphasises that there are many barriers within the laws that protect and prevent statelessness which impede the course of justice.

The comparative analysis between the jurisdictions of South Africa, Kenya and Myanmar respectively, will provide other means in which to combat the crisis while taking cognisance of the fact that stateless people are not any less deserving of justice and human dignity.

1.3 Research question

The main question in this research is:

- Whether by formulating and adopting rules, regulations and procedures that identify, determine and recognise stateless people, South Africa would be in compliance with international law that protects the rights of people who are stateless or are on the verge of becoming stateless?

In order to tackle this question the following sub-questions will be addressed:

4.1 Does South African legislation have provisions for access to nationality and issuance of identity documents to stateless people?

4.2 Does South Africa have a statelessness determination procedure in place?

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47 The Constitution with specific reference to the Preamble and Chapter 2.

4.3 To what extent is South Africa's nationality legislation informed and guided by international rules and standards?

4.4 Whether the selected comparative jurisdictions of Kenya and Myanmar provide adequate protection to stateless people in accordance to international law from which South Africa could draw lessons.

1.4 Aims

1. The aim of this research is to ensure the protection of stateless people through a legislative framework that recognises their status and rights while making sure that there is legislative will on the subject.
2. To assess the manner in which a statelessness determination procedure can be introduced in South Africa.
3. When legislative framework and procedures are put in place, the aim is to determine whether stateless people will be able to fully exercise their section 33 right including finding recourse through legality.
4. To evaluate the development and strengthening of South Africa's nationality legislation while looking at its strengths and weaknesses.
5. Critically analysing two other jurisdictions in order to find better practices that South Africa could emulate with regard to statelessness.

Many stateless children are born to undocumented and stateless parents,[48] therefore their births are unlikely to be properly registered in accordance to South African law. Unfortunately statistics and data regarding this population is almost non-existent. This means that current South African nationality law discriminates against these children in its application and practice.[49] It is difficult for these children to attend school without any form of identity and for those that do attend formal schooling and for those that are older, they are not able to sit for their

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48 Scalabrini Centre of Cape Town and Legal Resources Centre submission to the special rapporteur at the Office of the UN High Commissioner for Human Rights https://scalabrini.org.za/wp-content/uploads/2019/05/Scalabrini-Centre-of-Cape-Town-submission-OCHR-Statelessness-Minority-Issues-23-May-2018.pdf 2 (Accessed 16-10-2019).

49 Ibid 13, see also Legal Resources Centre "Submissions on arbitrary deprivation of nationality" http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf 7(Accessed 09-04-2019).

high school leaving examinations. Cases[50] have been taken to court to fight for their right to education, however, this research will show that though their right to education should be fought for, it does not change the fact that they remain undocumented[51] and stateless and will not sit for their school leaving examinations. The root of the problem, which is statelessness, should be the one which we seek to eliminate. The fight for their education is only part of the solution which in a way does not help in the case they are not going to be recognised as nationals considering they will not work or even enter into tertiary education.

The court cases for the application for the right to education for stateless children also remain a discretion by the court. A judgment by the Eastern Cape High Court which was overturned by the Constitutional Court involving 37 children is illustrative in this regard.[52] The Centre for Child Law approached the Grahamstown High Court in December 2018 with an application that 37 children be allowed to attend school pending another application. The High Court turned down the application and stipulated that while children were entitled to a right to education, such right was not an absolute right.

On appeal the Constitutional Court ruled that the children be enrolled into schools. One of the issues that this research aims to scrutinise surfaces from these court

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50 *Centre for Child law and Others v Minister of Basic Education and Others* Case No 2480/17. Litigation on this case was launched in 2016. Urgent applications related to this case were made in the Grahamstown Court (December 2018) and the court dismissed the case. An appeal was made in Constitutional Court in February 2019 and the court set aside the decision by the High Court pending hearing of the case launched in 2016 which was heard on 18-9 September 2019 and the court ordered that the respondents in the matter should not deny undocumented children the right to education, undocumented children should be enrolled and admitted in public schools.

51 This thesis will also refer to undocumented persons because lack of identification documents places such people at a risk of becoming stateless. Therefore, lack of documentation should not be mistaken for being stateless, 'the lack of documentation affects South Africans without birth certificates, stateless people, as well as undocumented migrants'. In this regard, see Guam, A & Esterhuizen, E „Thousands of „undocumented" children are being deprived of the basic right to education" (2019) South African Human Rights Commission available at https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen (Accessed on 19 May 2022).

52 In December 2018, the same court dismissed an urgent application by the Centre for Child Law that 37 children should be admitted to a public school pending final determination of the main case. These children were among many whose guardians had not managed to secure the paperwork needed to be allowed to register in public schools. In an order in February this year, the Constitutional Court directed the department to admit learners to the schools by March 1 pending the determination of the 2017 case.

cases. Firstly, for the children to be able to attend school it is in the discretion of the court and if the court is not in agreement like the High Court in this instance, the application is then denied. The Constitutional Court became the saving grace to the children as it overturned the decision by the High Court. Secondly the litigation process is protracted. These cases demonstrate that as long as children are undocumented and stateless, even the basic education may not be of assistance when the children reach the age of majority, as they will not be able to get work, open bank accounts, get health services and will risk being detained regularly etc.

While it is thought that this predicament is for non-South Africans, this is not entirely true, because South Africans also experience it.[53] There are different reasons that make children born to South African parents to be stateless. These include, their births not being registered at all or their births are registered but they are not in possession of their birth certificates and unable to retrieve these from the DHA.[54] Litigation has been taking place with regards to such cases, however, it does not solve all cases and other viable less restrictive solutions have to be developed and applied.[55] South African laws need to be 're-designed' such that they grant the right to nationality to the individuals, while they meet 'international law standards for access to nationality in international treaties to which many SADC states are signatories'.[56] If the problem is not solved then it will become a generational problem passing from parents to children which it already is for some.

While litigation is the only means available for stateless people, consideration should be given to the fact that it is an expensive avenue which is not accessible to these people as poverty is a struggle for them. This makes access to justice a luxury.[57] The Constitution of South Africa provides for the best interests of children concerning any actions that impact on their lives.[58] This means that children have

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53 Legal Resources Centre "Submissions on arbitrary deprivation of nationality" http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf 11 (Accessed 09-04-2019).

54 Ibid.

55 Ibid 14.

56 Muller L.H http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf. 141 (Accessed 19-04-2019).

57 Legal Resources Centre "Submissions on arbitrary deprivation of nationality" http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf 15 (Accessed 09-04-2019).

58 The Constitution section 28.

the right to have a nationality from birth.[59] Therefore, as long as these people remain stateless, any rights provided for in the South African Constitution or the African Charter on Human and Peoples' Rights (African Charter) remain inaccessible. They remain marginalised and their access to practically everything 'withdrawn from them'.[60]

1.5 Theoretical Framework and principles applied

In relation to theory, this thesis finds its support from two theories. The theory of natural rights and the theory of liberal politics. The validation for using these theories rests on the protection of everyone's rights; and the ability to exercise them as envisaged in this thesis. The aim is to illustrate the relation between the observations and findings showcased in this thesis with the two theories.

The thesis supports the human rights approach, maintaining that everyone, whether undocumented, stateless, or on the verge of becoming stateless, has a right to nationality (including having identification documentation) and the basic rights attached to it. States should not prevent anyone from exercising their basic rights. The intention is to counter views and theories that support state sovereignty that prohibits individuals from exercising basic rights. In this regard, the two theories and the findings in this work denounces views that support the non-recognition of stateless people and lack of legislation that protects them. Furthermore, the thesis observes that policies and practices that discriminate and degrades stateless people are unjust.

The theories are linked to the provisions of the UDHR, as part of customary international laws, with specific reference to article 15, providing for the right to nationality and that it should not be arbitrarily deprived. In addition, the work illustrates that the theories support the human rights approach by promoting the objectives of the 1954 and 1961 Conventions on Statelessness.

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59 The Constitution section 28, see also the African Charter on the Rights and Welfare of the Child (ACRWC).

60 Southern African Catholic Bishops' *"Stateless Children"* (Briefing Paper 403 at Conference with Parliamentary Liaison Office April 2016) http://www.cplo.org.za/wp-content/uploads/2016/02/BP-403-Stateless-Children_-Apr-2016.pdf (Accessed 13-04-2019).

Different philosophers consider human rights differently while considering that human rights are identified as a prominent element of being human. Human rights form part of a persistent discussion.[61] This thesis attempts to illustrate the link between the two theories, which are regarded as the foundation of human rights instruments, declarations or documents,[62] and their application to statelessness as a human rights problem. Furthermore, this thesis seeks to illustrate that the failure to legitimise the issues raised by stateless people during discussions on migration has been a concern to theorists.[63] Other issues of concern include the principles applied in governing issues related to migration and the exercising of rights by stateless and undocumented persons; and the systematic exclusion of these persons from accessing basic rights.[64] These concerns illustrate the contradictions on the application of theories such as the liberal political theory, however this thesis argues that the proper application of the principles of these theories,[65] without deviation, is a solution to the statelessness conundrum.

A broad-based approach was initiated by theorists in which they are pursuing a conservatory approach to citizenship; and allowing migrants to fairly exercise their rights.[66] The thesis uses these theories as a foundation and seeks to illustrate the manner in which the theories supports the cause in curbing statelessness in reality. The theories also have the same foundational objectives that align with the instruments that seek to equally protect the rights of all people. The thesis observes

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61 Berényi K *Addressing the anomaly of statelessness in Europe: An EU law and human rights perspective* (PhD thesis National Public University Hungary 2018) 41-42.

62 In this regard see all international and regional instruments, UN reports and declarations that protect of human rights.

63 Bloom T, Tonkiss K and Cole P *Understanding Statelessness* (Taylor and Francis Group 2017) 5.

64 Risse M “On the morality of immigration" 2008 *Ethics and International Affairs* 22(1) 25-33, Carens J “Aliens and citizens: the case for open borders” 1987 *The Review of Politics* 49(2) 251-273. See also Bloom T, Tonkiss K and Cole P *Understanding Statelessness* (Taylor and Francis Group 2017) 5.

65 Bosniak L *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2008), Cole P *Philosophies of Exclusion (*Edinburgh University Press 2000) and Rubio-Marin RF *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press 2000). In this regard, see also Bloom T, Tonkiss K and Cole P *Understanding Statelessness* (Taylor and Francis Group 2017) 6.

66 In this regard, see Bauböck R "The rights of others and the boundaries of democracy” 2007 *European Journal of Political Theory* 6(4) 398-405, Cabrera L *The Practice of Global Citizenship* (Cambridge University Press 2010), Caney S *Justice Beyond Borders* (Oxford University Press 2006).

that, in terms of morals and the values of these theories, initiating statelessness is malicious and discriminatory as it violates the rights of another person; and has dire consequences.[67]

1.5.1 The theory of natural rights

The concept of natural rights encompasses the notion that everyone has absolute rights which are non-transferable and are absolute. In this regard, laws are considered to rely on morals, ethics and integrity. The aim is to refrain states from exercising unlimited power over people who elected them into power. The natural rights theory entails that everyone has inherent rights such as the right to life and freedom. The natural rights notion is derived from natural law which finds its foundation from the Christianity ethics developed before the enlightenment period.[68] During this period the rights were believed to be from God to the people, and protected by the elected governments.[69]

The theory of natural rights dates back to 1651 when Thomas Hobbes published The Leviathan.[70] Hobbes describes natural rights as freedom belonging to everyone and that it is grounded on intuition as part of the fundamental dispositions and qualities of humans. In this regard, Hobbes alludes to the existence of a two-fold human nature. This human nature authenticated by Hobbes comprises of the protection of a person's right from violation by others and the manipulation of others to safeguard one's rights and interest.[71]

As time progressed, state of nature progressed to society. Despite the power men possessed, in society they had to relinquish some of the freedom they had during state of nature. In relation to this stage, Hobbes maintains that persons have a duty to regard the laws in a society. Adding the society move, he also considered the notion of social contract that justified a government established by the people. This meant that, people still possessed partial natural rights and had to obey societal

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67 Anttila M W *The Ethics of Denationalization: An argumentative analysis of the removal of citizenships in liberal democratic states* (Human rights Bachelor Malmö University 2010) 34.

68 A period when the European politicians completely restored the political science, philosophy and communication. See Berényi *Addressing the anomaly* 41-44.

69 Berényi *Addressing the anomaly* 42.

70 Hobbes T *The Leviathan, or The Matter, Form and Power of a Common, Wealth Ecclesiasticall and Civil* (Andrew Crooke 1651).

71 Berényi *Addressing the anomaly* 42-43.

laws and the government was obligated to protect people's rights to life, freedom and property. He viewed, freedom and equality as principles that were related to the core of human rights and the society had to acknowledge them. According to Hobbes, protecting the rights of individuals was essential.[72]

Locke advances the line of thought by suggesting how people are free by nature, equal and independent.[73] Locke reflected on the existence of 'state of nature' before the era of society which was regulated by reason and illustrated by freedom. According to Locke, during this era, people possessed rights which included the right to life, freedom and property. His views shifted to the society era when the government was instituted on the basis of agreement by the people. He observed that people possessed the authority to dissolve a government that did not serve the interests of the people.[74]

Rousseau addressed the social contract theory.[75] He focused on the importance of inequities between people and whether natural law permitted the existence of inequities. Furthermore, he explored the objections against social contract. Rousseau, viewed this theory as an agreement by individuals to be a community. In relation to the government, his view was that a state has power provided that it embodies the will of the people. According to Rousseau, the source of freedom and equality is nature, however, social participation has tarnished nature. He argues that exploring inequalities between people calls for the comprehension of the development of human nature. He asserts that this will result in determining the motive behind the modern community as he views the community as the cause of the disrupted state of nature.[76]

1.5.2 The theory of liberal politics

The liberal politics theory is comparable to the natural rights theory in that it does not support the notion of absolute monarchy. The theory of liberal politics supported the concept that all humans are equal, free and possess individual rights. According

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72 Berényi *Addressing the anomaly* 43.
73 Locke T *The Second Treatise of Civil Government* (Awnsham Churchill, England 1689).
74 Berényi *Addressing the anomaly* 43.
75 See Rousseau J *Discourse on the Origin and Foundations of Inequality Among Men* (The Bedford Series in History and Culture 1755).
76 Berényi *Addressing the anomaly* 44.

to John Gray,[77] the essence of liberal politics is based on '. . . *individualism, universalism and egalitarianism*'.[78] His view is that individualism concerns men being self-reliant and reaching their full potential. He asserts that the concept of universalism is based on the notion that everyone has basic needs that can be satisfied by having freedom related to relationships with others and freedom of movement. According to him, egalitarianism is a principle where everyone must be treated equal. This means that everyone has equal rights and prospects without any form of discrimination.[79]

The principles, such as equality and non-discrimination, underlying this theory do not support denationalisation. Denationalisation supports discrimination on the basis of national origin and can also lead to statelessness.[80] This thesis acknowledges that, the liberal theory has been criticised by some theorists on the basis that the act of banishing citizens existed in our history.[81] However, it is argued that this does not justify the actions of a state because banishing a person violates a lot of rights.

This thesis argues that, currently as statelessness remains a human right issue, the investigation of policies and practices that exclude stateless people and exclusion resulting from the increase in global migration, lays as a foundation to include finding solutions for statelessness from the standpoint of the liberal political theory.[82]

In light of the above background on theories that support equality and equal rights for everyone, this thesis suggests that the same philosophy and principles applied in the theories above should apply in the current issue of statelessness. The theories discussed have showcased a theoretical framework that observes and supports similar notions as the Statelessness Conventions discussed in this thesis. The Statelessness Conventions seek to protect stateless persons and promote the

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77 Gray J *Liberalism* (Open University Press 1986) 9.

78 Berényi *Addressing the anomaly* 44.

79 Ibid.

80 Anttila M W *The Ethics of Denationalization: An argumentative analysis of the removal of citizenships in liberal democratic states* (Human rights Bachelor Malmö University 2010) 34. See also Gibney M J "Should citizenship be conditional? The Ethics of Denationalization" 2013 *The Journal of Politics* 75(3)646-658, 651-2.

81 Anttila M W *The Ethics of Denationalization: An argumentative analysis of the removal of citizenships in liberal democratic states* (Human rights Bachelor Malmö University 2010) 37.

82 Bloom T, Tonkiss K and Cole P *Understanding Statelessness* (Taylor and Francis Group 2017) 5.

exercise of basic human rights without any form of discrimination. This thesis argues that stateless persons should be treated equally as other people. This gains support from the theories discussed above. The mere fact that stateless persons are human and as a result of their human nature means that they possess rights such as the right to life, freedom and equality etc. As the natural rights theory suggests, these rights are absolute and the government cannot deny the access to these rights on the basis of being undocumented or being stateless. Permitting statelessness to endure "not only represents a troubling exclusion from rights and development for the individuals concerned but also, if not properly addressed, undermines the project of liberal political theory itself".[83] It is, therefore, concluded that stateless persons must exercise all basic rights provided for in the UDHR, international and domestic laws and such rights include the right to nationality.

1.6 Contribution of new knowledge

There is a growing scholarly debate on statelessness. This research seeks to do a comparative analysis on three jurisdictions: South Africa which will be compared to Kenya and Myanmar without specifically looking at statelessness of a certain group of people but statelessness in general.

In most circumstances where statelessness is involved, stateless people need assistance to process their applications at the DHA through non-governmental organisations (NGOs) such as Lawyers for Human Rights (LHR) and they usually do so through litigation. Litigation is an expensive procedure especially in this instance and it takes a long time. The other factor is that litigation usually only helps the litigant in most cases and not the rest of the other people. Furthermore, it is on circumstantial basis which hardly assists the other people who are stateless.

In cases where one cannot approach the courts, this means that chances of getting remedies are slim as there are gaps in our laws in terms of giving nationality to those that are stateless or on the verge of being stateless. For those that do manage to go to court, the discretion is with the court and without legislation that provides for

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[83] Bloom T, Tonkiss K and Cole P *Understanding Statelessness* (Taylor and Francis Group 2017) 5.

how one can be identified as stateless and the process thereafter of making them non-stateless, these individuals remain without rights.

In addition to seeking legislation and guidelines on how to identify stateless people and the application process to follow to be granted nationality, it will further be suggested that with such processes in place it will be easy for stateless persons to evoke their section 33 right. This would include invoking the principle of legality in cases where there is a delay in the process or the Minister of Home Affairs gives irrational decisions, for instance when a judgment has been granted against the Minister and they delay in taking action.

In the event that there are procedures and guidelines in place but somehow irrational decisions are taken by those granted with the power to make decisions, such should be considered as an empowering provision for stateless persons. However, currently this is problematic to get since the only option(s) they have is through litigation which is often not guaranteed to all. Therefore, an argument will then be that these proposed procedures and guidelines will allow for an empowering provision to be created to assist stateless people apart from the litigation route. This allows for individuals to be able to make the application themselves before litigation. In the event that this is done properly, there will be no need for litigation or for NGOs to embark on strategic litigation.

1.7 Methodology

This thesis will take the form of desktop, library research and empirical research. The empirical method is generally used in law and it is when assumptions are tested with the use of direct or indirect observation. This thesis will be based on materials such as the Constitution of South Africa, selected pieces of South African, Kenyan and Myanmar legislation, selected international conventions, case law, textbooks, journal articles and internet sources. These materials provide the current law, views and opinions of other people on statelessness. These opinions critically analyse the manner in which the laws of South Africa handle statelessness as a crisis and provide solutions and recommendations which will also assist in the formation of jurisprudence. Further, case law and jurisprudence is being developed on a day to

day basis and these assist in developing and strengthening the law relating to statelessness.

The comparative analysis from two other jurisdictions that will be included in the thesis will assist in finding better practices that could assist South Africa on the crisis. In cases where no exact legislation is applicable to certain issues with regards to statelessness, contributions from journals, case law development, academic opinion, NGOs submissions and lobbying will contribute to persuading the Legislature to enact legislation that applies to the issue at hand. This could be done through policies as they can lead to more developed laws, rules and legislation.

While taking the above into consideration, it is very crucial to have a critical analysis of whether South Africa is in compliance with international laws that provide for protection of people who are stateless. Such an analysis cannot be isolated from the provisions of the Constitution of South Africa which provides 'all people' with fundamental human rights. Therefore, due regard to the provisions of the Bill of Rights[84] would be considered. International law as part of the rules recognised by different nations including South Africa will be key to this analysis.

1.8 Chapter Outline

Chapter 1: Introduction

The aim of this chapter is to provide the framework for the thesis. It sets out the problem statement, the research aims, the motivation and rationale, the hypothesis, the research methodology, including limitations as well as the chapter overviews of the thesis.

Chapter 2: Literature review

This chapter provides a brief background on statelessness and its current status. The analytical study with regards to statelessness being an issue that should be considered a human right concern is critically discussed. Further analysis will include an insight into the different doctrines on whether statelessness is an issue that has received full attention by states as a human rights issue, a comparison to

[84] The Constitution with specific reference to Chapter 2.

the manner in which the crisis is dealt with in different states as well as the manner in which statelessness is dealt with in a multidisciplinary way.

Chapter 3: The international legal framework

In this chapter, the prevention and protection against statelessness is analysed. This is done by analysing case law and laws that have dealt with the matter internationally and at a regional level including the remedies that are available to individuals who are stateless as well as the enforcement thereof.

Chapter 4: A comparative legal study of the nationality legal framework of South Africa, Kenya and Myanmar

The aim of this chapter is to do a comparative analysis on the rights that stateless people have in the selected jurisdictions. This chapter includes the legal framework that exists in the selected countries and the manner in which they protect stateless individuals and prevent the crisis. The analysis includes the remedies that are readily available to cure the situation and whether a gap exists or not.

Chapter 5: The formation of a statelessness determination procedure in South Africa

This chapter assesses the importance of identifying stateless persons and the reasons why there is a need for a determination procedure. This chapter is linked to chapter 3 as the existence of a determination procedure assists in protecting stateless persons and prevent statelessness.

Chapter 6: Conclusion and recommendations

In conclusion, the aims of the research and hypothesis raised in the introduction are discussed in this chapter. A conclusion on whether South Africa is in contravention with the international law dealing with statelessness or not is provided for also, together with what the law provides for and whether or not it is being implemented accordingly. Recommendations such as adoption of legislative amendments and ratifying of international treaties are suggested in order to have effective laws on the issue of statelessness.

Chapter 2 - Literature Review

Practitioners from different regions with experience on the topic of statelessness have gone to lengths to write about statelessness and find solutions that can assist states in reducing the problem. Some of these practitioners include the likes of Raymond Atuguba, Fatima Khan, Elvis Fokala, Lilian Chenwi, Laura van Waas, Paul Weis, Bronwen Manby, Carol Batchelor, Liesl Muller and many more. The work of these practitioners will be discussed in order to emulate and create new ideas and transform the South African legal framework to protect stateless persons.

Literature on statelessness has been, in some cases, incorporated in the international legal framework dealing with non-citizens as a comprehensive group which therefore makes some of the literature to not directly refer to statelessness but may include migrants and refugees.[85] The literature assists as it deals with legal framework that acknowledges and interrogates statelessness as an anomaly. Non-citizenship is an issue linked to refugees, legal and illegal migration in relation to education, health, law enforcement and local politics.

Further, discussions have gone into depth on how stateless people experience discrimination and exploitation leading to submissions on transforming the situation. However, the discussions are more focussed on immigrants and refugees and not statelessness which is a problem as stateless people are a separate group of non-citizens. This demonstrates the need for research and literature on statelessness just as much as refugee and immigrants have been researched. This research will analyse international and regional legal frameworks related to human rights in an attempt to interrogate the South African legal framework in light of its international obligations towards issues of nationality, citizenship and statelessness.

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85 Blitz K "Statelessness, protection and equality" Forced migration Policy Briefing https://www.refworld.org/pdfid/4e5f3d572.pdf 3 (Accessed 13-03-2020), see also Southwick K and Lynch M on behalf of Refugees International "Nationality Rights for All: A Progress Report and Global Survey on Statelessness" https://www.refworld.org/docid/49be193f2.html (Accessed 13-03-2020) and Motimele M *Statelessness: precarity or potentiality?* (Master's thesis University of the Witwatersrand 2015) 6.

2.1 International Legal framework

In terms of the international legal framework, nationality has been addressed in UN reports and HRC resolutions.[86] However, it is common cause that early writings did not discuss statelessness or the consequences that it brought about, let alone accept and acknowledge the impact that statelessness has in the legal fraternity.[87] Issues related to nationality or non-nationality began emerging around the 18th and 19th century. Around 1987, scholars like Zitelmann were of the view that statelessness was non-existent and did not consider it to be a concept that deserved legal recognition.[88] During this period international law acknowledged that nationality could be changed but did not recognise the possibility of statelessness[89] and this might have been due to the fact that states were considered to be the only international law subjects. Therefore, anyone that was not recognised as a national by any state was disregarded under international law.[90]

In 1949 the UN compiled a report on statelessness which identified statelessness as an anomaly, this meant that statelessness was a subject that was important internationally and needed attention.[91] The impact that this document carried is seen from the fact that it was compiled a year following the recognition of the right of nationality when the Universal Declaration of Human Rights (UDHR) was adopted in 1948. Another important fact to consider is that this document came just before the important conventions that cater for nationality and migration issues namely the 1951 Refugee Convention, and the 1954 and 1961 Conventions on Statelessness. Nationality as an issue that warranted attention at an international law level was

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86 UN Ad Hoc Committee on Refugees and Stateless Persons "A Study of Statelessness, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1" available at: https://www.refworld.org/docid/3ae68c2d0.html (Accessed 13-03-2020), UN Human Rights Council "Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 19 December 2011, A/HRC/19/43" available at: https://www.refworld.org/docid/4f181ef92.html (Accessed 13-03-2020) and UN Human Rights Council "Human rights and arbitrary deprivation of nationality: resolution / adopted by the Human Rights Council, 15 July 2016, A/HRC/RES/32/5" available at: https://www.refworld.org/docid/57e3dc204.html (Accessed 13-03-2020).

87 Berényi *Addressing the anomaly* 29.

88 Ibid.

89 Ibid.

90 Ibid.

91 UN Ad Hoc Committee on Refugees and Stateless Persons "A Study of Statelessness, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1" available at: https://www.refworld.org/docid/3ae68c2d0.html (Accessed 13-03-2020).

seen in the work of van Panhuys[92] around 1959 including the work by Weis around 1979 wherein he looked into an international law perspective on lack of nationality.[93]

It is important to look into human rights as they have an impact on stateless people. Questions that arise include; '(i) what rights are stateless individuals entitled to? (ii) who should provide those rights and their protection? and (iii) whether human rights are sufficient as the only rights granted to stateless individuals'.[94] In early 1968, Hersch Lauterpacht understood how statelessness was considered to be an anomaly and suggested the following to be included as part of international human rights:

> Every person shall be entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent. No person shall be deprived of his nationality by way of punishment or deemed to have lost his nationality except concurrently with the acquisition of a new nationality. The right of emigration and expatriation shall not be denied.[95]

Adding to Lauterpacht's thoughts, Guy Goodwin-Gill was one of the scholars who was of the view that the protection and needs of stateless persons should be given priority by the international community.[96] In Goodwin-Gill's view, statelessness needed to be a human rights issue considering that many took it as a technical problem. International human rights law has been vastly progressing and this has caused for the right to nationality to be encompassed in many international human rights instruments.

It is the view of those in practice that any right that finds its regulation within the international level is mostly regarded meaningless in practice. The reason behind this is that the regulation of statelessness in the international instruments is through the interests of the states involved. This has left the wording of such instruments

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92 Berényi *Addressing the anomaly* 30, see also van Panhuys H F *The role of nationality in international law: An Outline* (A. W. Sythoff 1959).

93 Weis P *Nationality and Statelessness in International Law* (Sijthoff and Noordhoff 1979).

94 Motimele *Statelessness* 7.

95 Lauterpacht H *International Law and Human Rights* (Archon Books 1968) 346.

96 Goodwin-Gill G S "The Rights of Refugees and Stateless Persons" in Saksena K P (ed) *Human Rights Perspective and Challenges (in 1990 and Beyond)* (Lancers Books 1994).

vague and permitting states' domestic regulation in accordance to their will.[97] The findings of Goodwin-Gill[98] were challenged by Lambert and Foster in 2016[99] and it is in this contribution that it was seen that Goodwin-Gill's suggestions are still relevant. Other scholars[100] argue that the judiciary plays an important role in eradicating statelessness in other continents, therefore, strategic litigation should be considered as an important element in the fight to end statelessness. This is the same situation that can be seen in South Africa considering the many cases involving stateless persons that have been taken to court.[101]

Human rights are a very important element in this thesis considering the fact that stateless persons are considered to have no rights under the operation of law of any state. Therefore, because the right to nationality is provided for in many instruments, it means that being rendered stateless is a violation of international and domestic law. This research will argue that stateless persons have no rights as asserted by Arendt.[102]

The fact that there are rights that are universal and are inalienable would, according to others,[103] contradict the argument that there are individuals that do not have rights when there is an international legal framework that provides all people with minimum human rights. While this is the case, arguments will be made that for one to enjoy the rights provided for, the extent of protection depends on the capabilities of the providing institution.[104] The increase in human rights violations globally indicates that the UN has flaws that need to be addressed considering that it is the agency assigned to protect the rights of people. In this case it means it is failing to protect

97 Ganczer M *"The right to a nationality as a human right"* http://real.mtak.hu/24919/1/9789462365032_hfdst02.pdf (Accessed 14-03-2020).

98 Goodwin-Gill *The Rights of Refugees* 1994.

99 Foster M and Lambert H "Statelessness as a Human Rights Issue: A Concept Whose Time Has Come" 2016 *International Journal of Refugee Law* 564–584.

100 Weiss A "Thoughts on Strategic Litigation: Can EU law prevent and reduce Roma statelessness in Europe?" https://www.statelessness.eu/blog/thoughts-strategic-litigation-can-eu-law-prevent-and-reduce-roma-statelessness-europe (Accessed 14-03-2020).

101 *Yamikani Chisuse and Others v Director-General: Department of Home Affairs and Another* [2020] ZACC 20, *Minister of Home Affairs v Ali* [2018] ZASCA 169; 2019 (2) SA 396 (SCA) and *Ruta v Minister of Home Affairs* [2018] ZACC 52 etc.

102 Arendt H *The Origins of Totalitarianism* (Harcourt, Brace, Jovanovich 1973).

103 Motimele *Statelessness* 7.

104 Ibid.

the rights of stateless people where states intentionally refuse to grant certain groups or individuals citizenship.[105]

According to Bentham, the only rights that provide stateless people with protection are substantive rights. Other rights such as natural and human rights are 'imprescriptible natural rights' or 'rhetorical nonsense.'[106] Therefore, the research will look into rights that stateless persons can enjoy, which are legislated, protected and can be defended. While discussions on statelessness and rights developed, related deliberations on nationality and its relations to state sovereignty were also emerging. The concept of sovereignty as defined in chapter 1 refers to 'a manifestation of the exclusive, supreme and inalienable legal authority of states to exercise power within the area of governance . . . and [it] permits a state to possess and exercise legislative executive and judicial powers over subjects within its territory'.[107] According to scholars like Arendt, human rights were solely ensured by nation states and the position started changing through transnationalism and globalisation.[108] An argument is made by Ziemele that despite states having sovereign powers on whether or not to grant nationality, states' international obligations in a way limit this power. This also applies to the enforcement of the states' obligation to curb statelessness.[109] Adding to this line of thought, Parra is of the view that state sovereignty does not take precedence over nationality as its role is limited currently and in order for statelessness to be reduced and curbed, there is a need for the two to be merged. This limitation on state sovereignty goes into the manner in which the nationality legislation is formed based on international law.[110]

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105 Motimele *Statelessness* 7.

106 Bentham J "The great divide: Citizenship and statelessness" https://www.iep.utm.edu/bentham/ (Accessed 14-03-2020).

107 Dube A "Of neighbours and shared upper airspaces: the role of South Africa in the management of the upper airspaces of the Kingdoms of Lesotho and Swaziland" 2015 *CILSA* 219-253 224.

108 Arendt *The Origins of Totalitarianism* (New York: Harcourt Brace and Jovanovich 1973/8).

109 Berényi *Addressing the anomaly* 30, see also Ziemele I *State Continuity and Nationality: The Baltic States and Russia: Past Present and Future as Defined by International Law* (Martinus Nijhoff) 283.

110 Parra J "Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness" 2011 *Fordham International Law Journal* 1666-1694.

2.2 Regional Legal framework

Statelessness increases on a day to day basis and this has led to a growing need for literature on the subject at a regional level. Scholarly research is focused on finding solutions on identification of statelessness on a global level and how reduction can be achieved through international law. There is a need for the relationship of rights and citizenship to be discussed in order to understand the experience of stateless persons.[111] One becomes stateless due to loss of citizenship or because one was never bestowed upon them. Scholarly research has scrutinised why individuals have been left stateless due to their citizenship being revoked, consequences thereof of having one's citizenship stripped off and issues that arise through the conflict of domestic nationality laws. In relation to Southern Africa, loss of citizenship is researched by Manby.[112]

The leading research on statelessness has been compiled mostly by legal practitioners and human rights activists who work with individuals who are stateless. They campaign against stateless people being unable to exercise their rights and they seek mechanisms which are available to assist the stateless persons. LHR in South Africa often conducts studies[113] directed at seeing how African countries' legal systems include statelessness as an issue that needs attention. Further, LHR also makes recommendations which they keep developing on the transformation of the legal systems in light of the obligations the countries have.

Nonetheless, when we consider the number of landmark judgments[114] delivered by regional human rights courts on the subject of statelessness, particularly concerning

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111 Motimele *Statelessness* 8.

112 Manby B *"Statelessness in Southern Africa"* https://www.refworld.org/pdfid/50c1f9562.pdf (Accessed 14-03-2020).

113 LHR "Statelessness and Nationality in South Africa" https://www.lhr.org.za/publications/statelessness-and-nationality-south-africa (Accessed 16-03-2020).

114 *Anudo Ochieng Anudo v United Republic of Tanzania Application* No. 012/2015 Judgment 22 March, 2018, the first by the African Court on Human and Peoples' Rights and we should also consider what the other regions have said in cases regarding nationality in cases such as Case of *Hoti v Croatia* (Application no. 63311/14) , ECLI:CE:ECHR:2018:0426JUD006331114 , Council of Europe: European Court of Human Rights, 26 April 2018, available at: https://www.refworld.org/cases,ECHR,5ae1b4e94.html (Accessed 28-07-2019), *Ramadan v Malta*, Application no. 76136/12, Council of Europe: European Court of Human Rights, 21 June 2016, available at: https://www.refworld.org/cases,ECHR,57ff5080ae3.html (Accessed 28-07-2019)

arbitrary deprivation of nationality, resolutions by and reports to the UN Human Rights Council (UNHRC), and renewed international and institutional attention, one can conclude that statelessness as a human rights issue is indeed a concept whose time has come[115] and should be coherently interrogated at a regional level by all states.

In 2012 the UNHRC implemented guidelines[116] on statelessness which dealt with statelessness determination and in 2014[117] they published a handbook with guidelines on protecting stateless persons. The handbook was a legal interpretative guideline to the governments, civil society, the judiciary, legal practitioners, and UN staff which provided for how stateless persons can be identified. Some scholars argue for the implementation of determination procedures at the national level to be regionally coherent as this would have a great impact on the efforts made by states.[118] Radnai is of the view that improved stateless identification procedures assist in exercising diligence in matters relating to nationality laws and granting of citizenship to children/people on the verge of becoming stateless.[119]

2.3 National legal framework

Arendt argues that stateless individuals do not have rights.[120] This literature evinces the view that the current political systems have rendered stateless persons non-existent. This is because the system or the state does not guarantee stateless individuals with substantive rights and it further identifies them as not worthy to form part of the society.[121] The argument by Arendt that stateless people lack the right to

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115 Foster and Lambert 2016 *IJRL* 564–584, see also Khan F "Exploring Childhood Statelessness in South Africa" 2020 *PER/PELJ* 4, 1-36 23.

116 Three guidelines were issued by the UNHCR in 2012: (1) on the Definition of a Stateless Person, (2) on Statelessness legal guidance for governments, civil society, the judiciary, legal practitioners, and UN staff, and (3) on the Status of Stateless Persons. These guidelines were intended to provide interpretative guidance to State Parties.

117 UN High Commissioner for Refugees (UNHCR) "Handbook on Protection of Stateless Persons, 30 June 2014" available at: https://www.refworld.org/docid/53b676aa4.html (Accessed 14-03-2020).

118 Radnai N "Statelessness determination in Europe: towards the implementation of regionally harmonised national statelessness determination procedures" https://files.institutesi.org/WP2017_08.pdf (Accessed 14-03-2020).

119 Radnai N "Harmonising standards on statelessness determination in Europe" https://www.statelessness.eu/blog/harmonising-standards-statelessness-determination-europe (Accessed 14-03-2020).

120 Arendt H *Totalitarianism*.

121 Motimele *Statelessness* 8.

have rights is essential as it showcases how much they are deprived and the true consequences of being stateless in a state. According to Agamben,[122] statelessness is a state of deep precarity that one cannot abscond from. This argument is critiquing human rights and articulates Arendt's view further. Citizenship is a subject that has become the centre of discussion of policy experts, scholars, politicians and even in our courts through cases. This is seen whenever there is a debate of an increase of illegal immigrants in a state and the relation this has with the inconsistency of how minority rights are applied.[123]

In light of the above, consideration should be taken on whether, stateless persons legally have rights, and whether they actually can substantively enjoy the said rights. In order to see whether one is substantially enjoying their rights, we need to know whether they have recourse in the instance that their rights have been infringed.[124] Unpacking citizenship, nationality and statelessness requires interrogation of state sovereignty. Citizens have rights that are bestowed upon them because of the relationship between them and the state. Further, based on the relationship with the state, individuals have duties that are imposed upon them as a result of the rights bestowed upon them. Stateless persons have not been granted citizenship by states and remain in an indeterminate state, this is why the issue should be researched and be interrogated.[125].

According to Kymlicka and Norman, the relationship between an individual being entitled to rights and the community is important when discussing citizenship. Therefore, because stateless persons lack attachment to the community. It creates a crucial bearing on not only stateless persons being entitled to socio-economic, political and civil rights 'but also their interconnection and assimilation into the communities in which they find themselves'.[126]

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122 Motimele *Statelessness* 8, see also Agamben G *State of exception* (The University of Chicago Press 2005) and Agamben G "*We Refugees*" https://thehubedu-production.s3.amazonaws.com/uploads/1836/1e788430-c11e-4036-8251-5406847cd504/AgambenWeRefugees.pdf (Accessed 14-03-2020).

123 Ibid.

124 Motimele *Statelessness* 6.

125 Ibid.

126 Kymlicka W and Norman W "Return of the Citizen" http://people.brandeis.edu/~teuber/will_kymlicka.pdf 353 (Accessed 14-03-2020).

According to international organisations and treaties, from a legal and policy view, nationality is not about classification or ethnicity but it is about citizenship as a legal status.[127] It is said that globalisation affects the relationship that an individual has with a state. This is because one can have different identities and allegiances around the globe weakening the sole relationship with either state according to other authors. Shanahan[128] argues that individual identity is no longer the sole system of how relationships should be between a state and an individual.[129] In addition to that Ford and Glenn[130] suggest that migration, race, gender and culture are global factors that produce other allegiances and identities over those created by the state.[131]

In light of domestic literature on who belongs and citizenship the question that is raised is how the state determines who becomes a citizen and whether it should solely do so. This question assists in understanding that being guaranteed the citizenship status means being granted rights.[132] The reason why there is a need for globalisation and human rights to be studied is because this allows for the State's traditional control over granting citizenship to be changed for the better.[133]

Further, a question on what defines persons who are said to belong always arises. As discussed by Belton, anyone who is protected in a closed community (guarded borders, strict requirements for membership) is a citizen. On the other hand, other scholars argue that there should be open borders or membership requirements that

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127 Rubenstein K Adler D work on "International Citizenship" *Indiana Journal of Global Legal Studies* 519-548 521.

128 Belton K *The great divide: Citizenship and statelessness* (Master's Thesis University of Central Florida 2005) 1, see also Shanahan S "Scripted Debates: Twentieth-Century Immigration and Citizenship Policy in Great Britain, Ireland, and the United States." in Hanagan M and Tilly C *Extending citizenship, reconfiguring states* (Lanham, Md: Rowman and Littlefield Publishers 1999) 83 as discussed by Belton.

129 Ibid 23, 'It is important to note that such identities have probably never been under the sole control and consideration of States. Religion, sexuality and sub-State group identities (such as being a unionist or environmentalist) are not necessarily under the direct purview of the State'.

130 Belton *The great divide* 17.

131 Ibid 17, see also Glenn E "Citizenship and Inequality: Historical and Global Perspectives" 2000 *Social Problems* 1-20 10.

132 Belton *The great divide* 13 and 107, 'That is, the establishment of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority'.

133 Ibid12.

are not very strict. [134] This has led to many supporting the idea of closed ethnic communities who fight for the right to 'self-determination'. Other scholars oppose this notion and are of the view that the link of ethnicity to citizenship leads to issues such as xenophobia and conflicts between groups. Faulks and Wiener favour citizenship to be granted without looking into ethnicity.[135]

When social rights are granted to non-citizens it becomes 'an economic good' according to Antonín Wagner.[136] This argument has been criticised by other scholars and has also led to the creation of policy and writings on the rights of those that are within a community but without the status of citizenship. Scholars such as Etienne Tassin advocate for foreigners to be part of a political community and be allowed to participate in local elections and that such rights should not be based on birth or descent.[137] Further, the assertions highlight the importance of the role that can be played by stateless persons in political systems that exclude them. When it comes to globalisation, other authors believe that for one to belong it should not be entirely upon the state as other factors such as multiple identities, associations and allegiances are involved.[138] Therefore, it is argued that whenever citizenship status is involved, it should reflect these new realities.

According to Manley Hudson and Joseph Carens, effective connections such as residence, work and family connection should be the basis of granting citizenship. This opposes the granting of citizenship based on place of birth *(jus soli)* or citizenship based on descent *(jus sanguins)*.[139] According to Hudson and Carens, people's citizenship should be granted by the state in accordance to the place they

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134 Belton *The great divide* 15, 'The "Protection Surge Capacity Project," also known as the "Surge Project," is an agreement between the UNHCR and the International Rescue Committee to provide "crucial staff support to UNHCR during crises requiring protection services" (International Rescue Committee). These protective services are extended to refugees, internally displaced persons and the stateless'.

135 Belton *The great divide* 101, see also Lynch's testimony to the Congressional Human Rights Caucus in "Statelessness: A Forgotten Human Rights Crisis"; the European Commission and the UNHCR's report "Strengthening Asylum in Ukraine" and the UNHCR Executive Committee's 2005 Progress Report 7 as discussed in Belton *The great divide* 15.

136 Wagner A. "Redefining Citizenship for the 21st Century: From the National Welfare State to the UN Global Compact." 2004 *International Journal of Social Welfare* 278-286 280.

137 Belton *The great divide* 16, see also Angus S "Two Conceptions of Citizenship" 1995 *British Journal of Sociology* 63-78 75.

138 Ibid 12.

139 Carens J "Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States." 1987 *The University of Toronto Law Journal* 413-43, see also ibid 16.

have strongest ties.[140] This means that according to these two authors, ethnicity and *jus soli* do not suffice and factual criteria take precedent.[141]

2.3.1 Human rights and the citizenship rights within a state

It is common cause that anything that happens in a state is no longer confined within that state. Everything is broadcasted worldwide within a short space of time and this includes human rights violations. A lot of literature has conceded that through the development of international human rights law 'nationality is today perceived as involving the jurisdiction of the state as well as human rights issues'.[142]

In 1966 the link between an individual having citizenship status and being able, through that status to exercise other rights, was argued by Arendt. According to Arendt, people who were displaced because of conflict and later lost their citizenship did not only lose their national rights but she asserted that '. . . the loss of national rights in all instances entail the loss of human rights, the restoration of human rights. . . has been achieved so far only through the restoration or the establishment of national rights'.[143]

According to Zorn human rights and citizenship rights are linked.[144] This assertion is also supported by Chief Justice Earl Warren in a report where he said 'citizenship is a fundamental building block to other human rights—it is "the right to have rights"'.[145] However, not everyone is of the view that citizenship is a human right that everyone should automatically be entitled to. According to Clark Hanjian, the right to citizenship should be granted by the state with the consent of the individual concerned instead of the state imposing on the individual. He further argues that when citizenship is conferred upon an individual without consent, such is a violation

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140 Belton *The great divide* 16, 'Hudson refers to this form of citizenship acquisition as *jus connectionis* . . . while Carens terms it "ascriptive citizenship"'.

141 Ibid 16, 'While agreeing with the importance of taking into consideration where people's ties are strongest with regard to residence and work in bestowing citizenship, the caveat must be made that if an individual would otherwise be stateless, such effective ties and ascriptive characteristics should be set aside until the time when the individual is able to acquire the citizenship where she has such ties'.

142 Batchelor C "Statelessness and the Problem of Resolving Nationality Status" 1998 *International journal of refugee law* 156-183 167.

143 Arendt H *Totalitarianism* 299.

144 Zorn J "*The Politics of Exclusion Citizenship, Human Rights and the Erased in Slovenia*" http://www2.filg.uj.edu.pl/~wwwip/postjugo/files/166/05-Zorn.identy.pdf 1 (Accessed 15-03-2020).

145 Belton *The great divide* 20 citing the Chief Justice.

of freedom of association, self-determination and freedom of movement, thought and conscience.[146] Other scholars argue that universal human rights do not exist because there are different notions culturally of the rights.[147] On the other hand Hanjian argues that human rights are broadly accepted and are absolute.[148] Arendt is of the view that these rights that are considered to be absolute cannot be separated from the state because 'it turned out that the moment human beings lacked their own government and had to fall back upon the minimum rights, no authority was left to protect them and no institution was willing to guarantee them'.[149] According to other scholarly literature, it does not matter whether citizenship rights are the same or linked to human rights, the fact of the matter is that state protection of these rights is needed until there is another entity available to carry that duty.[150]

2.4 The enforcement of the laws dealing with statelessness

It is understood that there is a variation in the rights of people with nationality and those without, such is allowed in terms of international law, however, states must not forget the obligation placed upon them to guarantee everyone within their jurisdictions with rights. Everyone in this instance, being inclusive of stateless individuals. Authorities involved with people who are stateless should be trained on the issue and the consequences it brings about. This training is a way to ensure enforcement and respect of the rights of the stateless people. Dialogues should occur between the stateless persons and the government for discussions on issues faced by the stateless in the states. The UN and its agencies should also ensure that their policies recognise stateless persons without being excluded based on being foreigners.[151]

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146 Hanjian C *The Sovrien: An Exploration of the Right to Be Stateless* 58-9 (Polyspire 2003).

147 Belton *The great divide* 20.

148 Hanjian *The Sovrien* 148-9.

149 Arendt *Totalitarianism* 291-2.

150 Belton *The great divide* 23, '[i]t should be noted that the State does not always protect the rights of its citizens. As Hanjian points out, "even within the allegedly safe confines of the citizen-state relationship, human rights violations of all proportions still happen with regularity. Citizenship provides no reliable guarantee that one's human rights will be protected" (151)'.

151 United Nations Guidance Note of the Secretary General "The United Nations and Statelessness" https://www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20SecretaryGeneral%20on%20the%20United%20Nations%20and%20Statelessness.pdf. 13 (Accessed 16-10-2019).

There are agencies[152] that focus on the gap in legal instruments that deal with stateless persons globally and seek to assist in finding solutions that bring states into reforming their laws to be better equipped in protecting both nationals and non-nationals. These agencies are conscious of the rights that stateless people are deprived of and are willing to assist by pressurising defaulting state systems to legally reform their citizenship laws.[153]

The international legal framework is dedicated to implement human rights for all and this has encouraged activists to seek knowledge and ways in which statelessness can be reduced. The more statelessness is given attention as an anomaly, the more it will be interrogated as an international law issue with more viable solutions created.

The rule of law is considered by the UN Secretary General as 'a principle of governance in which all persons, institutions and entities, public or private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards'.[154] Therefore, every state that has ratified treaties and conventions that provide for every individual to be granted with a nationality and does not provide same in its national laws means it is not upholding the rule of law. This means the state should be held accountable for being inconsistent with international standards and human rights violations, as statelessness violates every right for those suffering from it.

States can end statelessness by initiating vigorous legislative reform and monitoring. This also means that any state that is not party to international conventions dealing with the issue should become party to such. Laws also need to be enforced and this can only be done if there is enough budget for enforcement

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152 The United Nations High Commission for Refugees (UNHCR), UN General Assembly and the Office of the High Commissioner for Human Rights (OHCHR) etc.

153 See Atuguba R A, Tuokuu F X D and Gbang V "Statelessness in West Africa: An Assessment of Stateless Populations and Legal, Policy, and Administrative Frameworks in Ghana" 2020 *Journal on Migration and Human Security* 1-18 2, see also the whole article in general in terms of of administrative frameworks.

154 Report of the Secretary General "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" https://www.un.org/ruleoflaw/files/2004%20report.pdf (Accessed 13-04-2019).

programs and structures. This means that Parliaments should be able to hold governments accountable wherein they find that there is no progress in the initiatives taken to prevent statelessness. Further, political willingness should exist to combat the problem and Parliaments should make sure that it remains a political agenda.[155] Dissemination of information on the topic is important in that when everyone is well versed with the issue, it is easier for the laws to be more effective.[156] In the case of South African laws, there are no accountability checks and balances towards the government due to lack of legislation or regulations that are specifically in place for statelessness.[157] The existing sections have gaps and need to be amended; such gaps in the law make it difficult to enforce accountability.[158]

Statelessness in other states has been solved through amendment of rules dealing with acquisition of nationality in order to grant nationality to the stateless. This is done through meeting specific objectives with regard to them being linked to the country in question and mostly by birth. This is one of the successful ways in which statelessness is resolved. Procedure is equally important in that, documents as proof of nationality are made available. The aim should be to prevent new cases of statelessness while dealing with the existing ones. In terms of the Good Practices Paper Action 1 campaign to end statelessness in 10 years, it has been noted that states use non-automatic acquisition procedures such as acquiring nationality upon application and the granting of such remains in the discretion of the state. The effectiveness of such methods is low as individuals face problems such as lack of information on their right to apply and physical accessibility based on poverty. This makes it impossible for a number of stateless individuals to gain from these procedures.[159]

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155 Chungong M "The Role of Parliaments in Preventing and Ending Statelessness" http://archive.ipu.org/splz-e/captown15/mch.pdf (Accessed 20-04-2019).

156 Ibid. Chungong M http://archive.ipu.org/splz-e/captown15/mch.pdf (Accessed 20-04-2019).

157 Lawyers for Human Rights http://citizenshiprightsafrica.org/wp-content/uploads/2016/05/LHR_PractitionersGuide-Statelessness_2014.pdf 30-1 (Accessed 16-10-2019).

158 Ibid.

159 UNHCR The UN Refugee Agency "Resolving existing Major Situations of Statelessness" (Good Practices Paper, Action 1) https://www.refworld.org/pdfid/54e75a244.pdf 1-2 (Accessed 13-04-2019).

States that are party to conventions dealing with statelessness should assist in making stateless people naturalised citizens. This can be done by means of expedited procedures, fees that are low and minimising the requirements such as residence for instance. In some instances, states are willing to take part in ending statelessness, however, they do not have resources to do as such. The UNHCR should be of assistance together with the authorities of the state, civil society and other organisations that are in partnership with the UN. The assistance can be:

> filling capacity gaps in administrative procedures, raising awareness through public information campaigns, providing legal advice to stateless individuals and guidance on how to access procedures, supporting community outreach and mobile teams to ensure that stateless persons have access to nationality procedures and documents, strengthening integration efforts, national-reconciliation activities and confidence-building initiatives.[160]

Statelessness can also be resolved by means of sustained community-based advocacy, a successful litigation strategy and lobbying for the implementation of court decisions. International communities can assist by way of applying pressure to non-complying states to support the cause of curbing statelessness. There is a need to uphold the rule of law through court judgments and an existence of favourable political environment (political will). Such helps with the implementation of the decisions made by courts.[161]

2.4.1 Statelessness Determination Procedures (SDPs)

Statelessness has two distinctions that have been considered through literature. There is *de facto* and *de jure* stateless persons. According to Weis *de facto* statelessness refers to persons who lack documentations or other proof towards their relation with a state. *De jure* is when citizenship was never granted to an individual.[162] Despite the fact that both *de jure* and *de facto* stateless persons are likely to have the same experiences, the distinction is important considering the fact that the 1954 Convention on Statelessness focuses only on *de jure* stateless persons. Another important factor to note is that the distinction is needed when it

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160 UNHCR The UN Refugee Agency https://www.refworld.org/pdfid/54e75a244.pdf 2 (Accessed13-04-2019).

161 Ibid 9.

162 Weis *Nationality and Statelessness* 184.

comes to identification procedures for both dimensions as they may differ as argued by other scholars like Manly.[163] When it comes to SDPs, there are different ways in which they can be established based on available comparative research. Further, administrative and judicial actors are part of the decision-making processes related to these procedures.[164]

The UNHCR has provided the following approach to seek reduction of statelessness[165]

> The first involves changing the law and/or policy defining who belongs in the body of citizens. In a number of situations around the world, additional or amended criteria have been introduced in nationality laws to recognise specific categories of individuals as nationals based on strong links to the state such as residence or birth in the territory. States in Europe have tended to adopt a second approach which is facilitated naturalisation for stateless persons. This particularly suited to address the situation of individuals but has in a number of instances been applied on a mass scale.[166]

Turning to SDPs and looking into populations that are 'generally people who have been stateless for decades or generations' and are referred to by other writers as *in situ*.[167] In this research, stateless *in situ* is also considered to be the same as *de facto* considering the fact that they both have elements of being stateless for decades and in the only country they know.[168] Manly explores the question of whether the case of stateless *in situ* persons should be identified through stateless

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163 Manly M "UNHCR's Mandate and activities to address statelessness in Europe" 2012 *European Journal of Migration and Law* 261-277 267-9.

164 UN High Commissioner for Refugees (UNHCR), *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation*, October 2003, available at: https://www.refworld.org/docid/415c3cfb4.html 31 (Accessed 15-03-2020), see also Berényi *Addressing the anomaly* 35.

165 Vlieks C *A Study of the Concepts Statelessness in situ and statelessness in the migratory context in Europe* (Master's Thesis Tilburg Law School 2014) 16.

166 Manly M "UNHCR's Mandate and activities to address statelessness in Europe" 2012 *European Journal of Migration and Law* 261-277 273.

167 Manly M "UNHCR's Mandate and activities to address statelessness in Europe" 2012 European Journal of Migration and Law 261-277 273.

168 See also The Equal Rights Trust "Chapter 2: Critiquing the categorisation of the Stateless" https://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf (Accessed on 10-05-2022).

determination procedures to be granted a status. His answer to this question is 'no' and quotes the following:

> For these groups, determination procedures for the purposes of obtaining status as stateless persons are not appropriate because of their long-established ties to these countries. Based on existing international standards and [s]tate practice in the area of reduction of statelessness, such ties include long-term habitual residence or residence at the time of [s]tate succession. Depending on the circumstances of the populations under consideration, [s]tates might be advised to understand targeted nationality campaigns or nationality verifications efforts rather than statelessness determination procedures.[169]

Therefore, this means that SDPs, according to Ivan Kochovski, will be mostly applicable to what he refers to as statelessness in the migratory, which in this research will also include *de jure* and is regarded by Kochovski as falling within the asylum and immigration procedures.[170] Further, '[n]ationality verification efforts, on the other hand, are used with regards to domestic or *in-situ* stateless populations, i.e. persons that are stateless in their own country'.[171] The research seeks to find a common ground between the two in terms of both groups being able to be identified and be verified in order for them to have an effective nationality. This is important especially in the circumstances where a country such as South Africa does not have SDPs and legislation with provisions for access to nationality or issuance of identity documents to stateless people.

According to Bianchini there is ambiguity in terms of states implementing the identification procedures as there are no specific elements to be considered when

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169 UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02" available at: https://www.refworld.org/docid/4f7dafb52.html (Accessed 15-03-2020) paragraph 6.

170 Note that refugees may either be *de facto* or *de jure* (in this research all *de jure* persons are also considered to be stateless in migratory) but all *de facto* (in this research they are also considered as *in situ*) persons are not refugees. See also The Equal Rights Trust "Chapter 2: Critiquing the categorisation of the Stateless" https://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf (Accessed on 10-05-2022) 52-53.

171 Kochovski I *Statelessness and Discriminatory Nationality Laws: The case of the Roma I Bosnia and Serbia* (Master's Thesis Tilburg Law School 2013) 23.

looking into what the SDPs should include.[172] This makes it difficult for the exchange of good practices when it comes to matters relating to SDPs. Another stimulating issue related to statelessness is dual nationality as it happens when a person seeks another nationality while in most circumstances laws provide for automatic loss of the nationality right that was previously being exercised in such a situation. Ganczer argues that when a person requests for another nationality this should not be construed as loss of nationality on his accord and the principle of effectiveness should not be used as a defence by the state when they revoke nationality of these people.[173]

2.5 Statelessness in foreign jurisdictions - a comparative analysis (Myanmar and Kenya)

2.5.1 Myanmar

The Constitutions[174] before the existing Constitution[175] in Myanmar provided citizenship to the Rohingya people though they were identified as a minority group. Their status changed from being considered as neither minority nor non-citizens as per the Myanmar Constitution and laws currently. This would imply that they are regarded as stateless in terms of these laws whilst illustrating the role played by the laws in creating statelessness within the Rohingya people.[176]

According to DW,[177] the Myanmar citizenship laws in 1982 were not in violation of international laws but the problem was that they strongly focused on ethnicity. The 1982 laws stem from the 1948 laws which provided for citizenship to those belonging to one of the eight[178] recognised ethnicities that have been part of the country since the end of the British colony in 1823.[179] In 1982 the ruling government reformulated

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172 Bianchini K "A Comparative Analysis of Statelessness Determination Procedures in 10 EU States" 2017 *International Journal of Refugee Law* 42–83.

173 Berényi *Addressing the anomaly* 32, see also Ganczer M "International Law and Dual Nationality of Hungarians Living Outside the Borders" 2012 *Acta Juridica Hungarica* 316–333.

174 The Constitution of the Union of Burma 1947, the Constitution of the Union of Burma 1974.

175 The Constitution of the Republic of the Union of Myanmar 2008.

176 Parashar A. and Alam J "The National Laws of Myanmar: Making of Statelessness for the Rohingya" 2018 *International Migration* 94-108.

177 DW "*Rohingya crisis demonstrates consequences of statelessness*" https://www.dw.com/en/rohingya-crisis-demonstrates-consequences-of-statelessness/a-41212883 (Accessed 16-03-2020).

178 Arakanese, Bamar, Chin, Kachin, Karen, Kayin, Mon or Shan.

179 DW "*Rohingya crisis demonstrates consequences of statelessness*" https://www.dw.com/en/rohingya-crisis-demonstrates-consequences-of-statelessness/a-41212883 (Accessed 16-03-2020).

the citizenship laws and removed all exceptions that were available to laws enacted after the 1948 independence. Before 1982 the only persons to have citizenship belonged to one of the eight recognised ethnicity groups.

According to Nick Chessman, '[t]he 1982 law was not retroactive. Its regressive, racialist contents notwithstanding, it clearly provided that nobody who already had citizenship would lose it, unless they had acquired it by deceit'.[180] Further, he asserts that legal text is not the reason of loss of citizenship amongst the Rohingya in Myanmar but it is as a result of the 1982 laws being incorrectly implemented. He adds that the statelessness of Muslims in the west of Myanmar is a result of *de facto* instead of *de jure* measures. This is also drawn from the fact that in the late 1980s the military stripped Muslims of their citizenship by not issuing them with any form of identification.[181]

In order to reduce statelessness within the Rohingya community, there should be effective regional reaction and the thesis will attempt to address this.[182] While the role played by laws to create statelessness in Myanmar is straight forward, it is argued that it is the same with a country that chooses not to have laws that determine and recognise stateless individuals in order to create procedures and regulations to give stateless persons citizenship. To ignore them is to be complicit in violating their rights.

2.5.2 Kenya

According to the Kenyan National Commission on Human Rights in partnership with the United Nations High Commissioner for Refugees, in Kenya, stateless people have a challenge when it comes to exercising their basic and important rights as they are not recognised as the nationals of Kenya. There is still a need for amendments and changes in the policies, laws and the administration dealing with statelessness in order to prevent it. Kenya is not party to the two main conventions that deal with statelessness. However, it is party to the ACRWC, the African Charter

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180 DW "*Rohingya crisis demonstrates consequences of statelessness*" https://www.dw.com/en/rohingya-crisis-demonstrates-consequences-of-statelessness/a-41212883 (Accessed 16-03-2020).

181 Ibid.

182 Saliternik M "Myanmar's Rohingya Crisis and the Need for a Regional Response to Statelessness in Southeast Asia" https://www.ejiltalk.org/the-rohingya-crisis-and-the-need-for-a-regional-response-to-statelessness-in-southeast-asia/ (Accessed 14-04-2019).

and other conventions that provide for every individual to be granted nationality in the case they may be found to be at risk of being stateless. Therefore, the Government of Kenya has a duty to promote and protect fundamental human rights. The existence of laws that do not promote statelessness on its own is not enough. It is argued that, '[p]ractical steps must be taken to ensure that the promises contained in these instruments are translated into accessible and enjoyable rights'.[183]

If the Kenyan Government does not take any steps to curb the crisis, it will continue to exist and become worse. The issue is one that cannot be left unattended as the people affected are within the territory of Kenya and have the right to be protected too. In order for Kenya to be at par with its existing obligations both internationally and domestically, there is a need to clear gaps in law that may exist in relation to statelessness meanwhile making sure that the laws and policies are properly enforced and implemented. Until then, the stateless remain forgotten, remain being visitors in the only country that most of them know and above all, they remain with no access to human rights.[184]

In Kenya, citizenship is governed by multiple procedures. The current Constitution provides for three ways in which an individual can be granted citizenship and this is by birth,[185] registration and naturalisation. Principles relating to citizenship are set out in Chapter VI of the Kenyan Constitution and provides for which individuals were considered to be Kenyan citizens in 1963.

Any individual born in Kenya to parents with United Kingdom citizenship and 'its colonies or protectorates as of 11 December 1963, were to be considered as a Kenyan citizen, provided one of his or her parents was born in the country'.[186] A person born outside of Kenya was also a citizen if the person's father 'becomes, or would but for his death have become a citizen of Kenya at independence'.[187] In the

183 Kenya National Commission on Human Rights in partnership with United Nations High Commissioner for Refugees "Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya" https://www.unhcr.org/4e8338d49.pdf 5 (Accessed 14-04-2019).

184 Ibid 43.

185 In the Kenyan context acquisition of citizenship by birth is based on descent *(jus sanguini).*

186 Section 87 of the Kenyan Constitution, see also ibid 11.

187 Section 87(2) of the Kenyan Constitution.

case that an individual had links to Kenya, they were eligible to apply for citizenship, as long as the application was done by 13 December 1965.[188] If a person who is eligible to apply for registration fails to do so by the date designated to do so, they lose the chance to acquire citizenship. This chance is lost not only for the applicant, but also for any child, in the case of both parents not being nationals.[189]

The current Constitution requires that the only persons that can transmit Kenyan citizenship to their children born overseas are their fathers and this is discriminatory. This law needs to be interrogated and reformed as it has a negative impact. Section 96 of the Constitution[190] provides that the Parliament must '[p]rovide for due acquisition of citizenship of Kenya (whether by registration or naturalization) by persons who are not eligible or who are no longer eligible to become citizens [under the Constitution and citizenship laws]'. This is a step that the Kenyan Government is taking in order to give effect to section 96. The Kenyan Constitution and citizenship laws do not provide for granting of citizenship to persons born in the country who would otherwise be stateless and therefore need to be amended to provide for such.[191] According to section 90 of the Constitution if an individual is born outside of Kenya, they can become a citizen of Kenya provided that their father was a Kenyan citizen at the time of the individual's birth. The section provides ambiguity in interpretation as some would consider it to mean that any individual born in Kenya as a product of unions between foreign nationals and Kenyan women do not qualify

188 Section 88 of the Kenyan Constitution.

189 Kenya National Commission on Human Rights in partnership with United Nations High Commissioner for Refugees "Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya" https://www.unhcr.org/4e8338d49.pdf 11 (Accessed 14-04-2019).

190 'According to the Immigration Department, a draft bill has already been submitted to the Attorney General for onward transmission to Parliament. The suggested proposals (on file with this study's consultant) are designed to deal "substantively" "with the issue of statelessness" through "addressing the emerging challenges rather than turning away applicants due to a disability in law"' as discussed in Kenya National Commission on Human Rights in partnership with United Nations High Commissioner for Refugees "Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya" https://www.unhcr.org/4e8338d49.pdf 38 (Accessed 14-04-2019).

191 As discussed in Kenya National Commission on Human Rights in partnership with United Nations High Commissioner for Refugees "Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya" https://www.unhcr.org/4e8338d49.pdf 39 (Accessed 14-04-2019), '[t]o be consistent with article 1 of the 1961 Convention on the Reduction of Statelessness. According to information from the Immigration Department, efforts towards this end are already underway'.

for citizenship.[192] The constitutional requirement that provides for nationality being gained by foreign women married to Kenyan men only should be removed. The contention by courts is that the requirement is to punish citizens for marrying foreigners.[193]

3. Conclusion

In most of the literature, citizenship as a legal status is commonly assumed and revoked without the consent of the individual concerned. Rarely do authors interrogate the manner in which one is granted citizenship. Literature that discusses human rights in relation to citizenship does not take the fact that people should have citizenship for granted. In other words, the literature challenges state supremacy over individuals being able to make their own choices when it comes to their legal citizenship status.[194] Further, literature shows that there is a lack of SDPs in most countries, therefore, there is a need for states to include SDPs and verification procedures in their laws and interrogate the manner in which they will be implemented. It is in the best interest of stateless persons for regionally coherent identification and verification procedures to be made available in order to expedite the statelessness reduction process.

192 Constitution and the Kenya Citizenship Act Cap 170.

193 *Attorney-General v Unity Dow* (2001) AHRLR 99 at 101 (per Amissah JP of the High Court of Botswana). See also article 7(2) of the The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) urging States to 'grant women equal rights with men with respect to the nationality of their children'.

194 Belton K *The great divide* 12.

Chapter 3 - The international legal framework

This chapter analyses the prevention and protection against statelessness through analysis of case law and laws that have dealt with this matter both internationally and at the regional level of the three countries that are the main focus of this research (South Africa, Kenya and Myanmar). This analysis will also include the remedies that are available to individuals who are stateless as well as the enforcement thereof. This chapter proceeds from the standpoint that quite often, nationality and citizenship in international law are used interchangeably in order to define a legal relationship that exists between a person and the state. However, in most instances, the term nationality is usually used in treaties internationally.[195] Furthermore, as defined in chapter 1, statelessness is a state of not belonging to any country, or not being recognised as a national of any country.

International law has many sources that prohibit statelessness. These include the UDHR, in article 5[196] and article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Law (1930) which regulates the principle of nationality under domestic law.[197] In addition to these, there are also human rights conventions such as; International Convention on the Elimination of All Forms of Racial Discrimination, the ICCPR, the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Nationality of Married Women, the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the African Charter on the Rights and Welfare of the Child (ACRWC). However, the instruments that specifically set out the rights of stateless people are the 1954 and 1961 Conventions on Statelessness. Statelessness has components such as race, gender and ethnicity and such can be seen in the conventions mentioned above.

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195 Manby B "Statelessness and Citizenship in the East African Community" https://data2.unhcr.org/en/documents/download/66807 iii (Accessed 06-04-2020).

196 Article 5 which provides that, '[no]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.

197 See *Van Zyl and Others v Government of the Republic of South Africa and Others* [2008] 1 All SA 102 (SCA); (SCA); 2008 (3) SA 294 (SCA), see also Shearer R and Oppeskin B "Nationality and Statelessness" 93.

As it was established in the previous chapters that historically, states have had the discretion to grant nationality, this position continued post the establishment of the UDHR in 1948 which made provisions for the right of nationality for every person.[198] In the case that a state has not yet developed any regulations determining the right to nationality, there are basic principles in place that can be considered. Some of the principles are: (i) the obligation to grant nationality to children who are born in a state and are at risk of being stateless,[199] (ii) prohibition of discrimination in cases related to granting of nationality and (iii) exercising due process in granting and withdrawing nationality.[200] This norm of granting nationality to prevent statelessness was reiterated in the 1961 Convention on Statelessness in article 1 which stipulated that '[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless'. The right to nationality is provided for without any form of discrimination in the International Convention on the Elimination of Racial Discrimination (CERD).[201] CERD does not discriminate by distinguishing between citizens and non-citizens, further it provides that when it comes to the issues of naturalisation, nationality or citizenship, persons of all nationality should be treated equally.[202]

As mentioned in Chapter 2, other UN treaties provide minimum standards in terms of nationality laws. However, there is soft law in the form of a UNHCR Handbook

198 Article 15 of the Universal Declaration of Human Rights 1948.

199 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 72 (Accessed 06-04-2020). The principle appeared for the first time in The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.

200 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 11 (Accessed 31-03-2020).

201 Article 5 of the Convention on the Elimination of Racial Discrimination (CERD) provides that 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . (iii) The right to nationality'.

202 Articles 1(1) and (2) of CERD provide that:
1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
See also Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination against Non-citizens, 2005 and Manby B EAC https://data2.unhcr.org/en/documents/download/66807 72-73 (Accessed 06-04-2020).

that gives guidelines on prevention of childhood statelessness.[203] Article 6 of the ACRWC provides every child with a right to a name, to be registered at birth and to nationality.[204]

The act of bestowing nationality upon every child has been supported by the UN Human Rights Committee. The Committee has noted that in order to ensure that every child is granted nationality at the time of birth, it is essential for states to adopt applicable measures that allow for every child to have a nationality. This should be done with states working together and also internally. The granting of nationality under the state's laws should be exercised without any form of discrimination between legitimate children and children who are born out of wedlock or children that are born of parents who are stateless or relying on the nationality status of one parent.[205]

The International Court of Justice in the *Nottebohm* case explained that the general norm of states, judicial decisions and scholarly opinions is that nationality is a bond that has a genuine connection with societal foundation. The connection includes the presence of rights and duties that are reciprocal.[206] The rights that are granted by a state to its citizens differ from state to state, however, rights such as that of permanent residence in a state, freedom of movement, political rights, diplomatic protection rights and access to public services are commonly restricted. There are also rights that are guaranteed to both non-citizens and citizens through international human rights law.[207] Further, in terms of administrative law, stateless persons can lead a normal life in a state with good nationality laws while this is not guaranteed in a country with bad nationality laws, leading to statelessness.[208]

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203 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 5 (Accessed 06-04-2020).

204 Ibid, the draft protocol to the African Charter on the right to a nationality and the reduction of statelessness is still awaiting the input of states.

205 UN Human Rights Committee (HRC) "CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989" https://www.refworld.org/docid/45139b464.html paragraph 8 (Accessed 7-06-2020).

206 *Liechtenstein v Guatemala* ICJ Reports 1955 (*Nottebohm*) at 23. See also Batchelor A "Statelessness and the Problem of Resolving Nationality Status," *International Journal of Refugee Law* 156-183.

207 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf ix (Accessed 31-03-2020).

208 Ibid 1.

There is a need for global emphasis on the effectiveness of procedures that oversee the granting of nationality and issuance of documentation that nationality can be recognised from. This is based on the notion that the international community should disregard the practice of fighting against certain kinds of human rights violations and discrimination while endorsing others. This analysis is based on the low rate of accession that is evidenced in nationality law treaties in other regions and the scarcity of data, statistics or a low rate in research on statelessness even though there has been an improvement in recent years. Silence about the injustices that are being experienced by stateless people shows that states are being complicit in violating the rights of those who are stateless. This means that states have failed to honour their international obligations towards protecting the rights of everyone without prejudice or discrimination.

3.1 African regional legal framework

Colonial history has contributed highly to the reasons why there are high numbers of people at risk of being stateless in the region. This can be seen from the manner in which borders were created, causing ethnic groups to be divided between various countries and in addition, forced displacements and conflicts have been factors too.[209] This has led to some countries being hosts of long-term refugees or refugees fleeing from these countries or both. Some of the countries that have hosted long-term refugees include Uganda which has received refugees that have resided in

[209] See African Union--Peace and Security "African Union Border Programme (AUBP) - Uniting and integrating Africa through peaceful, open and prosperous borders" http://www.peaceau.org/en/page/27-au-border-programme-aubp (Accessed 01-06-2021), Frey A "Swaziland claims parts of Mozambique and South Africa territory" https://clubofmozambique.com/news/swaziland-claims-parts-of-mozambique-and-south-africa-territory/ (Accessed 01-06-2021) and Aernl-Flessner J "Who gets to define borders?" https://africasacountry.com/2018/06/who-gets-to-define-borders (Accessed 01-06-2021). All these articles speak about the creation of borders, divisions between countries and displacements which is becoming an issues during land claim discussions in South Africa and nationality issues.

that country for an estimated fifty years.[210] Kenya has also hosted refugees for Somalia in the Dadaab refugee complex which was launched in 1991.[211]

The most important link between a state and an individual is that of a state legally recognising the nationality or citizenship of that individual. In Africa during the colonial rule, having nationality in itself did not grant a person full rights in the state as it is now. This was because a limited number of people took part fully in ruling governments in the region. When it came to exercising both political and civil rights that were attached to citizenship, women were excluded in fully exercising these rights until the beginning of the 20th century and this was caused by the distinction between nationality and citizenship. This disadvantage also applied to people in colonial states who were not of European descent. Democracy resulted in individuals being able to claim and exercise their political rights, self-determination and decolonisation and everyone had the right to participate in the government. This made the difference between citizenship and nationality intolerable. With globalisation increasing during the same period migration also escalated world-wide. This has made issues of nationality to take priority internationally, especially on the issue of recognition of nationals and the granting of full rights. This has led to the regulation of basic principles on the subject of nationality considering that it is underdeveloped compared to other areas of law.[212]

Considering all the international instruments that have dealt with statelessness, it is high time that regional instruments dealing with statelessness, should be adopted. This will increase better treatment and norms relating to reduction of statelessness and protection of stateless persons and further increase comparative studies on the subject as it is not vastly explored. While it is accepted that there is lack of

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210 See Rweyunga CCB Local Integration as a Durable Solution for Protracted Refugees in Uganda: A Case Study of the Lumumbist Congolese Refugees at Kyaka 2 Refugee Settlement (LLM Dissertation Makerere University 2014) and Hammond L "Somali refugee displacements in the near region: Analysis and Recommendations: Paper for the UNHCR Global Initiative on Somali Refugees" https://www.unhcr.org/55152c699.pdf (Accessed 02-06-2021). The long term refugees include the Tutsis from Rwanda that have been in Uganda from between the periods of 1959 and 1973, the refugees from Congo that fled to Uganda around 1964 and Somali refugees that have been hosted in Kenya since early 90s.

211 The UN Refugee Agency "Dadaab Refugee Complex" https://www.unhcr.org/ke/dadaab-refugee-complex (Accessed 02-06-2021).

212 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 21 (Accessed 31-03-2020).

comparative studies on the topic, this should be taken as an opportunity to engage in discussions that bring about solutions and considering other researches that have developed better implementation or status determination procedures.[213]

As much as progress can be seen, statelessness remains a human rights issue.[214] This is based on the fact that even though many countries have become party to treaties that deal with statelessness, much progress is yet to be seen in attempts to curb statelessness. The lack of domestic procedures that determine statelessness, lead to the nationality laws violating the principle of non-discrimination.[215] This is the problem that South Africa faces as it has no procedures in place to determine stateless individuals let alone any kind of statistics to know the numbers of those faced with the crisis.[216] It is submitted that lack of determination procedures and statistics makes it easier for people who are stateless to fall in the cracks and remain in the margins where they are viewed as non-existing and will never belong if procedures are not put in place. In the case that nothing is done to resolve this crisis, stateless persons will remain without any form of rights although they are provided for in the Bill of Rights.

The ACRWC provides for the rights of all children to have a nationality, have their births registered and also have a name. The ACRWC exceeds what is provided for in the CRC by integrating the provision of children who may be at risk of being stateless which is stipulated in the 1961 Statelessness Convention. The ACRWC further allows the acquiring by a child of the nationality of the state in which they

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213 Bianchini K *The implementation of the Convention relating to the status of stateless persons: procedures and practice in selected EU states* (PhD Thesis University of York Law 2015).

214 Foster M and Lambert H International "Statelessness as a Human Rights issue: A Concept whose time has come" 2016 *International Journal of Refugee Law* 564–584.

215 Foster and Lambert 2016 IJRL 584, see also Lawyers for Human Rights "Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide" http://citizenshiprightsafrica.org/wp-content/uploads/2016/05/LHR_PractitionersGuide-Statelessness_2014.pdf 30-1 (Accessed 16-10-2019).

216 Lawyers for Human Rights http://citizenshiprightsafrica.org/wp-content/uploads/2016/05/LHR_PractitionersGuideStatelessness_2014.pdfhttp://citizenshiprightsafrica.org/wp-content/uploads/2016H/05/LHR_PractitionersGuideStatelessness_2014.pdf 30-1 (Accessed 16-10-2019), see also Scalabrini Centre of Cape Town and Legal Resources Centre submission to the special rapporteur at the Office of the UN High Commissioner for Human Rights https://scalabrini.org.za/wp-content/uploads/2019/05/Scalabrini-Centre-of-Cape-Town-submission-OCHR-Statelessness-Minority-Issues-23-May-2018.pdf (Accessed 16-10-2019).

were born at the time of birth in the case that they are not granted nationality of any other state according to its laws. Though the African Charter does not specifically refer to the right to nationality, it provides for an individual's legal status to be recognised in terms of article 5. This section has been interpreted by the African Commission to protect nationality rights. In 2015 a draft protocol on the nationality right was drafted in Africa on the basis that this right was implied in article 5 and the protocol was placed for consideration by AU structures.[217]

The African Charter provides for equal protection of the law for every individual in article 3 and that everyone is equal, this is inclusive of those that are stateless. The enjoyment of rights should be available to all with no distinction such as birth for instance and this is provided for in article 2. In addition to the African Charter, the ACRWC provides that every child has a right to have their birth registered in article 6. This helps to curb statelessness as birth registration makes it easier for the children to be legally recognised, identified and it also provides proof of which country they were born.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) makes provisions for rules that are generally non-discriminatory,[218] however, its provisions on nationality are weak as it fails to provide women with equal nationality rights as men in accordance to the provisions of CEDAW.[219] The Women's Protocol does not guarantee equal nationality rights for both men and women. CEDAW in article 6 makes provision for women to retain their nationality or acquire their husband's nationality, grants women and men equal rights in terms of their children's nationality unless a contrary provision exists in the national legislation or there are considerations of national security. An argument can

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217 See Meeting on the African Union Protocol on the Right to a Nationality and the Eradication of Statelessness October 29, 2018 - November 3, 2018 https://www.unhcr.org/ibelong/event/meeting-on-the-african-union-protocol-on-the-right-to-a-nationality-and-the-eradication-of-statelessness/ (Accessed 18-09-2020). See also Manby B EAC https://data2.unhcr.org/en/documents/download/66807 5 (Accessed 06-04-2020), and note that the draft protocol to the African Charter on the right to a nationality and the reduction of statelessness is still awaiting the input of states.

218 Ibid.

219 See Banda F in "Protocol to the African Charter on the Rights of Women in Africa," in Evans M and Murray R (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press 2008) 441-474.

be made on the basis that the Women's Protocol violates the African Charter's non-discriminatory provisions.[220] A General Comment on article 6 of the ACRWC was adopted by the African committee in May 2014 which was a reminder to the states that their sovereignty when it comes to granting nationality should be in the ambit of their international obligations. Further, the comment also denounces any form of discrimination in regulations that are related to nationality. 'Double *jus soli*' is a rule that the committee also validated and this rule requires for a child to be granted nationality in the case where either parents were born in that state and if the parents are foreigners, the child should be granted nationality after a period of residence which does not require reaching majority for citizenship to be confirmed.[221]

In 2011 the African Committee of Experts on the Rights and Welfare of the Child delivered the first judgment on the merits of a communication in which it interpreted article 6 of the ACRWC which stipulates that every child has a right to a nationality, name and birth registration. The decision which was in relation to the Nubian children in Kenya where the Committee of Experts held that Kenya violated its obligations that are provided in article 6 even though the Kenyan Constitution had been reformed. The reason for this was because Kenya did not sufficiently prevent statelessness as it does not guarantee nationality at birth to children that are born to stateless parents or children who would otherwise be stateless. The Committee emphasised the undesirable impact that statelessness had on children. It further held that children should in most circumstances be granted nationality from birth.[222]

The African Commission has had the privilege of handling cases about individuals involved in politics whose nationalities have been stripped off or have been deported

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220 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 26 (Accessed 31-03-2020).

221 Ibid 27. Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 27 (Accessed 31-03-2020).

222 *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Kenya, African Committee of Experts on the Rights and Welfare of the Child (The Kenyan Nubian Minors* decision*)* paragraph 42. See also Manby B EAC https://data2.unhcr.org/en/documents/download/66807 75 (Accessed 06-04-2020).

by their governments with the aim of silencing them.[223] This is a violation of their rights on the basis of purported legal status related to nationality or immigration. The African Commission has linked the provisions of article 5 of the African Charter that stipulates that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. . . .' to be applicable in cases where individuals end up being stateless due to states denationalising or attempting to denationalise them.[224] A decision concerning the Nubian people of Kenya which was handed down in 2015 by the Commission emphasised that nationality is an intricate link between an individual and their juridical personality. Therefore refusing an individual access to identification documents which grant them rights linked with citizenship is a violation of their right to be recognised. The Commission contemplated on the fact that article 5 of the African Charter protects a legal status in relation to claims of citizenship or nationality.[225]

With regard to article 7(1) of the African Charter, the Commission held that the provision of 'the right to an appeal to competent national organs' comprises the right for a case to be brought to court and the right to appeal cases from the *court a quo* to higher tribunals. In matters that involve the loss of nationality and deportations, the Commission is of the view that due to the fact that an individual is not recognised as a citizen, that does not substantiate their deportation; the individual should be granted a right to contest expulsion.[226] The Commission has relied on articles 2, 7 and 12 of the African Charter to rule against countries like Zambia, Angola and

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223 *Modise v Botswana* (Communication NO. 97/93) [2000] ACHPR 25 paragraph 91, *Amnesty International v Zambia* (Communication No. 212/98) [(2000] ACHPR, *Legal Resources Foundation v Zambia* (Communication No. 211/98) [2001] ACHPR, in this regard see also similar cases in Swaziland, *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88 119 and *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR 123 (HC) wherein a government sought to deport a citizen from his native country after defeating a political candidate, see also the discussion of these cases in Dube A and Nhlabatsi S "The King can do no wrong: The impact of The Law Society of Swaziland v Simelane NO and Others on constitutionalism" 2016 *African Human Rights Law Journal* 265-282 267.

224 *Modise v Botswana* (Communication NO. 97/93) [2000] ACHPR 25 paragraph 91, see also *Amnesty International v Zambia* (Communication No. 212/98) [(2000] ACHPR, *Legal Resources Foundation v Zambia* (Communication No. 211/98) [2001] ACHPR.

225 *The Nubian Community v Kenya* (Communication No. 317/06) [2015] ACHPR. See also Manby B EAC https://data2.unhcr.org/en/documents/download/66807 74 (Accessed 06-04-2020).

226 *Amnesty International v Zambia* (Communication No. 212/98) [(2000] ACHPR paragraph 33.

Guinea on deportation matters or mass expulsions that are related to ethnicity and further, the Commission observed that the expulsions are a human rights violation.[227]

The African Charter has a number of articles that have been used in cases that deal with the right to nationality, viz: (i) non-discrimination in article 2, (ii) the right to equality in article 3, (iii) the right to a fair trial and due process in article 7, (iv) the right to dignity and legal status found in article 5, and (v) the right to freedom of movement in article 12. Several cases have been brought before the African Commission in which the Commission found that the provision on the right to dignity and legal status as stipulated in article 5 of the African Charter apply in cases where states attempt to withdraw the nationalities of people rendering them stateless. In the case of John Modise who had spent a number of years in the homeland of South Africa called Bophuthatswana or the land between South Africa and Botswana (no-man's land). This was due to Botswana's Government refusing to recognise Mr Modise as a citizen. The Commission found that the Botswana Government had violated amongst other rights, his right to dignity in terms of article 5 of the Charter and had caused him to suffer.[228]

In another case of *Amnesty International v Zambia,* the Commission had to deal with a case related to the deportation of two individuals from Zambia to Malawi. The Commission found that the Zambian Government violated the dignity of these men in terms of article 5 as it had deprived the men of their family and deprived their families the support they deserved from the men. This it had done by compelling the men to live under degrading circumstances and as stateless persons. [229] Further when the state expels non-nationals, they are obligated to respect the people's right to family life together with other rights provided for in the African Charter.[230]

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227 See *Institute for Human Rights and Development in Africa v Angola* (Communication No. 292/2004) [2008] ACHPR; *African Institute For Human Rights and Development v Guinea* (Communication NO. 249/2002) [2004] ACHPR 59.

228 *Modise v Botswana* (Communication NO. 97/93) [2000] ACHPR 25 paragraph 91.

229 *Amnesty International v Zambia* (Communication No. 212/98) [(2000] ACHPR paragraph 50.

230 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 34 (Accessed 31-03-2020).

The African Court on Human and Peoples' Rights in March 2018 further delivered a judgment against the state of Tanzania in *Anudo Ochieng Anudo v Tanzania*. The court held that Tanzania violated various human rights obligations particularly the ones that are related to applying due process of law. It was found that Anudo had been unlawfully made stateless. It further held that Tanzania carried the burden of proving that the applicant was not of Tanzanian nationality as it was the one that was alleging that fact.[231] In terms of the Tanzanian Citizenship Act, which does not provide for court review, the court held that by denying the applicant of the right to Tanzanian nationality that he had exercised prior to the case, without an opportunity to appeal in a national court is a violation of his right to have his case be heard in a court as stipulated in article 7(1)(a)-(c) of the African Charter.[232] The court then noted that the Tanzanian Citizenship Act had breaches because it did not provide citizens with the right to exercise judicial remedies in circumstances where their nationality was tested as international law requires. The court was of the view that the state of Tanzania had to fill the gaps that existed in its laws.[233] The court found that the Immigration Act also had the same misfortunes and accordingly ordered that Tanzania amend its legislation to guarantee judicial remedies for individuals whenever there were disputes in relation to citizenship.[234]

West African countries have a rule developed from French law which allows a person born within the state or when one of the parents is born in the state to automatically become a citizen upon birth. The East African Community (EAC) countries do not have this provision in their laws. Adopting this rule and putting rules and regulations in place in order to form rules of evidence for the implementation of the rule is a means to reduce statelessness. Further, West African countries derived from French law the concept that if an individual has always been treated as a citizen of a state and exercised the rights that accompany that status, one can apply before court for an order confirming such status with support of some rules of evidence.

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231 *Anudo Ochieng Anudo v United Republic of Tanzania*, App. No. 012/2015 African Court of Human and Peoples' Rights paragraph 80.

232 The judgment makes reference to the International Covenant on Civil and Political Rights which is not the intention if we look at the article referred to in the text.

233 *Anudo Ochieng Anudo v United Republic of Tanzania*, App. No. 012/2015 African Court of Human and Peoples' Rights paragraphs 115-116.

234 Ibid para 132(viii).

When the rates of birth registration and documentation are very low, it creates a high number of people who lack evidence of their nationality.[235]

3.2 The provision for nationality as a right and preventing statelessness

In Africa the right to nationality is provided for in the constitutions of seven countries[236] either in general terms or to every child as they have a right to nationality and a name. In a country like South Africa, citizenship is based on *ius soli* for any child with no citizenship of another country or right of citizenship, including a general right to apply for citizenship upon attaining the age of majority for children born to parents who are not nationals, however, the right is only granted if the child's birth was registered.[237] Angola and Guinea-Bissau make nationality provisions for children belonging to stateless persons or where the nationality of the parents is unknown or children are at risk of being stateless as well as foundlings.[238] Countries that are regarded as having the strongest protections against statelessness for children born within their territory are those that follow the *ius soli* rule which means that they grant nationality automatically to any child born on their soil.[239] The *ius soli* rule will assist to formulate resilient regulations that protect and prevent statelessness for children born within the territory of these countries.[240]

The nationality laws in other countries have been detailed in their constitutions with provisions on how nationality should be recognised and managed. The issue is that the provisions in constitutions are there to serve as an empowerment to the legislature to implement legislation or offer guidance on values that include children's rights and non-discrimination with the final outcome being in the statute. Many countries have an exclusive citizenship Act or code dealing with nationality but some countries such as Mali and Burkina Faso have their nationality law in

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235 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 81 (Accessed 06-04-2020).

236 Angola, Ethiopia, Guinea-Bissau, Kenya, Malawi, Rwanda and South Africa.

237 South Africa Citizenship Act (No. 88 of 1995, as amended to 2010) (SACA), sections 2(2)*(a)* and 4(3).

238 As discussed in Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 45 (Accessed 31-03-2020).

239 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 9 (Accessed 06-04-2020).

240 As discussed in Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 60 (Accessed 31-03-2020).

legislation related to family law. Then there are a few countries that explicitly provide for the nationality right for all or that all children have the right to nationality and a name in their constitutions. Some of these countries are Kenya, Malawi and South Africa.[241]

In other countries the right to nationality is incorporated in other laws such as laws related to children for instance. Despite these attempts the nationality laws do not *per se* guarantee the fulfilment of these provisions. In other countries, such as Ethiopia, the nationality laws are not in compliance with what the Constitutions stipulate, as they are failing to guarantee nationality to children born in the state who would otherwise be stateless. The provisions stipulated in article 1 of the 1961 Convention on Statelessness and article 6(4) of the ACRWC that children born in a state and would otherwise be stateless should be granted nationality is specifically provided for in the nationality legislation of 13 African countries.[242] Further, six African countries provide for nationality to children born of stateless parents,[243] however, this does not protect children that are born to parents with nationality that they cannot transfer to their children.[244]

Many nationality laws in Africa discriminated on the basis of gender from the period they attained independence until recently. This meant that women were not able to pass nationality to their children in circumstances where the father was not a citizen or to foreign spouses. This position changed in the beginning of the 1990s when organisations that fight for women's rights fought against this discrimination and for the laws to be reformed and comply with international human rights. The case of *Unity Dow*[245] in 1992 was very significant as the appeal court upheld the right of a

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241 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 46 (Accessed 31-03-2020).

242 These countries are Angola, Burkina Faso, Cameroon, Cape Verde, Chad, Guinea-Bissau, Lesotho, Malawi, Namibia, São Tomé and Príncipe, South Africa and Togo as discussed ibid 49.

243 These countries are Benin, DRC, Gabon, Mozambique, Rwanda and Tunisia as discussed ibid 49.

244 See Chapter 4 of the Constitution of the Kingdom of Swaziland Act 2005 with specific reference to sections 43 and 46 that stipulate nationality for children flowing only from the father, see also as discussed in Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 46 (Accessed 31-03-2020).

245 *Unity Dow v Attorney-General* 1991 BLR 233 (HC).

woman to pass her Botswana nationality to her children. A court in Benin in September 2014 held that four articles in the nationality code were unconstitutional as they discriminated against women when it came to their rights to pass their nationality to their children or spouses.[246] The change in laws during the 1990s had some laws only reformed in such a way that much access to nationality was granted to children of national mothers which meant that there was no total equality. In a case from Sudan, a child belonging to a national mother was granted the right to claim nationality instead of being granted automatic nationality. In Sierra Leone the reforms made in 2006 still discriminated against children born in other countries.[247] With gender neutrality being practiced in many countries gender discrimination is decreasing. From the mid-1980s over 20 countries have endorsed laws that support gender equality.[248]

3.2.1 Acquiring nationality

3.2.1.1 Children's nationality

In some countries only fathers[249] have the undisputed right of transmitting their nationality to their children and in countries that do not provide for discrimination between parents in cases of children born in the country, fathers are the only ones to pass nationality to the child if born in another territory. In most cases if a country discriminates based on gender, it also discriminates on the basis of whether the child was born in or out of wedlock. If a child is born to a national mother and foreign father, they have a right to claim nationality but not an automatic right to nationality. This is proof of how the laws discriminate in individual provisions related to

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246 See as discussed in Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 63 (Accessed 31-03-2020), see also Chapter 4 of the Constitution of the Kingdom of Swaziland Act 2005 with specific reference to section 43(4) which deprives women the right to pass nationality to children unless the father denounces the child.

247 The Sudanese Nationality Act 1994 and Sudanese Nationality Act (Amendment) 2011 and 2018 [Sudan], 30 December 2018, available at: https://www.refworld.org/docid/503492892.html (Accessed 1-07-2020); Sierra Leone Citizenship Amendment Act No.11 of 2006 https://citizenshiprightsafrica.org/sierra-leone-citizenship-amendment-act-2006/ (Accessed 1-07-2020).

248 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 6 (Accessed 31-03-2020).

249 Chapter 4 of the Constitution of the Kingdom of Swaziland Act 2005 with specific reference to section 43(4) which deprives women the right to pass nationality to children unless the father denounces the child.

nationality yet the total effect of the provisions as a whole allows both genders to transmit nationality to their children, though the right, if not claimed will lapse. In a country like Benin, provisions legally discriminate as they allow a child born to a national mother to repudiate their nationality upon reaching majority and if they do not, the child is attributed nationality under the law.[250]

3.2.1.2 Acquiring nationality on the basis of marriage

Marriage is one of the grounds through which one can acquire nationality as an adult. This is because most countries provide for the acquiring of nationality automatically or through lenient terms of registration in common law countries or declaration in civil countries when one marries a national. The automatic acquisition of nationality upon marriage was the custom earlier and women would assume the nationality of their husbands or father. However, this custom is decreasing and remains in only eight countries in Africa.[251] A considerable number of countries still deny women to transmit nationality to their spouses, or have discriminatory residence qualifications in place for the foreign spouses married to national women who need to acquire nationality.[252] The period in which naturalisation is acquired is in some cases reduced but all other requirements have to be satisfied. Other countries, in particular, ones that have laws based on the French civil code usually object to an application to acquire nationality through marriage within the first year the application is made.[253]

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250 See as discussed in Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 64 (Accessed on 31-03-2020).

251 Benin, Central African Republic, Comoros, Congo Republic, Equatorial Guinea, Guinea, Somalia and Togo; Burkina Faso preserves guaranteed acquisition of nationality, on both spouses despite sex, Mali and Côte d'Ivoire followed suit, see as discussed in Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 65 (Accessed on 31-03-2020).

252 Benin, Burundi, Cameroon, Central African Republic, Comoros, Republic of Congo, Egypt, Equatorial Guinea, Guinea, Lesotho, Libya, Madagascar, Malawi, Mauritania, Morocco, Niger, Nigeria, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Togo and Tunisia, see as discussed in Manby above.

253 Article 4(3)(b) of the Constitution of Namibia 1990.

3.2.1.3 Acquiring nationality on the basis of *ius sanguinis* (descent)

A considerable number of African countries currently grant nationality to children born within their border if either parent is a citizen despite the gender and whether the child is born out of wedlock or not. This law is also extended to children born outside the country too. In some countries[254] the right is also granted in cases where one of the grandparents is a national of the country. Deviations do exist in this case depending on which territory the person was born.

Other countries provide for only one generation to pass nationality if they reside outside the country, meaning that someone who is a national and born in the country can pass that nationality to a child born in another country but that child is not allowed to pass on their nationality further. These provisions are derived from the British laws and are enforced by countries such as Lesotho, Malawi and Tanzania etc. In the Kenyan Constitution these provisions are allowed to be established by legislation, however, are not implemented in practice.[255] In other cases, when children are born in other territories, nationality maybe be passed, however, further requirements need to be complied with such as claiming the nationality right or informing the authorities of the birth. This may lead to the statelessness of some children even though the principle is accepted because if the limited time to claim the right lapses, the right is lost. In cases where there is a lack of diplomatic representation of the country where the parents have nationality in the country they reside, it becomes challenging to satisfy the requirements in practice.[256]

3.2.1.4 Acquiring nationality on the basis of adoption

When it comes to adopted children in Africa born in other countries, their acquisition of nationality is provided for in many African countries through registration procedures that are automatic or non-discretionary. In other countries provision is

254 Cape Verde, Ghana, Nigeria, Uganda and Zimbabwe

255 Article 14(3) of the Kenyan Constitution 2010; Section 7 of the Citizenship and Immigration Act 2011 of Kenya, as amended by the Security Laws Amendment Act, 2014. There was gender discrimination in the 1971 citizenship order of Lesotho before it was repealed by the 1993 Constitution as it provided that children born in foreign states could only acquire the Lesotho nationality through their fathers.

256 Manby B "Citizenship Law in Africa: A Comparative Study" "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 53 (Accessed on 31-03-2020).

made for discretionary naturalisation procedures and other countries do not provide for adopted children at all. Countries like Sierra Leone and Sudan have gone further and revised their laws to disregard adopted children or parents on definitions of 'child' or 'parent'. When a father legitimises a child through adoption in Central African Republic, that child becomes a national as of right, however, in the case of adoptions by non-biological parents, the effect is different.[257]

3.2.1.5 Acquiring nationality on the basis of naturalisation

In South Africa the naturalisation process comes in two steps. Permanent residence is required first and it takes a minimum of half a decade and another half decade after acquiring permanent residence is needed to become a citizen.[258] The requirements for proving legal residence disregard those that migrate from free movement zones like West Africa and those that work in informal sectors. The processes involved in naturalisation are challenging and in some countries they involve investigations, interviews and police inquiries. Other countries even request proof of good health and such is a basis of exclusion for a lot of people such as those who are disabled from obtaining nationality.[259] In some countries one has to obtain a decree from the President for naturalisation to be granted which is an administrative procedure requirement. In other countries if all requirements are met, the discretion is within the executive branch or the head of state. Long term refugees or former refugees suffer from the deficiencies that exist in laws related to naturalisation. In South Africa the process is that one becomes a permanent resident from being a refugee and then later becomes a naturalised citizen, however, in practice, this process has been reported as one with complications.[260] In some states, like Swaziland, they use customary law as a means of regulating citizenship acquisition.[261]

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257 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 57 (Accessed on 31-03-2020).

258 Ibid 7.

259 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 7-8 (Accessed on 31-03-2020).

260 Ibid 8.

261 Sections 4(2), 5(1) and 7(4) of the Swaziland Citizenship Act No.14 of 1992.

3.2.1.6 Acquiring nationality on the basis of dual citizenship

Upon attaining independence, many countries in Africa decided that dual nationality should be prohibited; they took the stance that if an individual had nationality in another country, they had to choose where their loyalty would be based. In the case that one did not take the nationality of the new country, they would be considered with distrust, as a possibility of working for the former colonisers or other interests. Obtaining the nationality of another country meant the automatic loss of one's birth nationality and one had to renounce the nationality of another country for naturalisation to take place.[262]

Currently dual nationality seems to be provided for in a limited number of countries, statistics show that many countries in Africa are now against the ban of dual citizenship.[263] In other countries,[264] the authorities have to give authorisation for dual nationality to take place. Other countries do not allow dual citizenship in certain situations such as in cases where an individual is in the process of becoming a citizen by naturalisation[265] or when the case involves people who are citizens from birth and willingly obtain the citizenship of another country.[266] In the countries that do not commonly make provisions for dual nationality, women who obtain the nationality of their spouses when they get married are allowed to keep their birth citizenship.[267] Dual nationality in many countries has consequences such as the inability to hold positions of high stature in the public office based on their allegiance

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262 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 73 (Accessed on 31-03-2020).

263 Some of these countries include Chad in article 6 and 7 of Decree No. 211 / PG.-INT. of 6 November 1963 implementing the Chadian nationality code, 1 December 1963, https://www.refworld.org/docid/3ae6b4da33.html (Accessed 8-06-2021), see the Burundian Nationality Code of 2000 article 21 as discussed in Canada: Immigration and Refugee Board of Canada, Burundi: Citizenship legislation; procedures for obtaining citizenship; whether dual citizenship is possible and, if so, how to obtain it; procedures for renouncing citizenship and the necessary documents; grounds for revoking citizenship, 22 January 2007, BDI102295.FE https://www.refworld.org/docid/485ba8577.html (Accessed 8-06-2021), article 8 of the Constitution of Ghana and see the 2010 Kenyan Constitution in articles 15(2) and 16.

264 Countries such as South Africa, Libya and Mauritania for example.

265 These countries include Namibia, Zimbabwe and Mauritius for example.

266 Benin, CAR, Côte d'Ivoire, Guinea and Madagascar.

267 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 73 (Accessed on 31-03-2020).

for both nationalities.[268] In Swaziland, the Swaziland Government sought to deport a citizen from his native country (Swaziland) after defeating a political candidate. The Government, in attempting to achieve its malicious acts, amended the Immigration Act, however, on appeal Mr Ngwenya was successful.[269]

Lesotho's appeals court, in a case that involved dual citizenship, decided that in the case that an individual obtained nationality of another country, they would lose their birth citizenship. However, the court also in the same judgment commended that legislation should be passed wherein dual nationality is not prohibited especially if the other nationality is South African. This, the court commended with special concern on the number of Basotho people who migrate to South Africa due to how the two countries rely on one another economically. [270]

3.2.2 Deprivation or loss of nationality including state arbitrarily not recognising citizens

Issues related to acquiring citizenship have gone unnoticed in most countries as they only become apparent when an individual is exposed to expulsion and during the application of a passport. The fact that most countries in Africa are introducing the use of identification cards, people who thought they were citizens of a state or believed to be entitled to citizenship under the law will realise that they are not considered as such with the possibility of not being nationals of any other state.[271]

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268 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 73 and 77-79 (Accessed on 31-03-2020) , some of these countries are Kenya where this provision is provided for in article 137(2)(a) of the Kenyan Constitution which provides that ' a person is not qualified for nomination as a presidential candidate if the person owes allegiance to a foreign state.', article 147(2)(a) of the Constitution of Mozambique which stipulates that 'All Mozambican citizens maybe candidates for the office of the President of the Republic, provided that they. . . possess nationality by origin and do not possess any other nationality.' And article 94(2)(a) of the Constitution of Ghana stipulates that 'A person shall not be qualified to be a member of Parliament if he— (a) owes allegiance to a country other than Ghana.'

269 See also the cases of *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88 119 and *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR 123 (HC) as discussed in Dube A and Nhlabatsi S "The King can do no wrong: The impact of The Law Society of Swaziland v Simelane NO and Others on constitutionalism" 2016 *African Human Rights Law Journal* 267, 265-282 and Maseko T "The drafting of the Constitution of Swaziland,2005" 2008 *African Human Rights Law Journal* 312-336 320-1.

270 *Director of Immigration and Others v Lekhoaba and Another* (C of A (CIV) No.22/07) [2008] LSCA 4 (11 April 2008) https://lesotholii.org/ls/judgment/court-appeal/2008/4/ (Accessed 07-07-2020).

271 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 79 (Accessed 06-04-2020).

State authorities in many African countries are prohibited from denying citizenship for any person who was from birth a citizen of that state, despite the fact that such person might be on the verge of becoming stateless or not. In other countries such as South Africa for instance, the laws related to nationality are not amenable to what is provided for in their constitutions and this causes uncertainties. In terms of countries that have laws that allow withdrawal of citizenship obtained through naturalisation, causes for the withdrawals are comprehensive and may include fraud or doubts on allegiance between states by the person of interest.

In most circumstances, states are likely to deprive an individual the recognition of nationality compared to allowing the automatic loss of nationality or nationality denied on the basis of an administrative action by the authorities.[272] Ethiopia and South Africa have constitutions that prohibit states from depriving people of nationality or ban the loss of nationality. Article 33 of the Ethiopian Constitution provides all who are Ethiopians with nationality and that the status cannot be withdrawn without their consent. In the case that a citizen obtains the nationality of another state, they will automatically lose their Ethiopian citizenship.[273] When it comes to South Africa, there is a contradiction with what is provided for in the Constitution and the provisions in the South African Citizenship Act 88 of 1995 (SACA).

Section 20 of the South African Constitution stipulates that citizens may not be denied of citizenship,[274] while the SACA makes provision of loss of citizenship automatically and the deprivation of nationality on discretionary basis including citizenship from birth. The present Constitution of South Africa came into effect after the adoption of the SACA which originally stipulated that a citizen by acquisition or from birth was capable of losing such citizenship (i) if they acquired the nationality of another country without being granted permission, (ii) in the case where they are

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272 Manby B *Citizenship Law in Africa* (African Minds 2016) 103, see also Manby B "You can't lose what you haven't got: Citizenship acquisition and loss in Africa", in Macklin A and Bauböck R *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, RSCAS 2015/14 https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf 17 (Accessed 07-07-2020).

273 Article 33 of the 1994 Constitution of the Federal Democratic Republic of Ethiopia and article 17 of the Proclamation on Ethiopian Nationality 378 of 2003.

274 Section 20 of the Constitution of the Republic of South Africa 1996.

citizens of another state and (iii) when the army of such state is in war with South Africa.[275] Provisions existed in the SACA in which individuals were prohibited from obtaining citizenship through naturalisation if there was fraud involved, previous convictions, or in the case where it was deemed to be in the public interest. If citizenship was denied on the basis of fraud, one was not protected from becoming stateless.[276] The provisions are still in effect and an amendment was introduced in 2010 stipulating that naturalised citizens would further lose their nationality if they join the army forces of another country in a war not supported by South Africa.[277]

The 1961 Convention on Statelessness in article 7 allows for a naturalised person to be deprived of their nationality if they are abroad for a period over seven years without showing the authorities any intent of retaining their citizenship. Therefore, some countries have provisions in their laws aligning with article 7. When it comes to full protection against people being stateless in circumstances of deprivation, only a handful of countries[278] have this provision in their laws when the government withdraws nationality. In some countries such as South Africa, Rwanda and Senegal, for instance, partial protection is available which means statelessness would exist in some situations and in others there is uncertainty on whether protection is available or not.[279]

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275 Section 6 of the SACA which was amended in 2004 by the amendment Act 17 of 2004 which eliminated the stipulation that a person would be denied nationality if they were using a passport of another country which was provided for in the 1995 Act.

276 Section 8 of SACA.

277 Subsection 6(3) of the South African Citizenship Amendment Act 17 of 2010 included. See Submission on the South African Citizenship Amendment Bill, B 17 – 2010 (Citizenship Rights in Africa Initiative, 6 August 2010) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100817pchomecra.pdf (Accessed 11-07-2020) where it was submitted that the amendment was contrary to the provisions of the Constitution.

278 Lesotho, Mauritius and Zimbabwe from 2013, however, the Zimbabwean nationality laws are contrary to what the Constitution provides for as they allow for the Minister to withdraw nationality attained by naturalisation if he is of the view that it is in accordance to public policy which can cause statelessness, see article 39(3) of the Constitution of Zimbabwe 2013 and Citizenship of Zimbabwe Act Chapter 4:01.

279 Article 42 of the Constitution of Lesotho 1993 as amended in 2001, the provision is contradicted by article 23 of the Citizenship Order 1971; article 11(3)(b) of the Mauritius Citizenship Act 1968 as amended in 1995; article 9(4) of the Namibia Constitution 1990 as amended in 2010; article 19 of the Rwanda Nationality Law 2003; article 21 of the Senegal Nationality Code 1961 as amended in 2013; article 8 of the South African Citizenship Act 1996 as amended in 2013 and section 49(5) of the Swaziland Constitution 2005.

3.2.3 Renunciation and reacquisition of nationality

In Africa it is not all states that permit people to relinquish their nationality. The reason for the existence of provisions such as those that do not allow renunciation is to protect citizens from being stateless, however, this can also be taken as denying people their right to free movement and expression.[280] Article 15 of the UDHR stipulates that an individual is permitted to acquire the nationality of another country in which they reside in based on different situations. However, in the case that dual nationality is prohibited, such would hinder the possibility of acquiring a new nationality. The other dilemma brought by renunciation stipulations is when there is no regard to preventing or protecting against people from becoming stateless. There should be reassurance that an individual involved will definitely acquire the new nationality or is at the position of being able to reacquire their original nationality if the process is not successful. Provisions allowing for such may exist but are, in most circumstances, not followed through in practice.[281]

3.2.4 Proving nationality

The guidelines used to prove the facts related to the claim of nationality and the issuance of documentation proving the recognition of a person as a citizen have the same significance in practice as the regulations on the circumstances that must be recognised. In cases where the requirements and costs for one to prove their nationality are arduous, it means that people will rarely be able to satisfy the requirements imposed by the law. Further, in situations where the recognition of nationality procedures are not available or are based on discriminatory measures a vast number of people become undocumented with a high chance of being stateless. Birth registration is important because in cases where a person's nationality is questioned, such can be utilised as conclusive evidence. The issuance of identification documents such as a passport is crucial even though they may not

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280 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 112 (Accessed on 31-03-2020).

281 Ibid 113.

be considered formal evidence of citizenship but will assist in the exercise of the right to nationality.[282]

A certificate of birth is not always regarded as proof that a person is a citizen, however, there are exceptions such as registration of births for the sake of nationality acquisition as a right provided for in some UN conventions.[283] It was held in the *Nubian children's* judgment that birth registration and nationality are connected.[284] Legal registration of birth makes it easier to prove the place of birth of both the individual involved and of their parents and their nationality. Without a birth registration process or an efficient birth registration system, many children will be at risk of becoming stateless.[285]

Birth registration is not a requirement for some countries and in others it only recently became a requirement. In countries such as Zimbabwe, South Africa and Mauritius for instance, registering of births was a requirement, however, it was not required in Tanzania, Botswana or Malawi.[286] There is a need for initiatives that would assist in the creation of efficient birth registration systems in African countries. The systems must be inclusive of all countries and the minority groups as they are the ones that are more at risk of becoming stateless.[287]

EAC member countries do not have an effective system in their national laws for registering births as they fail to acknowledge how crucial it is related to nationality law. Providing for the registration of births in laws should be linked with providing such right explicitly in the countries' constitutions in order to show the importance

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282 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 116 (Accessed on 31-03-2020).

283 Article 7 of the Convention on the Rights of the Child (CRC) and article 6 of the ACRWC.

284 The *Kenyan Nubian Minors* decision paragraph 42.

285 Manby B "Citizenship Law in Africa: A Comparative Study" 117 https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf (Accessed on 31-03-2020).

286 Manby B "Citizenship Law in Africa: A Comparative Study" 117 https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf (Accessed on 31-03-2020).

287 Civil Registration and Vital Statistics "Third Conference of African Ministers Responsible for Civil Registration: Yamoussoukro Declaration 13 February 2015" https://www.uneca.org/crmc3 (Accessed 13-07-2020).

thereof.[288] Other countries like Kenya make provisions for every child to have a right to a birth certificate in their Immigration Act but only to children who are citizens. It is necessary to note that the Births and Deaths Registration Act allows for compulsory registration of births but does not provide for it as a right. [289] In countries like Kenya, the legal framework that deals with nationality related issues such as registrations is still based on laws from the past, however, they constantly modify them. These laws from the past did not apply to all people in Kenya and only became inclusive of everyone when the countries gained independence. In Uganda the laws that did not include everyone when it came to registration are no longer operating.[290]

EAC member states have low numbers in terms of birth registrations. This has caused the UN Committee on the Rights of the Child to be concerned based on the reviews made by treaty bodies.[291] The most numbers of unregistered births in African countries are found in the rural areas as the systems are not accessible or inclusive.[292] EAC member states struggle with births that are registered late. Some countries like Kenya allow late registration only on condition that the Principal Registrar has granted such in writing.[293] It is encouraged that registration of births be done immediately in order to avoid complications that come with the many requirements that follow when late registration occurs which in most cases are difficult to comply with. Even though birth registration has improved in countries like

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288 Section 11 of the Child Act 10 of 2008 [Southern Sudan].

289 Section 22(1)(g) of the KCIA 2011 and Section 9 of the Births and Deaths Registration Act 2 of 1928 as amended (Cap. 149 Laws of Kenya 2012).

290 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 25-26 (Accessed 06-04-2020).

291 UN Committee on the Rights of the Child, Concluding observations: Burundi, 19 October 2010 CRC/C/BDI/CO/2) https://digitallibrary.un.org/record/692497?ln=en (Accessed 17-07-2020); UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third to fifth periodic reports of Kenya*, 21 March 2016, CRC/C/KEN/CO/3-5 https://www.refworld.org/docid/57aaeb8b4.html (Accessed 17-07-2020); Rwanda, 14 June 2013 (CRC/C/RWA/CO/3-4) https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/RWA/INT_CRC_COC_RWA_13833_E.pdf; Tanzania, 3 March 2015 (CRC/C/TZA/CO/3-5) http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhssLtNJbBZiFQ5NZyh2VH3hcSW0Z6IRACJZafsT2Vo8RTDFbd1J72ege4JeN4X1ReUaRCKfSv3SiQ8VAGWW598FfrscO8NxuOkmFJbrLEd32b, and Uganda, 23 November 2005 (CRC/C/UGA/CO/2) https://www.refworld.org/docid/45377eb70.html (Accessed 17-07-2020).

292 See UN Committee on the Rights of the Child "Concluding observations: Kenya, CRC/C/KEN/CO/3-5, 21 March 2016" paragraph 2930. See also Manby B EAC https://data2.unhcr.org/en/documents/download/66807 27 (Accessed 06-04-2020).

293 Section 8 of Births and Deaths Registration Act.

Kenya, the systems cannot yet be said to be fully problem free. The struggle for registration is also faced by children belonging to parents that are not recognised as Kenyan or orphans whose parents' nationality is questioned by the state. This situation improved on the basis of directives that were given by the Department of Civil Registration in 2008 which looked into assisting vulnerable children with easy access to late birth registration.[294]

The other category that makes it challenging in terms of birth registration is the children that are born to parents who are not married. This has led the high court in Kenya to hold that the names of fathers should be on the birth certificate of the child even in cases where the parents are not married.[295] However, an argument can be made on the notion that what happens when the father is unknown or his whereabouts are not known to the mother, this will then further delay the registration of the child's birth with the possibility of not even registering at all. Refugees have challenges in registering the births of their children, however, the UNHCR attempts to assist states with such cases. In addition, there is also more difficulties in birth registration of children that have been displaced as there is limited support for this category from international organisations.[296]

An identification document is, in some countries, *prima facie* evidence of nationality as the nationality of a person is on the document. The access to rights that are provided for is through possession of an identification card, this includes the right to education, healthcare services and even voting for instance. Further, an identity document is a required document for application of a passport.[297] In order for people to enjoy the rights that are provided for, there should be an effective administration for registration of identity documents in place[298] which is accessible to all people

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294 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 28 (Accessed 06-04-2020).

295 Ibid.

296 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 28-30 (Accessed 06-04-2020).

297 For southern Africa, see Klaaren J and Rutinwa B *Towards the Harmonisation of Immigration and Refugee Law* Chapter 2 "Population Registration and Identification" 26–38 as discussed in Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 119 (Accessed on 31-03-2020).

298 See Manby B *Struggles for Citizenship in Africa* (Zed Books Ltd 2013) 115–126 as discussed in Manby B ibid 119.

within a state as the practice experienced is said to be challenging. The determination of a person's nationality is usually in the hands of people who are less qualified or lack the experience in practice. This is because when the process begins it is usually civil servants in the low ranks who handle the applications and experience lack of knowledge of nationality laws in most circumstances. The procedures to be followed when the identification applications are rejected unlawfully may exist in theory, however, they are not easily accessible to everyone. Reviewing such decisions using judicial procedures is almost always an expensive procedure that is not afforded by the majority of people who are actually in need of such service and exclusionary.[299]

Nationality certificates are considered to be conclusive proof of nationality in civil law countries, they are issued by a tribunal. This process of an individual being recognised as a national through judicial procedures protects people from undue processes and from decisions that are made illogically by those in power. This opens up the argument which will be made in chapter 5 about the link between administrative procedures and nationality laws. In cases where a person's nationality is in question, the case can be taken to the tribunal where the matter will be decided and their status will be determined. With the availability of a nationality certificate means conclusive proof of nationality which need not be tested. The procedure maybe difficult for people to satisfy though it is there to provide them with protection against arbitrary processes. This procedure is provided for in theory in Commonwealth countries when the nationality of a person is questioned, however, it is provided for by the executive though in practice it is not known.[300] Different circumstances in practice require different kind of proof to determine the nationality of an individual, with the passport regarded as the most effective proof. This is

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299 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 29 (Accessed 06-04-2020).

300 See Section 20 of the Ghana Citizenship Act 2000 which gives the Minister power to grant nationality to an individual. This is also provided for in section 14 of the Gambia Nationality and Citizenship Act 1965 and section 24 of the Sierra Leone Citizenship Act 1973, however, such provision is not provided for in Nigeria. In the case of southern Africa countries that have the same provisions are Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe, however, the provision is not provided for in Kenya and Uganda.

disturbing because not everyone is privileged to possess a passport or travel internationally.[301]

Travelling documents such as passports are only of use to the citizens who wish to travel abroad. The nature of reasons why one would want to access a passport is often related to opportunity, access and privilege, however, the majority of people in African countries or poor countries in other regions such as Myanmar are not able to access these documents and to them it is luxury. International travel within the EAC community usually did not require an international passport, however, a decision to allow travelling with the use of national identity cards has been introduced. The 2010 Kenyan Constitution stipulates that everyone is eligible to obtain a passport and any form of document that identifies such a person as Kenyan. Further, the Kenyan Citizenship and Immigration Act also aligns with these provisions of the Constitution.[302] This process was previously set on discretion.[303] The implementation of the right to a passport took place in Uganda in 1999[304] and other countries in that region which include Tanzania and Burundi for instance, also adopted the provision.[305]

Acquiring a passport is challenging compared to acquiring a state's identification card. Accordingly the process of applying for a passport is stricter and requires the personnel to inspect the whole procedure thoroughly. In some circumstances, people in possession of nationality identity documents find their citizenship in doubt when they apply for a passport. In cases where a person's nationality is doubted,

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301 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 120 (Accessed on 31-03-2020).

302 Article 12(1)(b) of the Constitution of Kenya 2010 and Section 22(1)(g) of the Citizenship and Immigration Act 2011.

303 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 121 (Accessed on 31-03-2020).

304 Section 39 of Citizenship and Immigration Control Act 1999: 'Every Ugandan shall have the right to a passport or other travel documents.'

305 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 122 (Accessed on 31-03-2020).

there are further procedures and document requirements that they may go through in order to eliminate the doubt. Such documents may include birth certificates.[306]

3.3 Asian region legal framework

Most Asian countries regained independence around 1945 towards 1949 and these countries include Pakistan, the Philippines and Burma (now Myanmar) for instance.[307] Asia is largely a region with inherent differences in terms of religion, languages and ethnical groups.[308] There has been a lack in research on Asia's position which may have been based partly on the Asian states' poor participation in treaties that are related to nationality laws juxtaposed to other states. Further, the region lacks judicial decisions related to citizenship matters.[309] The literature position is developing and it is evidenced in a number of comparative analysis writings.[310] It has been noted that because most countries in Asia became free from colonialism or state-determination occurred in the 20th century, this explains the reason why their citizenship laws are stringently safeguarded.

There is a lack of regional judicial decisions in Asia when compared to what the other regions have done in matters related to nationality within their regional courts and committees. The writers in the region have acknowledged the underdevelopment of the region's performance on the international arena in nationality issues with majority studies linked to Europe.[311]

Upon gaining independence from the Soviet Union, Central Asian countries (CAC) undertook to make improvements on policies related to citizenship issues. However, this is not the position with other states in the region that were under the Soviet Union rule pre-independence as they have no regard about demographical issues

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306 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 34-35 (Accessed 06-04-2020).

307 Isharyanto "Post-Colonial Citizenship Law (Comparative Study of Asian Countries" 2019 *Jurnal Dinamika Hukum* 448-467 449.

308 Suryadinata L The making of Southeast Asian nations. State, ethnicity, indigenism and citizenship (WSPC 2014).

309 Isharyanto 2019 *Jurnal Dinamika Hukum* 449.

310 See Manby B Citizenship and statelessness in Africa: the law and politics of belonging (Wolf Legal Publishers 2015) and Vonk O Dual "Nationality" in the *European Union: A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Martinus Nijhof 2014) as discusses ibid.

311 Choen H "National Identity and Citizenship in the People's Republic of China and the Republic of Korea" *Journal of Historical Sociology* 84–118.

related to immigration and ethnicity.[312] When CAC attained their independence, they resorted to granting citizenship status to anyone residing within the territory despite heredity being the determination factor for the status. [313]

Gaining independence means that a country has to adjust its nationality policies and a rise in migration also needs to be addressed during this era. Initially there were few concerns in relation to migration in the Asian region as it occurred domestically. The position changed during the 20th century when international migration emerged due to new states being created on the basis of independence.[314]

Colonialism in the Asian region like other regions caused displacement which still has an impact between countries in the region. However, countries such as Myanmar and India were under the British colonial rule and that meant that the laws in the two countries were applied similarly.[315] In Myanmar a lot of people have experienced challenges with regard to their citizenship status which has led to a lot of people, mostly the Rohingya, being refugees in other countries and stateless. This is not the case for all minority groups in Myanmar as the nationality challenges of the other minority groups such as the Tamils and the Urdu people have developed.[316]

Despite the region being notorious for having the highest rate of stateless people because of countries like Myanmar, other countries can be applauded for their efforts in eradicating statelessness. Kyrgyzstan has become the first country in history to end statelessness within its territory.[317] The Kyrgyzstan managed to grant nationality to over 13 000 individuals within a period of five years. This initiative was

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312 Isharyanto 2019 *Jurnal Dinamika Hukum* 449.

313 Ibid 450.

314 Amrith S S *Migration and Diaspora in Modern Asia* (Cambridge University Press 2011).

315 Vonk O "Comparative Report: Citizenship in Asia" https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 4 (Accessed 24-08-2020) and Arraiza J M and Vonk O "Report on Citizenship Law: Myanmar https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 3 (Accessed 24-08-2020).

316 Vonk O "*Comparative Report: Citizenship in Asia*" https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 4 (Accessed 24-08-2020).

317 UNHCR "The UN Refugee Agency "Kyrgyzstan ends statelessness in historic first" https://www.unhcr.org/news/press/2019/7/5d1da90d4/kyrgyzstan-ends-statelessness-historic-first.html. (Accessed 24-08-2020).

influenced by the UNHCR campaign called 'I Belong campaign'. The Kyrgyzstan government showed political will and identified the number of people who were stateless and within five years it had granted them with citizenship status. Other countries globally (South Africa and Kenya etc.) can emulate the procedures and measures that were used by the Kyrgyzstan Government to show political will in ending the crisis.[318]

3.3.1 Acquiring nationality in Asia

In terms of the manner in which citizenship was acquired, most countries followed *ius sanguinis* through the paternal lineage with maternal lineage only followed as an exception in cases such as when a child was born to unmarried parents and the father rejected the child.[319] Due to the loss of nationality of origin by women upon marriage leading them to acquire their husband's nationality, majority of the children share the same nationality with their parents. This discrimination based on gender came to an end around the 20th century and women were now allowed to possess their own nationality. Gender equality is now being practiced in some countries in Asia such as Japan, Sri Lanka and Pakistan for instance.[320]

Currently the majority of Asian countries practice both the *ius sanguinis* and *ius soli*. Conventionally, *ius soli* provides for a diversion from the normal practice of using *ius sanguinis* in cases where the children were born abroad and an application is being made for acquiring citizenship. The transfer of citizenship through this provision is extended up to the second generation. In Asia citizenship by birth is commonly acquired through *ius sanguinis* which is a practice imitating European as opposed to American practices.[321]

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318 UNHCR: The UN Refugee Agency "Kyrgyzstan ends statelessness in historic first" https://www.unhcr.org/news/press/2019/7/5d1da90d4/kyrgyzstan-ends-statelessness-historic-first.html. (Accessed 24-08-2020).

319 Isharyanto 2019 *Jurnal Dinamika Hukum* 457-458, see also, in the case of Swaziland, see Chapter 4 of the .Constitution of the Kingdom of Swaziland Act 2005 with specific reference to section 43(4).

320 Isharyanto 2019 *Jurnal Dinamika Hukum* 457-458.

321 Vonk O "Comparative Report: Citizenship in Asia" https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y (Accessed 24-08-2020).

Operation of law makes it difficult to unify the manner in which people gain nationality globally if each state has their own rules and regulations.[322] In Myanmar for one to acquire citizenship it is required that one of the parents must be a citizen by birth and the other parent must be, in accordance to Myanmar laws, an associate or naturalised citizen.[323] Further, birth registration is an integral process related to nationality issues and the acquiring of documentation that proves one's nationality. In Asia the countries that have challenges with the registration process are Cambodia and Myanmar.[324]

3.3.1.1 Acquiring nationality on the basis of dual nationality

Asian countries are against the idea of children born in foreign countries to possess dual nationality and in order for the children to be granted the nationalities of their parents, further conditions must be fulfilled. It is at this point that even though the Asian region mirrors European practices, the difference is seen through further rigid provisions provided for in these circumstances. Other countries in Asia such as Malaysia and Nepal still practice gender discrimination when granting children nationality.[325] Many countries world-wide are seeking to purge the *ius soli* principle or in its stead create a principle with better conditions in comparison with the *ius soli* principle.[326]

Due to the prohibition of dual nationality in Asia as a region, in most countries when a person acquires the nationality of another country by choice, it warrants the loss of their birth nationality. The countries that allow people of origin to renounce their nationality voluntarily and acquire nationality of another state are Pakistan and Bangladesh. Loss of nationality upon acquiring nationality of another state is applicable in South Korea except in cases where one acquires the other nationality

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322 Vonk O "Comparative Report: Citizenship in Asia" https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 8 (Accessed 24-08-2020) .

323 Ibid 10, associate and naturalised citizens are people who were granted nationality on the basis of the 1948 Union Citizenship Law of Burma and persons who have resided in Burma before 4 January 1948 and processed their nationality applications after 1982 respectively.

324 Arraiza J M and Vonk O "Report on Citizenship Law: Myanmar https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 (Accessed 24-08-2020) and Sperfeldt C "Report on citizenship: Cambodia" https://cadmus.eui.eu/bitstream/handle/1814/45084/GLOBALCIT_2017_02_Cambodia.pdf 15-16 (Accessed 25-08-2020).

325 Isharyanto 2019 *Jurnal Dinamika Hukum* 457-458.

326 Ibid 458.

by marriage or other specified circumstances. However, in Sri Lanka, persons who acquired nationality by registration or birth are the ones to which the loss of nationality by acquiring another nationality rule apply to. The same rule that applies in other regions that fraudulent practice in acquiring nationality leads to the loss of nationality applies in Asia.[327]

3.3.1.2 Acquiring nationality on the basis of being an abandoned child

In cases of abandoned children, only a few countries in Asia make provision for these children to automatically acquire citizenship, supposedly with many countries in the region considering the children as nationals. Age limitation is a common provision used by the countries that recognise abandoned children as citizens. The countries specify up to what age a child should be considered a citizen when found.[328]

3.3.1.3 Acquiring nationality on the basis of naturalisation

Naturalisation is considered as another form of acquiring nationality in terms of laws of other countries as already established above. Therefore naturalisation is also applied in other Asian countries such as Bangladesh where the process also considers family links.[329] Other countries such as Japan have a low rate of naturalisation and this also includes countries that form part of the Organization for Economic Cooperation and Development. Countries that are part of this organisation are also against the notion of dual nationality.[330]

In Asia no country provides for refugees to be naturalised and naturalisation for stateless persons is only provided for in three countries, however, the practical impact of these provisions of naturalisation to the stateless are minimal. Stateless persons in Afghanistan are provided with discretionary naturalisation only when they have met all the requirements for naturalisation or are married to a citizen. China also provides stateless persons with discretionary naturalisation if they have fulfilled all the requirements. It is only in Vietnam where persons who are stateless are offered naturalisation by entitlement. This is offered if the stateless individuals do

327 Vonk O Dual Nationality in the European Union. A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States (Martinus Nijhof 2014).

328 Isharyanto 2019 *Jurnal Dinamika Hukum* 459.

329 Ibid.

330 Isharyanto 2019 *Jurnal Dinamika Hukum* 459-460.

not have identification papers, they respect the Constitution and laws of Vietnam and also if they have been residing in the country for 20 years. It is not unexpected that there still is a lack of regulations in relation to facilitated naturalisation of refugees and stateless people in Asia. This is due to the low rates in ratification of international treaties relevant to citizenship and statelessness.[331]

3.3.2 Losing nationality in Asia

Citizenship can be lost on the state's accord when it withdraws nationality or when the citizen willingly renounces their nationality.[332] It is generally recognised internationally that fraud is a ground for citizenship to be lost even if statelessness is a consequence thereof.[333] Even in the case that states do not implicitly provide this ground in citizenship laws, general administrative law principles are assumed to be other means which can be applied to withdraw citizenship.[334] Administrative law plays and integral role when countries revoke nationality even though such a provision is not specifically provided for in the laws of many countries but is seen through practice.[335] However, further elaboration will be made in chapters four and five in order to understand the negative impact that administrative decisions have on the stateless community and solutions that can be used.[336]

Loss of nationality for some people in other Asian countries transpired due to their countries being at war and such countries include Myanmar, Sri Lanka and Malaysia for instance.[337] Safeguarding methods such as reversing the renunciation of nationality are made available in the states of Vietnam and Mongolia in instances where citizens attempt to acquire nationalities of other states and are rejected. Other regions can use the reverse of renunciation method in an attempt to reduce statelessness as a safeguarding tool. Renouncing one's nationality voluntarily is prohibited in North Korea and Nepal, and in Thailand it is only allowed in cases where a citizen marries someone from another state. Asian citizens residing in other

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331 Vonk O "Comparative Report: Citizenship in Asia" https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 26 (Accessed 24-08-2020).

332 Ibid 23.

333 Ibid 25.

334 Ibid.

335 Isharyanto 2019 *Jurnal Dinamika Hukum* 461.

336 Isharyanto 2019 *Jurnal Dinamika Hukum* 461-462.

337 Ibid 461.

countries are at risk of losing their nationality as this is one of the methods recognised for loss of nationality in the region. The only country that has an exception to this rule is Malaysia as it provides for this rule to only apply to persons who acquired nationality through naturalisation.[338]

3.4 Categories of people susceptible to statelessness and the impact thereof

When it comes to citizenship laws and the administration related to it, there is lack of effective provisions to integrate migrants to be nationals. This has increased the population of people who are stateless.[339] In Africa, the groups that are more susceptible to being stateless are similar. They can be divided into four main categories which are: Historical or contemporary migrants with their descendants; Refugees or those who were refugees before including refugees that were returned to their country of origin where they have few or no current links;[340] border populations, including 'pastoralist ethnic groups' who frequently cross borders, nomads including people that have been affected by disputes related to border and territory transfers and children with no parents including children that have been trafficked.[341]

3.4.1. The impact of being statelessness

The scope of statelessness as a problem is being addressed by the need to create administrative systems that are reinforced and safeguard the registration of births and access of identity documents widespread. The consequences of not being recognised as a national can be serious. One is prone to be subjected to arbitrary detention and expulsion. Several countries in the EAC have been practicing arbitrary detention and expulsion and it has caused a negative impact not only to individuals who are foreigners but also people who are either nationals or have the entitlement to nationality. In countries such as Kenya, Burundi and Rwanda where since independence, individuals are obligated to possess a national identification card one can be excluded from public and private benefits if they do not have an identity

338 Isharyanto 2019 *Jurnal Dinamika Hukum* 461.

339 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 4 (Accessed 06-04-2020).

340 This group is found in almost all regions including Asia, especially considering the situation of Myanmar.

341 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 3 (Accessed 06-04-2020).

card.[342] In countries like Uganda and Tanzania the possession of identity cards was not required and access to services did not require identification until recently which shows a change in the system.[343]

In the *Nubian children's* case, the African Committee of Experts dealing with rights and welfare of children indicated that despite the causes of statelessness, the negative impact thereof cannot be overemphasised. Due to no fault on their part, stateless children endure an uncertain future. This means that they lack any form of exercising constitutionally protected rights granted by the state such as having justice procedures at their disposal or travelling freely within the state or outside. Further, stateless children are unable to realise their socio-economic rights which include the rights to education and to health care. Statelessness is a position that contrasts what is regarded to be the best interests of children in a nutshell.[344]

3.4.2. The COVID-19 pandemic and the stateless community

The stateless community has already been historically marginalised and with the pandemic disrupting the world the community is now exposed to even worse double standards of marginalisation as compared to the rest of the people. An imbalance, to say the least, has been seen in the manner in which the governments, globally, are responding to the pandemic. It is clear that citizens are given priority in receiving states' assistance with the majority of the countries making no efforts to include the stateless community. Further marginalisation as the stateless people are not being granted any form of relief, medical assistance or supplies that citizens are receiving from their governments. When stateless people are in need of all these services, they are unable to approach the relevant authorities for fear of being arrested for being undocumented.[345]

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342 They include being able to obtain a passport, voting and holding a public office position or getting health services for instance.

343 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 3 (Accessed 06-04-2020).

344 The *Kenyan Nubian Minors* decision paragraph 46, see also Fokola E and Chenwi L "Statelessness and rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee" 2013 (6) *African Journal of Legal Studies* 357-373.

345 International Commission of Jurists Advocates for Justice and Human Rights "In Solidarity with the stateless" https://www.icj.org/wp-content/uploads/2020/05/Joint_Statement_in_Solidarity_with_the_Stateless-27.05.20.pdf (Accessed 04-06-2020).

Despite all the negativity that has been occurring during this pandemic period, India is to be applauded as its judicial system has shown initiative through considering the release of detainees with the aim of curbing the virus. The detainees are undocumented and were declared to be foreigners, however, they are now eligible for release upon meeting the requirements that have been set by the Supreme Court of India. This came after the court considered the state that the pandemic has put the country in and that the court had already ordered the release of other detainees in general, the court saw no issue in doing the same with detainees that were considered to be foreign. The aim of the release was to decrease the amount of infections in detention centres.[346]

3.5 The enforcement of laws related to nationality and remedies

Statelessness as a subject in the international arena has led the UNHCR to distribute guidelines on the subject[347] and develop on how the stateless can be protected.[348] The guidelines are based on experts meetings that were convened for issues relating to statelessness which were concluded by finalising on what defined a stateless individual. It was further established whether it is a mixed question of

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346 The Hindu "SC orders release of detainees lodged for 2 years in Assam detention centres" https://www.thehindu.com/news/national/other-states/sc-orders-release-of-detainees-lodged-for-2-years-in-assam-detention-centres/article31333315.ece (Accessed 28-08-2020).

347 UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 1: The definition of 'Stateless Person' in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012, HCR/GS/12/01" https://www.refworld.org/docid/4f4371b82.html (Accessed 28-08-2020); UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02" https://www.refworld.org/docid/4f7dafb52.html (Accessed 28-08-2020); UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, 17 July 2012, HCR/GS/12/03" https://www.refworld.org/docid/5005520f2.html (Accessed 28-08-2020); UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04" https://www.refworld.org/docid/50d460c72.html (Accessed 28-08-2020), UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05" https://www.refworld.org/docid/5ec5640c4.html (Accessed 28-08-2020).

348 UN High Commissioner for Refugees (UNHCR) "Handbook on Protection of Stateless Persons, 30 June 2014" https://www.refworld.org/docid/53b676aa4.html (Accessed 28-0814-03-2020).

fact and law when a state's operation of law does not regard an individual as its national.[349]

The EAC partner states seek to strengthen the measures to address statelessness through coordination amongst them together with other international bodies and agencies such as the UN. The laws that grant and regulate the recognition of nationality of a state are extremely political and tend to be controversial. This is due to high migration levels or instances where states involved lack strengthened or effective regulations on nationality.[350] The existence of an EAC treaty seeks to encourage EAC Partners in committing to follow the principles provided for in the African Charter. Their obligation to respect and protect human rights also means that they are obligated to curb statelessness and respect the right to nationality. If EAC partner states do not grant the right to nationality within their territories, this would lead to the infringement of the right to free movement and lack of respect towards the people's human rights.[351]

There is a need for countries that grant nationality based on descent only to have an obligation of surging the access of nationality on the basis of long-residence or other measures. When it comes to persons on the verge of becoming stateless, like children with no possibility of being granted the nationality of their parents, the state should put in place easy and expedited naturalisation procedures or even non-discriminatory ways of registration. In cases that states have available procedures to protect stateless children, in most circumstances it is very challenging to access these procedures and there is a need for other ways in which acquisition can take place. The process of naturalisation is based on the personal discretion of the Minister or President, however, it is supposed to be decided objectively based on processes that are transparent and fair. When an application for naturalisation is denied, reasons for such decision should be made available together with opportunities to review the decision in the case that the individual is said to not meet

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349 UN High Commissioner for Refugees (UNHCR) "Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: ("Dakar Conclusions"), September 2011" https://www.refworld.org/docid/4e8423a72.html paragraphs 12 and 13 (Accessed 28-08-2020),

350 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 5 (Accessed 06-04-2020).

351 Ibid 6.

the requirements stipulated in legislation. The 1951 Refugee Convention in article 34 and the 1954 Convention on Statelessness in article 32 provides for states' obligation to assist with naturalisation. Therefore, states should consider these provisions when making decision of naturalisation. This can be seen in the case of the Makonde people in Kenya where fees related to applications were reduced.[352]

The easy way of guaranteeing that children born in a state do not end up stateless is by the application of an outright *ius soli* rule which provides any child born in the state with automatic nationality.[353] This makes the right to nationality a controversial issue which needs radical legal knowledge in order to give answers on who should be considered a citizen. This on its own is but just one of the many challenges faced by a person claiming the right to nationality. In countries like South Africa, Mozambique and Lesotho for instance the laws and Constitutions conflict in some provisions.[354]

The UNHCR has considered three possible solutions for refugees and these are: (i) considering integrating them in the first country they seek asylum, (ii) resettling them in another country and (iii) repatriating them voluntarily. Repatriating refugees is considered a better resolution, however, there is no certainty on the safety of the refugees when repatriated. A small figure can be resettled so this is not a more viable solution as the number of refugees has increased over the years. The large number of refugees that have settled in other countries on the basis of asylum has seen a need for a solution that can allow for refugees to be reintegrated into the local communities. Article 34 of the 1951 Refugee Convention stipulates that countries should enable the adjustments of refugees through naturalising them. States should do this by making sure that the process is accelerated, affordable and accessible to all. [355]

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352 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 81-82 (Accessed 06-04-2020).

353 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 4 (Accessed 31-03-2020).

354 Ibid 46.

355 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 46 (Accessed 31-03-2020).

African countries have seen a protracted and large number of refugees settling in different regions whether the reason is for exile or fear of persecution but there has been a need for solutions to be put into operation.[356] The 1951 Refugee Convention provides for what is known as the 'cessation clauses' which are related to ending the status of being refugees in a manner that is regulated.[357] This process allows for the UNHCR to enter into agreements with the nationality countries of the refugees so that they may be repatriated or integrated into society. In some cases when an individual is still in need of the protection from another country, they will qualify to be exempted from the process.[358]

The procedure of naturalising stateless individuals is provided for in broad terms in the laws of a few countries.[359] The interpretation of law providing for the naturalisation of stateless people often is not done in a favourable manner in practice, however, countries such as Lesotho and Malawi provide for, in certain situations, stateless persons to be registered. [360] The aim now is for other countries to follow suit in terms of naturalising stateless persons and granting them with a legally recognised status while improving on the shortcomings that are faced by the countries that already have that provision in their laws. There are countries with commendable naturalisation systems that are accessible to refugees and deal with them in the most humane manner. The systems do not have in place requirements that may hinder the access by refugees and are easily accessible and operational.

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356 UN High Commissioner for Refugees (UNHCR) "Protracted Refugee Situations, 10 June 2004, EC/54/SC/CRP" https://www.refworld.org/docid/4a54bc00d.html 14 (Accessed 25-08-2020, see also Manby B ibid 128.

357 Manby B ibid 129.

358 UN High Commissioner for Refugees (UNHCR) "Assistance to refugees, returnees and displaced persons in Africa: Report of the Secretary-General, 29 August 2006, A/61/301" https://www.refworld.org/docid/4601416e2.html (Accessed 26-08-2020).

359 See for instance article 17 of the Nigerian National Commission for Refugee Act of 1989 which stipulates that, '[s]ubject to the provisions of relevant laws and regulations relating to naturalisation, the Federal Commissioner shall use his best endeavours to assist a refugee, who has satisfied the criteria relating to the acquisition of Nigerian nationality to acquire the status of naturalisation under such relevant laws and regulations' and section 14 of the Ghana Refugee Law of 1992 provides that the '[s]ubject to the relevant laws and regulations relating to naturalisation, the Board may assist a refugee who has satisfied the conditions applicable to the acquisition of Ghanaian nationality to acquire Ghanaian nationality'.

360 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 130 (Accessed 31-03-2020).

Accommodating naturalisation measures should be made available for refugees that have been integrated in communities or that are in camps.[361]

According to the UNHCR the Southeast Asian region should be a priority[362] in relation to the Global Action Plan 2014-2024[363] to end statelessness. The reason for this is not only because it is estimated that 40 per cent of the stateless people are found in that region but also because the nationality status of the Rohingya community in Myanmar has not been resolved. Further, there still is a lack of improvement towards respecting the human rights of the Rohingya community.[364]

3.6 Conclusion

As it has already been established, being granted nationality is an opening to the ability of persons to exercise their rights and being protected by the state which granted them citizenship amongst other things.[365] For one to possess citizenship they should be linked to a state and that link should be recognised.[366] In cases where people have not acquired citizenship it means they do not have rights such as socio-economic, political and civil rights for instance. This makes their existence difficult in the sense that they are unable to do things that may seem easy to those that have the legal citizenship status such as accessing health facilities, getting employed or even accessing education.[367]

The status of being recognised by a state as a citizen is crucial in relation to the link created between a country and the citizens.[368] In my view, the role of citizens is

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361 Manby B "Citizenship Law in Africa: A Comparative Study" https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf 130 (Accessed 31-03-2020).

362 Vonk O "Comparative Report: Citizenship in Asia" https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 27 (Accessed 24-08-2020).

363 UNHCR The UN Refugee Agency "Global Action Plan to End Statelessness: 2014 – 2024" https://www.unhcr.org/ibelong/global-action-plan-2014-2024/ (Accessed 26-08-2020).

364 Vonk O "Comparative Report: Citizenship in Asia" https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 26 (Accessed 24-08-2020).

365 Isharyanto 2019 Jurnal Dinamika Hukum.

366 Bosniak L "Citizenship Denationalized" 7(2) 2000 *Indiana Journal of Global Legal Studies* 447-509.

367 Ngai M M "Birthright Citizenship and the Alien Citizen" 75(5) 2007 *Fordham Law Review* 2521-2530.

368 Parker K M "Making Blacks Foreigners: The Legal Construction of Former Slavesin Post-Revolutionary Massachusett" 2001 Utah Law Review 75-124 75.

often taken for granted by states and even in writings yet they are the needed basics for a state to be recognised as such and without which it becomes impossible. The predicament further extends because the exercising of rights and obligations are linked to people being recognised as citizens.[369] This leads to the question on what steps should be taken against states that decide to denounce the citizenship status of a group of people based on their ethnicity or discrimination for instance. This is a narrative that should be challenged vigorously as many people's rights are being violated with states getting away without any consequences attached to their actions. The nature of citizenship makes it a very intrinsic and integral topic in terms of policies both within states and outside.[370] The question of who belongs to a state remains in the power of such states to regard and decide upon, however, as mentioned before this power is now subjected to be in line with the principles provided for by international laws related to nationality.[371] Lack of consensus between states on what measures should be regarded on the determination of citizenship is still the challenge. If states could reach a consensus on a method to use, the different challenges faced by citizens related to nationality would decrease.

369 Filomeno A "The triumph of instrumental citizenship? Migrations, identities, and the nation- state in Southeast Asia" 23(3) 1999 *Asian Studies Review* 307-336 and Volpp L "The Citizen and the Terroris" 49(5) 2002 *UCLA Law Review* 1580–1583.

370 Isharyanto 2019 *Jurnal Dinamika Hukum* 449.

371 Ibid.

Chapter 4 - A comparative legal study of the nationality legal framework of South Africa, Kenya and Myanmar

The aim of this chapter is to do a comparative analysis on the rights that stateless people have in the selected jurisdictions. This chapter will include the legal framework that exists in the selected countries and the manner in which they protect stateless individuals and prevent the crisis. The analysis will include the remedies that are readily available to cure the situation and whether a gap exists or not. The aim for selecting these territories was to demonstrate that in terms of South Africa, laws may exist that may assist stateless persons, however, if it does not officially recognise stateless persons and enact laws in that regard, it is complicit in creating statelessness the same way a country like Myanmar which has prevalent cases of statelessness is. Kenya has taken steps to grant nationality to some stateless persons and such should be emulated by South Africa and Myanmar.

4.1 The historical background of nationality laws

4.1.1 South African

Before the Constitution of South Africa came into force in 1994, the provision on nationality was found in the South African Citizenship Act 44 of 1949 (SACA). The provisions in SACA mostly referred to 'any person', however, when it came to the provision that stipulated the availability of citizenship to every South African, such was an intentional misrepresentation of reality.[372] This was because the only people who enjoyed the rights that came with being a citizen were white people or those that identified as Europeans. Other races were considered to be citizens, however, they were not allowed to vote, or freely move around the country and their status position was not similar to that of the whites or Europeans.[373]

Around 1970 a new legislation called the Black Homeland Citizenship Act 26 of 1970 came to force and it was aimed at withdrawing more of the citizenship status that black people had. This caused all blacks to be relocated to their original homelands wherein they were granted homeland citizenship further to the South African

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372 Klaaren J 'Post-Apartheid Citizenship in South Africa' in Aleinikoff TA and Klusmeyer D (eds.) *From Migrants to Citizens: Membership in a changing world* (Washington DC: Carnegie Endowment for International Peace 2000).

373 South African History online: Towards a People's History "The Homelands" https://www.sahistory.org.za/article/homelands (Accessed 08-06-2020).

citizenship they already possessed. Their South African citizenship was eventually lost when the homelands were acknowledged as sovereigns.[374] It is only in 1994 that the Black Homeland Citizenship Act finally ceased to operate paving way for everyone to be able to vote in the 1994 elections and the 1995 SACA came into force.[375]

The 1995 SACA was not regarded as an amendment of the 1949 Act; it was actually a replacement of the laws related to citizenship during Apartheid which were discriminatory in nature.[376] In 1994 everyone who was a citizen in South Africa was eligible for acquiring the South African citizenship. It is argued by Klaaren J that the only important changes made to prior regulations on citizenship in South Africa were their equal application to all citizens.[377] Among the changes, the new legislation allowed re-acquisition of citizenship to those that had lost it while they were in exile for instance and further provided for stateless children considering their large population.[378] The SACA has gone through many amendments which include Act 44 of 1949 which ceased to operate in 1995. A new version of the Act came into operation in 1995 and ceased operating in 2012 and the current version came into force.

The 1949 Act provided citizenship to a child born to married parents at the time of birth provided the father was a South African and the birth was registered. In the case of unmarried parents, the child would be granted citizenship subject to the mother being a citizen of the Republic.[379] This law differentiated between children who were legitimate and those who were not. Furthermore, the law would then discriminate against children born outside South Africa to unmarried parents

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374 South African History online: Towards a People's History "The Homelands" https://www.sahistory.org.za/article/homelands (Accessed 08-06-2020).

375 Hobden C "*Report on Citizenship Law: South Africa*" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 3 (Accessed 08-06-2020).

376 Klaaren J "Constitutional Citizenship in South Africa" 2010 *International Journal of Constitutional Law* 94-110.

377 Klaaren J "Post-Apartheid Citizenship in South Africa" in Aleinikoff TA and Klusmeyer D (eds.) From Migrants to Citizens: Membership in a changing world (Washington DC: Carnegie Endowment for International Peace 2000) 221.

378 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 4 (Accessed 08-06-2020).

379 Section 6 of the South African Citizenship Act of 1949 (SACA).

wherein the father was not South African as such the children would not acquire South African citizenship through their mothers.[380] Legitimacy was then removed from the 1949 Act in 1991 and it now stipulated that any person born abroad to a South African parent would become a South African citizen whether they were legitimate or illegitimate.[381]

4.1.2 Kenya

The amendments that had a significant impact on Kenyan nationality laws occurred in 1985 with the majority of the amendments between the periods of 1969-2008 being for political gains. However, the Kenyan nationality laws are based on the provisions of the Kenyan Constitution.[382] The Kenyan Citizenship Act 49 of 1963 (KCA)[383] did not create any major changes in relation to what the Constitution provided for in nationality issues. The KCA, however, made a change in terms of persons who were African descendants as they were allowed to apply for Kenyan nationality through the registration process. These persons were eligible for application for nationality if they were of good character, were able to communicate in Swahili or English, were ordinary resident in Kenya for a period of five years and were apposite to being a Kenyan citizen.[384]

The pre-requisite of the application was that the person had to renounce their other citizenship in order not to have dual nationality. If they failed to do so within 21 or 28 days after acquiring the Kenyan nationality, the registration would be reversed.[385] The Minister had the powers to deny renunciation by declaration from a citizen of a Commonwealth or another foreign country if such declaration was applied during a period where in Kenya was partaking in war or if it was against public policy.[386] The power that the Minister held in accordance to the 1963 Constitution and the KCA was the ultimate decision that was not subjected to any form of review.[387]

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380 Section 6 of the SACA of 1949.
381 Section 2(2)*(b)* of the SACA 2010 Amendment Act (No 17 of 2010).
382 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 1 (Accessed 06-07-2020).
383 Later referred to as Chapter 170. The Kenya Citizenship Act (KCA).
384 Ibid section 3.
385 Ibid section 5.
386 Ibid sections 6 (1) and (2).
387 Ibid section 9.

The Constitution of Kenya was amended numerous times, however, the 1985 amendment consisted of substantial changes in relation to nationality. In the 1985 amendment, section 89 of the 1963 Constitution was changed to include either parent in a case of nationality by birth for a person born in Kenya after liberation.[388] Previously the provision guaranteed nationality by *jus soli* unless the parents were foreign or where the father was foreign, a diplomat or a citizen of a country that was adversary towards Kenya. The provision was later revised in order to integrate *jus sanguinis* meaning that not only did a person had to be born in Kenya but in addition, they had to be born of a Kenyan national.[389] This amendment was said to have officialised what had been practiced already by the Department of Immigration as they did not purely apply the *jus soli* provision.[390] Therefore, the amendment caused statelessness among persons who had legitimately acquired nationality on the basis of being born in Kenya.[391] This meant that for them to become Kenyan citizens again, they had to apply to be naturalised.[392]

4.1.3 Myanmar

Historically, Myanmar foreign and citizenship laws were initially promulgated in 1864 through the Foreigners Act which provided the definition of a 'foreigner'. The Foreigners Act also stipulated that foreigners were allowed to be in the country only with the permission of the President even when in transit.[393] This Act was followed with the Registration of Foreigners Act which was legislated in 1940. This required foreigners to be registered, however, it also did not provide for the meaning of citizen.[394]

Section 11 of the Burmese Constitution of 1947 acknowledged and incorporated the use of *jus soli* and *jus sanguinis*. It stipulated that for a person to be considered a Burmese national they had to satisfy the following: be a progeny of parents who are

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388 The Amended Constitution of Kenya Act 6 of 1985.

389 Ibid, see also Manby B "Statelessness and Citizenship in the East African Community" https://data2.unhcr.org/en/documents/download/66807 10 (Accessed 09-07-2020).

390 Shah R K D "Britain and Kenya's citizenship law: a conflict of laws?" 1992 *Immigration and National Law and Practice* 120-5 121.

391 Ibid.-

392 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 9 (Accessed 06-07-2020).

393 The Myanmar Passport Act [India Act XXXIV] 1920.

394 The Registration of Foreigners Act [Burma Act VII, 1940].

natives of Myanmar; be born within the Union and one of the grandparents be a native of Myanmar; be born within the Union and at the time of the 1947 Constitution endorsement their parents must have been alive and nationals of the Union and any person who was a resident of the Union and was born in regions that were recognised by the British empire and had been a resident for a minimum of eight years in the ten year period directly prior to 1 January 1942 with the objective of permanently re5siding in the Union and had indicated as such in terms of the laws.

The 1948 Union Citizenship Act provided for guaranteed acquisition through: permanent residency for persons with grandparents who were permanent residents of Burma; any progeny born in the Union past the 1 January 1948 to nationals and any progeny born outside of the Union to parents officially serving the Union. In terms of naturalisation the process required for the person to have reached the age of majority, resided in the Union for a five year period, familiar with one of the local languages, aiming to reside in the Union, withdraw all their other nationalities and proclaim their allegiance to the Union.[395] Persons who served in the military services of the Union for a minimum of three years were eligible for naturalisation.[396] In terms of persons born in territories that were recognised by the British Empire and had resided for a minimum of eight years in the ten year period prior January 1948, it meant that they were inevitably granted *jus soli* nationality in terms of the Union Citizenship (Election) Act of 1948.[397]

In 1949 Myanmar undertook to register its citizens through the Residents of Myanmar Registration Act, the effect which saw the registered persons being granted National Registration Cards (NRC). The NRCs were further supplemented by Temporary Registration Cards (TRCs) also referred to as 'White Card'.[398] The aim for the latter was to provide identification while waiting for the processing of new ones if they had lost or damaged the old ones. During the 1990s period, the TRCs

395 Article 7(1) of the Union Citizenship Act LXVI of 1948.
396 Ibid article 13
397 Article 3 of the Union Citizenship Act LXVI of 1948.
398 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 6 (Accessed 16-09-2020).

were utilised as a form of identification for marginalised people.[399] In summary, the processes of obtaining and losing nationality from 1948-1974 were legalised by the Union Citizenship (Election) Act.[400]

In 1974 a new Constitution came into operation in the Union of Burma and it outlined in article 145 what meaning had to be carried by the word 'citizen'.[401] The position of the 1948 laws regulating nationality remained into the 1982 Citizenship law which acknowledged the nationality of those who were nationals during the period it was enforced.[402] The sequential laws in Myanmar recognised the majority of the marginalised groups as foreigners which was a risk towards the country as it led to their enduring oppression. The creation of borders indicated that Myanmar had to consider who belonged and who was considered as foreign through a census that was operated by the military.[403]

4.1.4 Conclusion

The transitioning of the laws in all three countries reflect significant changes. Some of the changes have similar consequences which are dire to the intended beneficiaries of the laws or policies while some changes are improvements which have positive impacts. This can be seen in the amendments that were done in South Africa which saw the application of equality with the nationality laws for all citizens, erasing the differentiation between illegitimate and legitimate children in most circumstances and the gender biasness for instance. Kenyan transition is said to be based on political gain in most of its amendments which raises questions on who was meant to benefit from the amendments even though they were said to be in the interests of the citizens. Myanmar is still lacking as the transitions are only aimed at discriminating and identifying the marginalised groups with the intent of officialising them as foreigners causing the groups to be displaced and stateless.

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399 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1.6 (Accessed 16-09-2020).

400 The Union Citizenship Act [Act No. LXVI of 1948].

401 Article 145 of the Constitution of the Socialist Republic of the Union of Burma provides that 'All persons born of parents both of whom are nationals of the Socialist Republic of the Union of Burma are citizens of the Union. Persons who are vested with citizenship according to existing laws on the date this Constitution comes into force are also citizens.'

402 Article 6 of the 1982 Citizenship Law.

403 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1. 7 (Accessed 16-09-2020).

While in Kenya and Myanmar, negative intentions are clear, South African amendments also create statelessness through the cases that are taken to court and these cases will be discussed later in the chapter.

4.2 The current nationality law

4.2.1 South Africa

Although state sovereignty exists in terms of laws that regulate statelessness, such should be consistent with international custom, conventions and principles of law in relation to nationality.[404] There is no legislative framework recognising the rights and status of stateless individuals to date in South Africa. For one to enjoy and exercise all the rights provided for in the Constitution of South Africa, they should possess nationality as there is no equality when treatment differs or is not existing for some in terms of being granted nationality. Many cases have been brought to the courts in pursuit of bringing justice for people who face this predicament, yet a gap still exists in the laws and policies with regard to statelessness.[405]

Being stateless means being discriminated against and side-lined in communities that do not guarantee equal rights to all. In communities that do, one has to have nationality to exercise rights.[406] Therefore, it becomes clear how ill-treated and hopeless stateless people are and with no indication of a room for improvement in the situation of non-belonging they are in.[407] The presence of a Constitution that provides for human rights to everyone, says volumes in the manner in which stateless people should be treated in a country such as South Africa. The aim of the

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404 Convention on certain Questions relating to the Conflict of Nationality Laws 1930 article 1 and Stiller M "Statelessness and international law: A historic overview" DAJV Newsletter 94-99 94 http://dajv.de/law-journal.html?file=tl_files/DAJV/Z_Englische%20Webseite/Newsletter/03-2012/MArtin%20Stiller-%20Statelessness.pdf (Accessed 29-07-2019).

405 They include the cases of *N and Others v Director General: Department of Home Affairs and Another* [2018] ZAECGHC 90; [2018] 3 All SA 802 (ECG).

406 Weissbrodt D The Human Rights of Non-Citizens (Oxford University Press, 2008) 97 and 108 Guidance note https://www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20Secretary-General%20on%20the%20United%20Nations%20and%20Statelessness.pdf (Accessed 13-04-2019).

407 Nafees A "Migration and international law, The right to nationality and the reduction of statelessness - The responses of the international migration law framework" 2017 *Groningen Journal of International Law* 1-22 11.

South African Constitution is to provide transformation and the preamble prohibits the discrimination and non-recognition that is faced by the stateless persons.

The most recent amendment on the 1995 SACA is the 2010 amendment. With the Constitution of South Africa being the ultimate law of the land, other pieces of legislation should be in line with the provisions of the Constitution. This has made the constitutional lawfulness of the SACA to be questioned as it has, in many circumstances, denied many citizens their right to nationality. In many cases nationality in South Africa was acquired by descent despite the territory in which the birth took place. This has been questioned in the case of *Yamikani Vusi Chisuse and Others v Director General of the Department of Home Affairs (Chisuse)*[408] which will be discussed later in the chapter.

Further, territory as a factor in terms of acquiring nationality only has an impact when the parents involved are foreigners and mostly this factor is not definitive of the outcome. Numerous repercussions occur based on the territory factor applied to foreign parents considering their large population. The reason for this is the low statistics on naturalisation, also observing the significance of the period linking the status of temporary and permanent residency compared to the period between being a resident and acquiring nationality.[409] The differentiation between the periods is effected due to the rights that are provided for in the Constitution of South Africa and to whom they apply on the basis of their nationality.[410] Further, other SADC countries do not support dual nationality making it difficult for many foreigners in South Africa to go through with the naturalisation process.[411]

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408 *Yamikani Vusi Chisuse and Others v Director General of the Department of Home Affairs and Others* case number 77944/2016 (Gauteng High Court) and *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20 (Chisuse1 and Chisuse2).

409 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 6 (Accessed 08-06-2020).

410 Klaaren J "Constitutional Citizenship in South Africa" *International Journal of Constitutional Law* 94-110 102.

411 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 6 (Accessed 08-06-2020).

4.2.2 Kenya

The 2010 Kenyan Constitution amendment introduced provisions which included dual nationality, equality in gender and it also influenced a new legislation called the Kenya Citizenship and Immigration Act.[412] In Kenya citizenship by birth is granted through *jus sanguinis* meaning that the importance lays mostly not on whether a person was born in Kenya but on the fact that either of the parents must be Kenyan.[413] Further, nationality by birth was also granted to people born to parents who at the time when Kenya was liberated were citizens of UK and British colonies but born in Kenya.[414]

The changes have now allowed gender equality because previously, children born outside Kenya would be granted Kenyan nationality if the father was a Kenyan citizen, however, mothers now qualify to transfer nationality to their children born abroad.[415] Section 88(1) of the previous Constitution provided that the people who were born in Kenya to foreign parents before independence could be registered as Kenyan, however, the 2010 Constitution acknowledges them as citizens by birth[416] which is an improved status. The improved status guarantees that their nationality will not be withdrawn through a decision by the executive. While it is an improved status, their rights are not impacted in any form.[417]

4.2.3 Myanmar

Citizenship was classified into three groups in terms of the 1982 Citizenship Law. Firstly, 'Full citizens' are predominantly the people forming part of the eight cultural groups that were established in Myanmar before 1823[418] which were later sub-categorised into 135 groups.[419] The other persons that qualify for full citizenship

412 Kenya Citizenship and Immigration Act 12 of 2011 (KCIA).

413 Article 14(1) of the Constitution of Kenya 2010 read with Clause 30 of Schedule 6 of the Constitution and section 6 of the KCIA.

414 Schedule 6, clause 30 of the Constitution of Kenya 2010.

415 Ibid.

416 Ibid.

417 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 12 (Accessed 06-07-2020).

418 Article 3 of the 1982 Citizenship Law read together with article 6, which in reality is inconsistently applied.

419 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1. 8 (Accessed 24-08-2020).

include people who were already nationals when the law was enforced, children to parents who are nationals as well as those with one parent regarded as a full citizen and children who are the third generation to persons considered as associate and/or naturalised nationals.[420] Secondly, 'Associate citizens' are nationals who acquired the nationality in terms of the 1948 Union Citizenship Law and do not form part of the 135 cultural communities. Thirdly, 'Naturalised citizens' are nationals who do not form part of the acknowledged cultural groups who were granted nationality after 1982.[421] As referred to above, both the naturalised and associated citizens also known as 'mixed blood' have limited rights compared to full citizens.[422] Later, the NRCs were substituted by colour coded cards called the 'Citizenship Scrutiny Cards'. Pink cards represented full citizens, blue for associated citizens and green for naturalised citizens.[423]

The high number of population that were undocumented (Muslims, Chinese and Indian etc.) were granted with TRCs during the period of 1995. This was a clear indication on how the nationality issues were easily manipulated without any form of permanent solution. However, even with the uncertainty that lingered within the status of people who possessed the TRCs, they were able to take part in elections.[424]

The retraction of the TRCs took place in 2015 together with the right to vote that was attached to them leading to many people becoming undocumented. The TRCs were replaced with what was known as the 'Identity Cards for National Verification' (ICNVs) which were intended as a form of inspection through the application thereof, of people who were qualified to be citizens. Of note is that the ICVNs were not

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420 Articles 5-7 of the 1982 Citizenship Law.

421 Articles 23 and 42 of the 1982 Citizenship Law with exception provided for in the 1982 Law and the 1983 procedures.

422 Articles 53(c) and 30(c) of the 1982 Citizenship Law.

423 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1. 9 (Accessed 24-08-2020).

424 Kyaw N N "Unpacking the Presumed Statelessness of Rohingyas" http://www.networkmyanmar.org/ESW/Files/Nyi-Nyi-Kyaw.pdf 18 (Accessed 10-08-2020).

attached with the right to vote and the nationality status of those that were granted with ICVNs remains ambiguous.[425]

Therefore it can be seen that during the period of 1974-1982 the naturalisation process was applicable in Burma provided the people met the requirements for the process. *Jus soli* was pertinent to those with all grandparents who were nationals of Burma and further if the person applying together with their parents were born in Burma. The 1982 Citizenship Law then introduced acquisition of citizenship through only *jus sanguinis* as the law in Myanmar providing immunity to only those that migrated and resided in Myanmar before its liberation on 4 January 1948.[426]

4.2.4 Conclusion

In conclusion, it is apparent that despite the South African laws attempting to solve matters related to nationality through legislation, a lot still needs to be done. While amendments that have left many stateless have been put in place or the existence of an impact that dual nationality has on naturalisation and the time periods thereof, it has become the responsibility of the judiciary to interpret the law in a manner that does not oppose what the Constitution provides for. Further, there is a need to consider the proper and effective implementation of such laws, policies and orders that are made by courts if we need to see much progress in nationality issues. This discussion will be interrogated in chapter 5. In terms of Kenya, we see that the current legislation has been amended to resolve issues such as gender equality, dual nationality and making sure that the power of the executive to withdraw nationality is limited and is overseen. Myanmar on the other hand is not showing any signs of progress in its current laws as reflected by history. Laws in Myanmar continue to be created in such a way that identifies minority groups with the aim of stripping their rights off.

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425 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" 9 https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 (Accessed 10-08-2020).

426 Ibid 11.

4.3 Acquiring nationality

4.3.1 South Africa

4.3.1.1 Nationality acquired at birth

The laws that regulate nationality in South Africa differentiate between the acquisition of nationality by birth and descent.[427] The 2010 amendment Act[428] now makes provisions in sections 2 and 3 for anyone born either in the Republic or outside to acquire citizenship by birth with citizenship by descent only applying to people adopted by a citizen of the Republic. In both circumstances birth registration is mandatory according to the Birth and Death Registration Act 51 of 1992 (BDRA). The amendment in SACA eliminated the gender specifications which mostly recognised the male parent's occupation or status in sections.[429] The amendments to SACA have constrained children from foreign persons born within South African territory from acquiring nationality. The 1995 SACA granted nationality to anyone born in the Republic provided that at least one of the parents was a citizen or had a status of a legal resident. In cases where the parents were illegally residing in South Africa without permanent residency, section 2(2)(b) of SACA stipulated that their children are prohibited from acquiring nationality. The scholarly interpretation connoted to this section was that both parents had to be permanent residences or that one parent had to be a citizen.[430] However, in practice, nationality was granted to a child born to one parent with permanent residence.[431]

The amendments in 2010 did not guarantee nationality by birth to the children born in the Republic to foreign parents.[432] Section 4(3) stipulates that if the parents are in possession of permanent residence the children may apply for nationality when they are majors and have been in South Africa since birth. This means that, presently, all children belonging to permanent residents lack citizenship and therefore are unable to exercise their constitutionally guaranteed rights. This has

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427 Sections 2 and 3 of SACA 88 of 1995 as amended by SACA 17 of 2010.
428 SACA 17 of 2010.
429 See the SACA 49 of 1949 in general.
430 Klaaren J "Constitutional Citizenship in South Africa" *International Journal of Constitutional Law*. See also Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 7 (Accessed 08-06-2020).
431 Klaaren J "Post-Apartheid Citizenship in South Africa" 230.
432 *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA).

seen organisations such as the LHR and the Centre for Child Law taking the DHA and the Department of Education to court in pursuit for justice for all these people.[433]

The genesis of birth registration lies in giving notice[434] of the birth which is concluded by the issuance of a birth certificate.[435] Lack of a birth certificate means that the children are imperceptible in the registration system, this leads to no access to education,[436] social grants and healthcare services.[437] In *Child Law v Director-General: Department of Home Affairs and Others (Centre for Child Law)* it was argued that section 10 discriminated against fathers who had children out of wedlock from giving notice and registering the birth of their children without the mother participating in the process. This was considered to be a violation of their right to equality as provided for in section 9(3) of the Constitution[438] and this was not in the interests of children as this would ultimately lead to the children being stateless.

When it comes to registration of births and the encounters, illegitimate children suffer more. In South Africa when a child is born out of wedlock, registration of that child's birth is supposed to be done by the mother in terms of regulation 12 of the BDRA. This has caused a lot of children to end up stateless as some are not registered on the basis that their mothers might not be properly documented or have abandoned them for instance. The registration of the children born out of wedlock has been challenged in the *Centre for Child Law* case.[439] In the *Centre for Child Law* case, the matter brought to court was about the unconstitutionality of section 10 of the BDRA, an application which had been dismissed earlier in the case of *N and Others v Director-General: Department of Home Affairs and Another*.[440] The case was concerned with the refusal by the DHA to allow birth registration of the child by

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433 See for example *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA), *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (*Centre for Child Law v Minister of Basic Education*) and *Chisuse* 1 and 2.

434 Sections 9 and 10 of the Births and Death Registration Act No 51 of 1992 (BDRA).

435 Ibid sections 9(7) read with section 5.

436 See *Centre for Child Law v Minister of Basic Education*.

437 *Centre for Child Law v Director-General: Department of Home Affairs and Others* [2020] ZAECGHC 43 paragraph 4.

438 See also *Centre for Child Law v Director-General: Department of Home Affairs and Others* [2020] ZAECGHC 43 paragraph 5.

439 Ibid.

440 *N and Others v Director General: Department of Home Affairs and Another* [2018] ZAECGHC 90; [2018] 3 All SA 802 (ECG).

the father in circumstances where the mother is not a South African citizen and is unable to register the child herself. The issue that the court was concerned with was the proper 'interpretation of and implementation of section 10' of the BDRA.

Before traversing into the reasoning of the court and the outcome, it is important to note that the state failed to make submissions in the case, showing how much ignorant they are in cases that fundamentally affect people's rights and livelihood. In particular especially when the people involved are defenceless community members, in this case, being children who are not registered and are born out of wedlock.[441]

The court in *Centre for Child Law* declared section 10 of the BDRA to be unconstitutional to the extent that it denied fathers with children born out of wedlock access to give notice of their children's birth without the mothers partaking in the process. The court reached this conclusion after realising that the section in question untenably violated the rights of both the fathers and their children and therefore denied them access to several welfares.[442] The court then read in the words into the legislation as suggested by the appellant while giving the legislature 24 months to amend section 10[443] and referred the order to the Constitutional Court of South Africa for confirmation.

The case was heard on 1 September 2020 and judgment was delivered on 22 September 2021.[444] The Constitutional Court held that section 10 infringed on the rights of unmarried fathers in that it unfairly discriminated against the fathers by not allowing them to give their surname to their children. In relation to the children born out of wedlock, the majority judgment went on to say that the section was not in line with the provisions of section 28(2) of the Constitution of South Africa which makes provision of the rights of every child. In this regard, it was held that section 10 disregarded the right of the children not to be discriminated in terms of birth or in

441 *Child Law v Director-General: Department of Home Affairs and Others* [2020] ZAECGHC 43 paragraph 3.

442 *C and Others v Department of Health and Social Development, Gauteng and Others* [2012] ZACC 1; 2012 (2) SA 208 (CC) at 231B.

443 *Centre for Child Law v Director-General: Department of Home Affairs and Others* [2020] ZAECGHC 43 paragraph 23.

444 *Centre for Child Law v Director-General Department of Home Affairs and Others* [2021] ZACC 31.

any social manner. The majority judgment then ordered that section 10 was unconstitutional and contradicted the provisions of the Constitution that provided for dignity and equality of the children by reason of being born out of wedlock. The declaration of invalidity was ordered to be effective from the date when the order was made.[445]

The dissenting judgment held that the discrimination that section 10 depicted was not unfair and it was reasonably justifiable.[446] It further held that declaring section 10 invalid would amount to placing the children's best interests at risk. I do not agree with the dissent judgment because it seems that it does not take into consideration the risk of statelessness and the right to nationality of the children born out of wedlock. The conclusion of the dissenting judgment, in my view, would exacerbate the difficulties South Africa is facing in relation to statelessness.

In summary, the case has depicted the flaws that the South African system has wherein undocumented mothers are unable to register their children and even if the fathers are South African the BDRA served as a hindrance for them to register their children. Therefore, the majority judgment serves as victory because by declaring section 10 as unconstitutional, fathers of children born out of wedlock are now able to register their children and this will assist in cases where the mothers are unable to do so due to different circumstances.

In terms of undocumented children accessing their right to education the Minister of Basic Education was taken to court in the case of *Centre for Child Law and Others v Minister of Basic Education and Others*.[447] In this case the application of section 29 of the South Africa Constitution that provides for the right to education to every child without any condition was the centre of discussion. The children involved in this case were denied the exercise of this right on the basis that they did not have any form of identity documents[448] including their parents.[449] The court reiterated the

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445 *Centre for Child Law v Director-General Department of Home Affairs and Others* Case [2021] ZACC 31 paragraphs 75, 79, 88 and 89.

446 *Centre for Child Law v Director-General Department of Home Affairs and Others* Case [2021] ZACC 31 paragraph 127.

447 *Centre for Child Law v Minister of Basic Education.*

448 As discussed in previous chapters, identity documents can be in the form of identity documents, birth certificates or even permits.

449 *Centre for Child Law v Minister of Basic Education* paragraph 1.

importance of the right to education in the life of children and the manner in which it resolves the historical inequalities by attempting to provide opportunities and a better livelihood for all.[450] It was argued in the case, by the applicants, that the respondent should be able to allow other forms of identification other than passports, birth certificates or permits.[451]

The application in this case had been refused as previously discussed in chapter 1.[452] The refusal was later set aside in the Constitutional Court where it was held that the respondents should enrol and admit the children. It was argued by Section 27 (*amicus curiae)* that the right to education was not only a right in the South African Constitution but also a right that enjoyed international human rights protection.[453] The decision of the respondent was considered by the applicants to violate the best interests of the children in terms of section 28(2) and discriminated against the children involved in relation to their right to equality which is guaranteed in section 9(1) of the Constitution.[454] The court noted that these children do not only face the predicament of their right to education being violated, but also face the challenges of becoming stateless and further suffer from being required to provide proof of identity that they are unable to attain.[455]

The court reiterated the obligations that South Africa has in terms of the international agreements that it is party to that are related to the best interests of children such as the right to education, to which this right is unconditionally afforded to 'every child'.[456] The court also noted with concern the fact that even illegal foreigners and children who are on the verge of being deported remain as custodians to the right to education.[457] The respondents argued that in terms of sections 39 and 42 of the Immigration Act 13 of 2002 as amended,[458] undocumented children are not allowed to be provided for with basic education. The court then held that the sections were

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450 Centre for Child Law v Minister of Basic Education paragraphs 3-4.
451 Ibid paragraph 10.
452 *Centre for Child Law and Others v Minister of Basic Education and Others* (3317/2018) (ECG) unreported (10 December 2018).
453 *Centre for Child Law and Others v Minister of Basic Education* paragraph 17.
454 Ibid 21.
455 Ibid 65.
456 Ibid 78, also see the CRC which was signed in 1993 and ratified in 1995.
457 *See Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50(T).
458 Immigration Amendment Act 19 of 2004.

in contradiction with the provisions of section 29(1) of the Constitution of South Africa. The interpretation of the court was based on the provision of section 39(2) of the Constitution which provided for legislation to be interpreted in line with the Bill of rights.[459] Therefore, the court held that in the case that the purpose of the Immigration Act was not to amend or repeal the Schools Act 84 of 1996, it must be interpreted in a manner that compliments the right to education as provided for all in the Schools Act without discrimination against undocumented children.[460] The court then ordered that sections 39 and 42 of the Immigration Act did not deny undocumented children the right to education and barred the respondents from refusing to enrol and admitting undocumented children into public schools.[461]

Another predicament that South Africa suffers from is the implementation of what is provided for in SACA by the DHA which has proven to be difficult. This is based on the fact that stateless children are said to acquire nationality, however, the DHA has failed to make available regulations in which direction is given to people seeking to apply for nationality through this provision. Lack of any form of guidance by the DHA renders this exemption for stateless children futile.[462] The DHA has been taken to task on the basis of this discrepancy in the case of a stateless descendant of Cuban nationals. LHR assisted the child as it is well known for bringing court applications against the DHA. In the case of the child of Cuban nationals, the DHA settled by granting the child 'citizenship by birth'.[463] Further, the DHA agreed to formulate regulations in accordance to section 2(2) to provide guidance on the procedures to be followed in order for stateless children to apply for citizenship.[464] Despite

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459 *Centre for Child Law and Others v Minister of Basic Education* paragraph 112.

460 Ibid 125.

461 Ibid 135.

462 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 13 (Accessed 08-06-2020).

463 LHR "Press: States ask South Africa to give rights to the stateless" http://www.ngopulse.org/press-release/press-statement-states-ask-south-africa-give-rights-stateless (Accessed 16-09-2020).

464 Evans J "Settlement gives stateless children hope" https://www.news24.com/news24/southafrica/news/settlement-gives-stateless-children-in-sa-hope-20160906 (Accessed 16-09-2020), see also the latest SACA draft regulations that were published for comments, however, they did not include any guideline on section 2(2) https://www.gov.za/sites/default/files/gcis_document/202007/43551rg11151gon815.pdf (Accessed 16-09-2020).

reaching the settlement around September 2016, it took long for the child to be granted with nationality and regulations are not yet in place.

In terms of these socio-economic rights which are some of the rights that are guaranteed by the Constitution but are evidently difficult for persons who are not citizens to enjoy yet entitled to them, Justice Mokgoro in the *Khosa v Minister of Social Development: Mahlaule v Minister of Social Development (Khosa)*[465] considered that both citizens and permanent residents should have access to socio-economic rights. Justice Mokgoro maintained that the rights that are guaranteed in terms of section 27(1) of the South African Constitution should be balanced with reasonable procedures that are aimed at achieving the duty within the section. The Justice went further to consider that the ability by the State to defend its decision to limit the availability of socio-economic rights by availing it only to citizens should be met with coherent application of the Bill of Rights as a whole not partly.

The minority judgment in the *Khosa* case penned down by Justice Ngcobo took the view that the State was correct by arguing that not granting non-citizens with grants was a way of limiting migration by foreigners to South Africa with the knowledge that they will be provided with social benefits,[466] an enticement that according to the State would be a burden to the social security system. In my view, just like the reasoning granted by Justice Mokgoro, the case has to be considered in light of all the rights provided for in the Constitution of South Africa, such as the right to dignity and equality for instance and a balance should be struck. The right cannot be analysed in isolation of the Bill of Rights as this would lead to injustice.

4.3.1.2 Nationality by descent

The unconstitutionality of sections 2(1)(a) and (b) of SACA as amended was challenged and declared to be both unconstitutional and invalid by a High Court in the Gauteng region of South Africa. The order for constitutionality invalidity was then referred to the Constitutional Court for confirmation in terms of sections 167(5) and 172(2) of the Constitution of South Africa. The case was heard in the Constitutional Court on 13 February 2020 and the judgment was handed down on

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465 *Khosa v Minister of Social Development: Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004(6) SA 505 (CC) (*Khosa*).

466 Ibid paragraph 126.

22 July 2020.[467] The changes that occurred in the various versions of the SACA has caused many people to lose their nationality as those in the *Chisuse* case.[468] The loss of nationality immediately caused a violation of the litigants' right to citizenship provided in section 20 of the South African Constitution.

The main issue in the case of *Chisuse* was whether sections 2(1)(a) and (b) of SACA violated the constitutional rights of people who were born abroad to a South African citizen prior to 1 January 2013, when the sections denied these people with the right to retain or acquire the South African citizenship. The Constitutional Court did not confirm the invalidation order, however, it construed that the sections were capable of being interpreted to include the persons involved in a way that did not violate their rights.

Section 2(1)(a) was found to retain the nationality of people who possessed the status of nationality by birth before the amendment. Therefore the Constitutional Court found it much endeavouring to interpret this section to include people who possessed the status of nationality through descent before the amendment. In its reasoning the Court found this to be Constitutional as long as section 2(1)(b) was interpreted in a manner that was inclusive of the other persons who acquired nationality by other ways that were provided for before the amendment.[469]

The Constitutional Court, therefore, interpreted section 2(1)(b) as not applying only prospectively but included persons born before and after the amendment. In conclusion section 2 was found to accommodate both categories of persons. The Constitutional Court then declined to invalidate the section based on the fact that the interpretation could comply and be aligned to the Constitution of South Africa and upheld the High Court order that the applicants were nationals of the Republic. The DHA was then ordered to include the applicants in the population register and grant them with birth certificates, identity numbers and documents that reflected that they are South African citizens.[470]

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467 *Chisuse* 2.
468 *Chisuse* 1 and 2.
469 Ibid.
470 *Chisuse* 1 and 2.

In most circumstances when cases like these are litigated the state's reasoning is usually not convincing and they fail to justify their actions. Therefore, this inessential behaviour portrayed by the state continuously in cases that involve the rights of vulnerable people has led the courts to consider the state as not being like any other litigant who may be lacking resources and have uncertainties of how the proceedings should be handled for them to deserve lenience by the court.[471]

In regards to statelessness, section 2(2) of SACA has made nationality provisions for anyone born within the Republic who is not a national of another country and is unable to claim nationality elsewhere if their birth was registered in compliance with the BDRA. This process is aligned to the provisions of section 28 of the Constitution of South Africa which stipulates the right of every child to have a nationality status. Therefore, section 2 in its entirety depicts a hybrid form in the manner in which nationality is granted which includes both *jus soli* and *jus sanguinis*.[472]

4.3.1.3 Nationality acquired by naturalisation

The amendments that were made to the requirements of naturalisation include the person being naturalised to have reached the age of majority. The change in terms of the majority section was the age, it previously was 21 but it changed to 18 and was aligned to the Children's Act 38 of 2005. Further, in terms of naturalising through being a resident of the republic, previously the laws were less stringent when considering the number of years it took for one to be naturalised. Section 5(1)(c) before amendments made provision for one to have been residing in South Africa for a prolonged period that was not less than a year at the instant of their application while having been residing in the Republic for a period not less than four years 'during the eight years immediately preceding the date of [their] application'.

Presently, the obligations are that the person should reside in the Republic for a prolonged period of not less than five years at the instant of their application in accordance to the amended section 5(1)(c). However, there is ambiguity on this aspect as the information provided to the public by the DHA and the regulations[473]

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471 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) paragraph 82.

472 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 7 (Accessed 08-06-2020).

473 See Regulations 3(2) *(a)-(b)* on the SACA 88 of 1995.

related to SACA make provision for a period of ten years as a resident without being outside the Republic for a period longer than 3 months in a year within the five years before the application. In the case that it is found that the regulations are more stringent compared to the Act, such is open for a possible legal contest as it is not allowed.[474] This ambiguity opens a leeway for different interpretations such as that five years of ordinary residence is required for an individual as a permanent resident which will then add up to a total of ten years as a requirement if we are adding the five year period that is stipulated in section 25 of the Immigration Act 13 of 2002.[475]

In terms of persons that become naturalised through marriage, the requirements for residence have also accumulated and are stringent. This appears from the change in the period of two years for 'marriage and residence' that was initially required while running simultaneously. The regulations provide for the same obligations as those that are required from non-spousal naturalisation such as a period of ten years as a resident without being outside the Republic for a period longer than 3 months in a year within the five years before the application.[476] The minimal changes made in relation to naturalisation of minor children were the prominence on the application being made by the parent or the legal guardian which is stipulated in both sections 4(a) and (b).

The SACA, however, provides for exemptions on the requirements to be allowed by the Minister in terms of section 5(9)(a) which applies to persons who do not meet the requirements for residency but possess scarce skills that are essential to the Republic.[477] Additionally, children of persons who are not permanent residents are now eligible for applying for nationality upon reaching the age of majority if their birth was registered in accordance with the BDRA and they have been residing in South Africa from that period. This is only applicable if the parents were legally residing in

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474 Reed T "Home Affairs flouts Citizenship Act" in Tourism Update https://www.tourismupdate.co.za/article/home-affairs-flouts-citizenship-act (Accessed 16-09-2020) as seen in Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 8 (Accessed 08-06-2020).

475 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 8 (Accessed 08-06-2020).

476 See Regulation 5 on the SACA 88 of 1995.

477 See section 5(g) of SACA Act 17 of 2010.

the Republic and does not exclude an individual in the case that they are able to claim the nationality of another country. This is an extension to the provision of stateless children as they do not have a claim of nationality to another country.[478]

In cases of people who apply for naturalisation in South Africa, the amendment Act in section 5(1)(h) requires them to be from a country that acknowledges dual nationality and if not they should provide proof that they renounced their previous nationality. The question to be asked is why does it matter whether the country where the person naturalising allows for dual nationality if the Republic allows for such. This requirement in my view defeats the purpose of what dual nationality provides for.[479] In defending this contentious requirement, the DHA stated that the requirement was put in place to curb the number of people who were seeking to defraud the systems in order to acquire social grants from both states in which they have nationality.[480] This requirement is almost impossible for persons to meet if they are from disintegrated states.[481]

In the case of *Minister of Home Affairs v Ali and Others*[482] the court dealt with the interpretation of section 4(3) of the amendment Act in relation to whether the respondents fulfilled the requirements provided for in the section in order to acquire nationality by naturalisation. The denial by the DHA to confer naturalised nationality upon the respondents was on the basis that the 2010 amendment to the section did not apply retrospectively. Further that if it applied retrospectively, it would cause the state to have extra responsibilities that were not envisioned by the Legislature. This according to the state would cause the DHA to experience an increase in applications inconveniencing its overwrought system which would be tantamount to commandeering the Minister's supremacy if applications would be accepted through

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478 Hobden C "Report on Citizenship daw: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 8 (Accessed 08-06-2020).

479 Ibid 11.

480 Parliamentary Monitoring Group "South African Citizenship Amendment Bill [B17-2010]; Births and Registration Amendment Bill [B18-2010]: Minister of Home Affairs briefing" https://pmg.org.za/committee-meeting/12064/ (Accessed 30-06-2020).

481 Masondo S "Dual citizenship clamp" https://www.timeslive.co.za/news/south-africa/2010-09-19-dual-citizenship-clamp/ (Accessed 30-06-2020).

482 *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA).

affidavits, a method that was not provided for in the Act but was ordered by the court.[483]

It was argued by the respondents that being deprived of the prospects of applying for nationality due to lack of guidelines by the Minister of the DHA was a violation of their rights. Further that by being naturalised, they would limit the stigma they suffered by being foreigners in their birth country.[484] The court was of the view that the retrospective application applies to rights that were attained before the ratification of the Act.[485] The court held that the section did not add to the strain in the system of the DHA by creating new responsibilities and rights, further, the argument that separation of powers would be defeated did not observe the manner in which the respondents were made to suffer by the DHA.[486] In light of those reasons the court then ordered the DHA to create regulations in relation to the granting of nationality through naturalisation in accordance to section 23(a) of SACA within a year from the date on which the judgment was granted.[487] Before the endorsement of the regulations the naturalisation application in terms of section 4(3) can be done through affidavits.[488]

4.3.1.4 Dual nationality in South Africa

Dual nationality is currently provided with the prerequisite that the person applying for it applies for an absolution from the Minister in terms of section 6(2) of SACA in order to retain their South African nationality when they apply for the nationality of another state. This application is required to be made before attaining the nationality of another state, failure to comply will lead to the inability to retain South African nationality. The only solution available to this quandary is if the person involved resumes their lives in the Republic through the process of ‘re-naturalisation’ or by applying for their nationality to be resumed in term of section 13(3). This option is inaccessible to persons who wish to continue residing abroad as it compels for

483 *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA) paragraph 13.
484 Ibid 15.
485 Ibid 14.
486 Ibid 22.
487 Ibid 27.
488 Ibid.

persons to be permanent residents.[489] The Minister no longer has the authority to just withdraw citizenship of persons who have dual nationality as it is now generally accepted due to section 9 being repealed.

4.3.2 Kenya

4.3.2.1 Acquiring nationality Kenya

Acquiring nationality in Kenya is possible through 4 ways which are: firstly when Kenya became liberated people became citizens if they were part of two generations born in Kenya and were citizens of colonies in December 1963 [490] or in the case that they were born in another country, their father possessed the Kenyan nationality;[491] secondly, if born after liberation, the person was born in Kenyan territory excluding those with fathers who were diplomats and in the case that the status of the father as a diplomat denied the child access to nationality, the child could acquire it through the mother if she was a citizen[492] and if the child was born in a foreign country and the father was Kenyan, while Kenyan mothers were unable to transfer nationality to their children if born in a foreign country;[493] thirdly, there was an impermanent period in which people were allowed to register which was within two years after the day of liberation or any other date officially provided for to the contrary,[494] and this was available to groups such as (i) persons born in Kenya to parents born in other countries, (ii) women married to nationals, (iii) residents from UK and Colonies that have stayed in Kenya for a long period, (iv) persons from UK and Colonies that have been naturalised and (v) nationals from Commonwealth countries; and fourthly naturalisation or registration, this happened when for instance a woman was married to a citizen and they had to be registered or through naturalisation where the following requirements needed to be complied with: (i) must be 21 years old, (ii) must have stayed in Kenya for 12 months immediately prior to initiating the naturalisation application (iii) they should have been lawfully and ordinarily residing in Kenya for a comprehensive four year period in the seven year

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489 See also Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 11 (Accessed 08-06-2020).

490 Section 1(1) of the Constitution of Kenya 1963.

491 Ibid section 1(2).

492 Ibid section 3.

493 Ibid section 4.

494 Ibid sections 2(1) and (6).

prior to the 12 months, with familiarity in Swahili, well characterised and with the aim of constantly residing in Kenya. Upon an efficacious naturalisation application, the Minister then grants the person with a naturalisation certificate.[495]

Subsequently the Kenyan citizenship laws did not accommodate for foundlings. The 2010 Kenyan Constitution provides for foundlings that seem to be below the age of eight and guarantees them with citizenship by birth.[496] If such a child is found, they are to be handed to the Department of Children services where a background check will be conducted while safeguarding the rights of the child.[497] Failure by the Department to secure the information will result in judicial proceedings to establish the age and background information including their place of residence.[498] Upon contentment by the court that all processes necessary were taken by the Department in relation to the investigations, the court may order that the child be registered as a citizen of Kenya by birth or give an order it regards to be appropriate.[499]

Despite the law making provisions that the child should be declared as a Kenyan citizen immediately after being placed in a care facility, the reality is that such applications are only being made later when the child is being adopted and the adopting parent prays to the court for it to acknowledge the child as a Kenyan citizen.[500] In the case that it is later found out that the child is a national of another state, or someone arranged for the abandonment of a child with the aim of the child to acquire the Kenyan nationality[501] or nationality was acquired unlawfully or that the child was above eight years old for instance, such nationality can be withdrawn.[502] This position is, in my view, a violation of the child's right to nationality and should be deferred until the child reaches an age of majority in order to choose the nationality of their choice. In the case of a child acquiring nationality of a state fraudulently on the instant of either a parent, guardian or any other elderly person,

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495 Section 7 of the Constitution of Kenya 1963.
496 Section 14(4) of the Constitution of Kenya 2010.
497 Section 9 (1)-(3) of the KCIA.
498 Ibid section 9 (4).
499 Ibid section 9 (5)-(6).
500 See *CM*, Adoption Cause no. 242 of 2011 [2015] eKLR paragraph 5 and *FM* (minor), Adoption Cause no. 169 of 2017 [2019] eKLR.
501 Section 9 (7) of the KCIA.
502 Article 17(2) of the Constitution of Kenya.

such child should not suffer the repercussions of actions that they were not in control of and lacked the legal capacity to have orchestrated. The position of granting such children with the nationality they already have would be a progressive solution instead of causing them to be stateless.

In terms of acquiring nationality through registration in the previous Kenyan Constitution, only persons who were unable to acquire nationality automatically but had compelling connections in Kenya were competent to acquire nationality by registration.[503] A time period was put in place for people to make the applications after Kenya became liberated with the exception of women married to Kenyan men and there was limited discretion. Persons who were entitled to attain nationality but were unable to do so through this process were able to follow the naturalisation process, however, more discretion applied in this procedure.[504] With the new Constitution in operation, there is an amalgamation of selected attributes from both the naturalisation and registration processes, the end result was the citizenship by registration procedure. [505]

The new Constitution of Kenya has provided for a wider range of persons to qualify for the application of nationality by registration. The subsequent are groups of persons who qualify for nationality by registration procedure together with the procedures they should follow.

1. Persons in a marriage with a citizen of Kenya for a minimum of seven years

Foreigners married for a period of seven years to Kenyan citizens are eligible for nationality by registration.[506] Requirements that should be met in order for the application to be successful include: the law under which the marriage was concluded is acknowledged by Kenya; the person applying must not be a 'prohibited immigrant'; the person must not have been imprisoned for a period exceeding three years and the purpose of the marriage should not be for seeking an immigration or

503 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 13 (Accessed 06-07-2020).
504 Ibid.
505 Ibid.
506 Article 15(1) of the Constitution of Kenya 2010.

nationality status, further the marriage should still be existing during application.[507] Upon application the person should submit specific documents together with the application form and fee.[508] An analysis to the difference in the current provision is that it enforces a seven year period before a person is eligible to be a citizen while previously a woman married to a Kenyan man would instantly be granted citizenship upon lodging an application.[509]

It has been noted that the required seven year period is complicated for the persons involved in the case that they do not have another immigration status. The permanent registration avenue is something that the people can seek, however, it can only be applicable after three years.[510] Therefore a concern is raised that during a period where one has been in the country under another permit which can expire upon marriage or during the course of the marriage before one is able to qualify for nationality or residency, is a violation against the rights to family and dignity including discrimination.[511] In the *Khatija R N Mohamed and Another v Minister for citizenship and immigration and Others*[512] case the court held that it would not be in the position to authenticate the legal status of a person who had no legal status in Kenya. However, it noted that even though the three year period of permanency residency was, in accordance to the court, justified, there was a need for spouses to be catered for as the period provided for was flowed in cases related to them.[513]

The new Constitution also differs from the previous one as it denies persons who were previously married to Kenyan citizens an opportunity to acquire nationality by registration.[514] The Constitution presents a different position when it comes to widows and widowers who are not citizens but would have acquired Kenyan nationality after the seven year period had their spouses be still alive. It allows for

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507 Section 11 of the KCIA.

508 The Specifications for the application for nationality is found at https://fns.immigration.go.ke/services.php (Accessed 16-07-2020).

509 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 13 (Accessed 06-07-2020).

510 Ibid.

511 *Khatija R N Mohamed and Another v Minister for citizenship and immigration and Others*, Constitutional Petition no. 38 of 2012 [2013] eKLR.

512 Ibid.

513 Ibid.

514 Section 88(3) of the Constitution of Kenya 1969.

them to make the applications after the seven year period under the requirements that apply to registration by marriage.[515] It is important to note that if the widow or widower gets married to a non-citizen within the seven year period, they forfeit their right to nationality provided for in this provision.[516] Nothing in the law suggests the position of widows and widowers who marry within the seven year period with suggestions that the seven year period would start from when they get married again.[517]

2. Adopted children

When a Kenyan citizen adopts a foreign child, they can lodge an application for the child to be granted Kenyan citizenship.[518] This process involves less stringent discretion given that the applicant fulfilled all requirements. The application process for the child to acquire Kenyan nationality requires the adopting parent to submit their proof of Kenyan nationality (identity card/passport or certificate if nationality was acquired through registration), Kenyan adoption certificate or one from a jurisdiction whose decisions are acknowledged by Kenya together with proof that the child is a lawful resident of Kenya. The documents will be submitted together with an application form and fee.[519]

3. Resident in Kenya constantly for a minimum of seven years

The Constitution of Kenya vests powers to the Parliament to create provisions in which nationality can be granted to non-citizens who are lawfully residing in Kenya.[520] Acquiring of nationality through this manner is a costly and extensive process compared to other procedures. Eligibility for nationality application through this process requires that the applicant must be a major with legal capacity.[521] If the applicant's country of nationality is at war with Kenya at the time of the application, the applicant may not be registered as a Kenyan national.[522] Upon being registered

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515 Section 12 (1) and (2) of the KCIA.
516 Ibid section 12 (3).
517 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 14 (Accessed 06-07-2020).
518 Article 15(3) of the Constitution of Kenya 2010.
519 Section 14 of the KCIA.
520 Article 15(2) and (4) of the Constitution of Kenya 2010.
521 See section 13 (1) of the KCIA
522 Ibid section 13 (2).

as a national, the person is able to make an application for their child's Kenyan nationality who were born before the applicant acquired their nationality by registration and this includes any person dependent on the citizen by registration.[523]

4. Persons who are stateless, migrants and their descendants

The new Kenyan Constitution became innovative when it included provisions that allowed persons who had resided in Kenya for an extensive period and were not catered for or were relegated for different reasons in the previous Constitution to apply for nationality.[524] Therefore in terms of the new Constitution read together with the Kenyan nationality laws, this category of persons are entitled and qualify to apply for nationality if at the time of the liberation of Kenya they were residing in Kenya, they do not have a nationality entitlement of another state and qualify to apply for nationality through the registration process.[525] The same process that applies to stateless persons for applying for nationality is available to persons who migrated to Kenya on their own accord before liberation and continued residing in Kenya, however, during the application process, they have to qualify to apply for nationality. Despite the process being similar, for the latter an extra requirement applies wherein they need to prove that they are not in possession of another state's passport or any form of identity document.[526]

Stateless people were granted a period in which they were allowed to apply for nationality. The five year period was further extended by three more years as provided for by law.[527] Notwithstanding the opportunity made available, the category to which these periods were aimed for did not avail themselves as a result of lack of dissemination of information and flawed administration system.[528] The Kenyan law permits the application of nationality by direct descendant of persons who are stateless to apply for nationality by registration if they meet the requirements.[529] In

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523 Sections 13 (2)-(4) of the KCIA.

524 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 15 (Accessed 06-07-2020).

525 Ibid.

526 Section 16 of the KCIA.

527 Ibid sections 15(2) and 16(2).

528 Manby B "*Statelessness and Citizenship in the East African Community*" https://data2.unhcr.org/en/documents/download/66807 10 (Accessed 06-04-2020).

529 Section 17 of the KCIA.

cases where a person's application is not successful they are able to appeal the decision at the Kenyan Citizenship and Immigration Service Appeals Tribunal which presently may not be fully effective[530] since most appeals occur through a judicial process.[531]

There is uncertainty on the wording of the dual nationality provisions in Kenya. The new Constitution of Kenya permits for persons to hold dual nationality, however, it is ambiguous as to whom it applies. It provides that any person who is a citizen by birth will not have their nationality withdrawn as a result of gaining nationality of another state.[532] In circumstances where a person held nationality by birth and lost it, this provision allows for them to redeem that status.[533] Citizens by registration will be regarded as dual citizens if they do not provide proof of renunciation within 90 days after acquiring nationality by birth.[534] This means that even if a person is a citizen by registration the provision also allows for them to apply for dual nationality. Further, people who had previously lost their nationality are able to make applications for them to be registered again as Kenyan nationals.[535] The important and prevalent practice is that dual nationality is only available if the other country also allows for dual nationality.[536]

A person who attains dual nationality is given a three month period to reveal their dual status failure to do so will lead to a minimum of three years imprisonment or fine.[537] The judiciary has construed that when former citizens attempt to regain their nationality as now provided for in the new Constitution such is not a matter of rights but of law which means that a procedure has to be followed.[538] If this procedure is deferred by the officials in charge of the procedure, the court intervenes by granting

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530 See Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 17 (Accessed 06-07-2020).

531 Section 7(1) of the Kenyan Citizens and Foreign Nationals Management Act of 2011.

532 Article 16 of the Constitution of Kenya 2010.

533 Article 14(5) of the Constitution of Kenya 2010.

534 Section 20(1)-(3) of the KCIA.

535 *Jisvin Pattini v Director of Immigration and Another*, Constitutional petition no. 251 of 2014 [2015] eKLR, paragraphs 35-36.

536 Manby B "*Statelessness and Citizenship in the East African Community*" https://data2.unhcr.org/en/documents/download/66807 14 (Accessed 06-04-2020).

537 Section 8(5) of the KCIA.

538 *Bashir Mohamed Jama Abdi v Minister for Immigration* High Court Constitutional Petition 586 of 2012 [2014] eKLR paragraph 27.

an order for the applicant to be granted with the certificate of re-acquisition of their nationality as this is judicially considered to be a violation of rights.[539] The situation of a former citizen regaining their nationality is, however, a questionable scenario of what the intention of the Constitution was as this is demotion to nationality by registration which is susceptible to revocation by the executive unlike citizenship by birth.[540]

4.3.2.2 Dual nationality in Kenya

After Kenya became liberated, the Kenyan Constitution interdicted persons from acquiring dual nationality. It called for persons to relinquish their other nationalities in order to acquire the Kenyan nationality or lose their Kenyan nationality upon reaching the age of 21.[541] The renunciation also applied to those that desired to be naturalised. Therefore dual nationality was only applicable to persons below the age of 21 upon attaining the age of majority they had to decide which nationality they would acquire and renounce the other. If the persons attained 21 before liberation, they were allowed a two year period in which they would relinquish the other nationality and pledge their loyalty towards Kenya and if not they would lose their Kenyan nationality.[542] The Kenyan courts have construed the ban on dual nationality to not apply to persons who hold nationality on the basis of birth unless they had voluntarily withdrew their Kenyan nationality.[543] In the *Sirat*[544] case it was held that as long as the other country allowed dual nationality there was no need in denying a person their Kenyan nationality.

4.3.2.3 Myanmar

The nationality laws in Myanmar are absolute and discriminatory meaning that when nationality is granted it is on the basis of strict *jus sanguinis*, nationality based and

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539 *E W A and 2 Others v Director of Immigration and Registration of Persons and Another* Constitutional Petition no. 352 of 2016 [2018] eKLR.

540 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 19 (Accessed 06-07-2020).

541 Section 12 of the Constitution of Kenya 1963.

542 Section 12 of the Constitution of Kenyan 1963.

543 *Miguna Miguna v Fred Okengo Matiangi and Others*, Petition No. 51 of 2018 [2018] eKLR; *Mahamud Muhumed Sirat v Ali Hassan Abdirahman and Others* Election Petition No. 15 of 2008 [2010] eKLR.

544 Ibid.

ethnical requirements.[545] This excludes people who are not from Myanmar from becoming citizens by naturalisation, a provision that is made available by other states such as South Africa and Kenya. Naturalisation in Myanmar is legally considered to be nationality by descent instead of the naturalisation processes as regarded by other nations. Naturalisation is essentially granted to those who are not from the eight legally acknowledged cultural groups who are considered the legitimate citizens.[546] Legal identification in Myanmar is founded on legally and intrusive ways which have defined the ethnic disparities and led to the country into an eluded understanding of groups that belong legally while excluding many in the process.[547]

The question that rises is what then happens to the larger group of people whose rights are compromised including the nationality right, while under normal circumstances they are supposed to be regarded as nationals with protected rights. These people are led to being stateless in a country that lacks a statelessness legal framework to protect them under any circumstance.[548] The legal framework related to nationality has distinguished between what is regarded in Myanmar as 'full citizens' and 'guests'.[549] The former are the ones that are fully protected and are able to exercise their legal rights with the latter being the minorities who are the larger group that are considered to be citizens by naturalisation or associated citizens with limited rights.[550] The latter group has the majority of its population undocumented and stateless.

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545 Maatsch A *Ethnic Citizenship Regimes, Europeanization, Post–war Migration and Redressing Past Wrong* (Palgrave Macmillan UK 2011).

546 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 2 also note that standard naturalisation is only applicable hypothetically towards persons who migrated to Myanmar before 4 January 1984 in accordance with Article 42 of the 1982 Citizenship Law.

547 Arraiza J M "Squaring Indigenous Circles: The Making of Nicaragua's Indigenous Communal Property Regime" 80 2012 *International Journal on Minority and Group Rights* 69-103.

548 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1. 2 (Accessed 16-09-2020)

549 The 1982 Citizenship Law read together with the 1983 procedures related to the 1982 Citizenship Law of Myanmar.

550 Ho E L E and Chua L J "Law and 'race' in the citizenship spaces of Myanmar: Spatial strategies and the political subjectivity of the Burmese-Chinese" 2016 *Ethnic and Racial Studies* 896-916.

The 1982 laws provided for opportunities in which other categories of people would be able to attain the Myanmar nationality 'full citizenship'. These categories would include persons who were citizens before the law was enacted,[551] progenies to a single parent with full citizenship status and the other parent possessing a naturalisation or associate status[552] and any person who is a third generation to parents who are naturalised or associated nationals.[553] The provision in the Citizenship Law is clear, however, application in reality is a challenge and ambiguous reasons are given for the denial in being granted full citizenship.[554] The failure of acknowledging certain cultural groups depending on who is ruling Myanmar has caused the majority of the people falling within the marginalised groups to be displaced and become stateless. This situation is further convoluted by the division that has been created by the categories of nationality in Myanmar.[555]

4.3.4 Conclusion

The legal framework of South Africa has now been setup up to attempt to afford rights to everyone with limitations only applied through the proper application of the Bill of Rights. However, it is in some of the cases discussed above that we see that South Africa is complicit just as Myanmar in contributing to statelessness through some of its laws, the manner in which the laws are interpreted or the lack of will by the government to reduce statelessness and protect the people in the situation. Kenya on the other hand has shown initiative as a certain period was given for stateless persons to register, however, due to complications such as lack of dissemination or resources on the side of the persons involved, the majority of people were not registered. Kenyan legal framework has evolved and Kenya has taken great strides to attempt to grant stateless communities with nationality and it is still an ongoing process which Kenya should be applauded for.

The cultural dynamics of Myanmar are extremely broad and this has been a working process in relation to integrating cultural groups through identification and

551 Article 6 of the 1982 Citizenship Law.
552 Ibid articles 7(b)-(c).
553 Articles 7(d)-(f) of the 1982 Citizenship Law.
554 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 12 (Accessed 10-08-2020).
555 Ibid.

determining whether they are regarded as citizens of Myanmar in issues of acquiring nationality. The conflict about which cultural groups form part of citizens has seen Myanmar with prevalent cases of stateless persons globally. Therefore in order for Myanmar to be fully liberated, nationality is one of the issues that has to be robustly interrogated[556] through aligning their policies and law with international standards and to be more inclusive. Myanmar's nationality legal framework should be inclusive and provide solutions on preventing statelessness instead of being the cause of the problem. A countries democracy and freedom is measured on the level of protection the citizens are afforded by the government especially the marginalised groups. A country is capable of being implicit in creating statelessness through different ways such as discriminatory laws that exclude other people within the country.[557]

4.4 Loss and revocation of nationality

4.4.1 South Africa

4.4.1.1 Involuntary loss of nationality

Involuntary loss of nationality takes place in cases where people seek to acquire the citizenship of another country while failing to retain their South African citizenship or when they join the military forces of another state to fight against South Africa. This is done without seeking an exemption from the Minister in terms of section 6 of SACA. The law detects that in order to retain South African nationality an application for exemption should be made. Further, it is provided in section 6(3) that if a person who attained citizenship through naturalisation and elects to join the army of another country in a war not advocated for by South Africa, they will lose their citizenship. The difference in this sub-section from the first two is that it is more stringent in the sense that it does not only refer to war against the Republic but also to wars not advocated for by the Republic and it is without any Ministerial immunity.[558]

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556 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 1 (Accessed 10-08-2020).

557 Fee L K "Citizenship Regimes and the Politics of Difference in Southeast Asia" https://ias.ubd.edu.bn/wp-content/uploads/2018/09/working_paper_series_08.pdf 5 (Accessed 11-08-2020).

558 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 10 (Accessed 08-06-2020).

4.4.1.2 Renunciation of nationality voluntarily

Section 7 of SACA allows for renunciation of citizenship by a person in the cases where they want to become citizens of other countries. The procedure to be followed in terms of the regulations is that the person who wishes to renounce their citizenship must tender a signed statement of renunciation together with the motives for the renunciation. In circumstances involving minor children wherein the parents are renouncing their citizenship or the other parent is not a citizen, the nationality of the minor child is also terminated. In my view, instead of terminating the child's nationality, the option should be left open until the child attains the age of majority to permit them to choose the nationality of their choice amongst the countries involved.

4.4.1.3 Deprivation of nationality

Section 8 of SACA provides that if a citizen acquired nationality through naturalisation their nationality may be withdrawn if it was acquired fraudulently or naturalisation was acquired in terms that are against the requirements of SACA or any other legislation. In the case of a person who is serving sentence of over 12 months in another country or the Minister is assured that the withdrawal of a person's nationality is within the interests of the public, the Minister is authorised to withdraw the nationality of such person. The Constitution of South Africa in section 20 provides for non-deprivation of citizenship, therefore an argument can be made that the deprivation provision in SACA is contrary to the Constitution which is meant to be the prevailing law to which all legislation should be aligned.[559] In 2017 the Minister is said to have exercised his powers in terms of this section when he withdrew the nationality of Janusz Waluś a naturalised citizen of the Republic convicted of killing Chris Hani.[560]

4.4.2 Kenya

In Kenya the Minister in charge of issues related to nationality has the power to deprive any person who acquired their nationality through naturalisation.

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559 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 11 (Accessed 08-06-2020).

560 du Toit E News24 "Janusz Walus 'stripped of his South African citizenship" https://www.news24.com/news24/southafrica/news/janusz-walus-stripped-of-his-south-african-citizenship-20170529 (Accessed 25-06-2020).

Section 8(1) of the Kenyan Constitution provides for ways in which nationality can be lost.[561] These include: (i) when a person through actions and statements is treacherous towards Kenya; (ii) persons who are involved in unlawful activities such as business with countries that are at war with Kenya; (iii) if a person is imprisoned for a period of 12 months and above in the five years that they were granted the Kenyan nationality; being an ordinary resident of another country constantly for seven or more years after being granted the Kenyan nationality unless the period was due to them being in service on behalf of Kenya or they made an application at a consulate office yearly informing the authorities that they intend to keep their Kenyan nationality; and if a person attained the Kenyan nationality unlawfully.

4.4.2.1 Renunciation

Any person holding Kenyan nationality is capable of renouncing their nationality by affirming their intentions.[562] Upon a full investigation by the Cabinet secretary of the intentions of the person who is renouncing their nationality and on whether they understand the impediments that come with the decision, the declaration will be initiated. When the process is completed, a certificate of voluntary renunciation is granted to the applicant declaring that they are no longer a Kenyan national.[563] This process can be refused in the following circumstances:[564] firstly, if the other country is at war with Kenya; secondly, if the granting of nationality is not in the best interest according to the Cabinet Secretary; and thirdly, if the successful application guarantees the applicant to be stateless.[565]

4.4.2.2 Revocation

The new Constitution advanced the revocation or deprivation provision. This has been done by way of introducing more limitations to the discretion that the officials have and the process has been made to include accountability. This means that a revocation decision by a Cabinet Secretary should be accompanied by documented reasons which allows the applicant to whom the decision is adverse an opportunity

561 Constitution of Kenya 1963.
562 Section 19 of the KCIA.
563 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 19 (Accessed 06-07-2020).
564 Section 19(3) of the KCIA.
565 Ibid section 19(4).

to challenge the decision. Revocation can only transpire through an endorsement by the Citizenship Advisory Committee.[566] The revocation of nationality notice is provided in 14 days together with the reasons.[567] Previously the revocation order by the Minister was considered to be final, however, the new laws allow for the unsuccessful applicant to appeal the decision within 30 days and exhaust all their judiciary processes before the revocation is made final.[568]

It is noteworthy to point out that when discretion is concerned it means that accountability is low or does not exist. Therefore, there is a need for tribunals or due process through courts to be set up so that those who make decisions are held accountable for their actions. In most countries there are judiciary decisions that are made against the decision makers, however, the implementation for such orders has proven to be unsuccessful in many instances.

Kenyan statistics have shown that there are around 14000 stateless persons in Kenya.[569] The majority of the stateless persons in Kenya are the ones that migrated during the colonial phase. However, the majority of the stateless persons did not make use of the opportunity of applying for citizenship under the legal provisions at the time with stipulated requirements.[570] Some of the stateless communities include the Shona, Somalis, Rundi and many others.[571] The same fate that is faced by the stateless communities of other states is faced by the stateless population in Kenya as they carry on leading relegated lives.[572] Their fate is that which includes amongst other things, lack of social services, identity documents, arbitrary arrests, and no

566 Section 21 (1) of the KCIA.
567 Ibid section 12(5).
568 Ibid section 12(6)-(9).
569 Opile C "Birth registration drive combats statelessness among Kenya's coastal Pemba community" https://www.unhcr.org/ke/12681-birth-registration-drive-combats-statelessnessamong-kenyas-coastal-pemba-community.html 6 (Accessed 29-07-2020).
570 Section 3 of the KCA.
571 The Final Report of the Truth, Justice and Reconciliation Commission of Kenya (TJRC 2013) http://citizenshiprightsafrica.org/wp-content/uploads/2013/03/TJRC-Final-Report-VolumeIIC.compressed.pdf accessed 4 January 2020 (TJRC report), see also Ndubi M "The Shona: A stateless community in Kenya yearning to gain citizenship" https://www.unhcr.org/ke/12739-shona-stateless-community-kenya-yearning-gain-citizenship.html (Accessed 30-07-2020).
572 TJRC report http://citizenshiprightsafrica.org/wp-content/uploads/2013/03/TJRC-Final-Report-VolumeIIC.compressed.pdf accessed 4 January 2020, see also KNCHR "Out of the Shadows: Towards ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya" https://www.unhcr.org/4e8338d49.pdf (Accessed 30-07-2020).

access to education or formal work. This form of discrimination increases yearly and extends to different communities such as the Muslims of Somali.[573]

While a lot of negative reports transpire in relation to the stateless population of Kenya, some positive reports that can be emulated by other countries such as South Africa and Myanmar exist. These reports include the steps that the Kenyan government took to proclaim other marginalised groups as Kenyan tribes meaning that they were granted citizenship and birth certificates.[574] Further, this has opened opportunities for other communities such as the Shona community to be granted nationality as another Shona stateless girl was granted nationality in July 2020 and this shows hope for other stateless communities.[575] The existence of the procedures for stateless persons to apply for nationality is a positive step, however, these procedures are exorbitant and are not easily accessible for other stateless people.[576]

The Kenyan government in 2019 initiated a one year programme where they would recognise and register as citizens stateless people in Kenya.[577] This initiative has proven that the Government of Kenya is willing to eradicate statelessness while meeting its international obligations, however, results are yet to be seen while also considering the requirements that the taskforce will use on whether they will not be too stringent for the beneficiaries of the programme.[578] This initiative is one of the

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573 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 22 (Accessed 06-07-2020).

574 Ndubi M "The Makonde: From Statelessness to Citizenship in Kenya" https://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html (Accessed 30-07-2020).

575 Wanjohi J "Stateless Shona Girl Granted Kenyan Citizenship Courtesy of Interior Cabinet Secretary Fred Matiang'I" https://www.mwakilishi.com/article/immigration-news/2020-07-29/stateless-shona-girl-granted-kenyan-citizenship-courtesy-of-matiangi (Accessed 30-07-2020), see also NRC "Documentation opens doors for Kenya's stateless Shona community" https://reliefweb.int/report/kenya/documentation-opens-doors-kenyas-stateless-shona-community (Accessed 30-07-2020).

576 Manby B EAC https://data2.unhcr.org/en/documents/download/66807 45 (Accessed 06-04-2020).

577 Kenya Gazette notice No. 7881 of 23 August 2019 "The National Taskforce For the Identification and Registration of Eligible Stateless Persons as Kenya Citizens" http://citizenshiprightsafrica.org/wp-content/uploads/2019/08/Kenya-Taskforce-Identification-Stateless-Persons_Gazette.Vol_.CXXI-No.110_23Aug2019.pdf (Accessed 30-07-2020).

578 Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 23-4 (Accessed 06-07-2020).

solutions that can be imitated by both the Governments of South Africa and Myanmar in order for them to comply with both their international and domestic obligations.

4.4.3 Myanmar

Associate and naturalised citizens are capable of losing their nationality status under the 1982 nationality laws if they support an opponent of Myanmar in a war that Myanmar is not part of,[579] when they have been involved in an act regarded as immoral,[580] or engaged in an act that threatens the security and dominion of Myanmar,[581] acquired nationality unlawfully,[582] or if the person is a progeny of an associate or naturalised citizen who has lost their nationality.[583] Furthermore, if a person acquires the nationality of another country,[584] they will lose their Myanmar nationality automatically or if they use the passport or are in possession of a certificate of another state[585] or they permanently reside outside of Myanmar.[586] However, people are allowed to withdraw their nationality voluntarily.[587]

The 1982 Laws were intended to create unequal nationality status, however, it ended up causing statelessness. This could have been prevented if the application of law was in accordance with the rule of law that was stringently applied, meaning that anyone who had an entitlement to the Myanmar nationality should have been granted with nationality which rarely happens as they do not belong to the recognised cultural groups.[588]

4.4.4 Conclusion

Kenyan citizens have been arbitrarily deprived of their nationality with the Cabinet Secretary in other circumstance denying a citizen their Kenyan nationality

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579 Articles 35(a)-(b) and 58(a)-(b) of the 1982 Citizenship Law.
580 Articles 35(f) and 58(f) of the 1982 Citizenship Law.
581 Ibid articles 35(a)-(e) and 58(a)-(e).
582 Ibid articles 18, 36 and 59.
583 Ibid article 29 and 51.
584 Ibid articles 13, 16, 17, 34 and 57.
585 Ibid articles 16, 17, 34 and 57.
586 Ibid.
587 Ibid articles 14, 32 and 55.
588 Article 6 provides that 'anyone who was in possession of a nationality status by the time the 1982 law was enforced remains a citizen', see also Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 13 (Accessed 10-08-2020).

on the basis that they held nationality of another country.[589] This kind of administrative malfunctions are not foreign to other countries such as South Africa, as in another instance, the South African DHA withdrew citizenship for a lot of citizens without notifying them.[590] Such administrative failures should be guarded against as they are to the detriment of citizens.

In South Africa it is apparent that despite the laws and regulations provided for in relation to nationality and restraining the stateless population, inadequacy still exists in the manner in which the laws are executed and interpreted on the part of the DHA. The practice in reality is infiltrated with a lot of discrepancies that defeat the values that are provided for in the constitutions of the states and violates the rights of people. Further, notwithstanding the nationality related laws that are provided for in South Africa, there are also other various impediments that make these laws to seem redundant in addition to the DHA not implementing the laws. Xenophobia is one of the major setbacks that South Africa constantly encounters. People in power have on many occasions instigated xenophobic attacks when addressing the public.[591] This has caused foreigners whether one has been naturalised and acquired citizenship through other means to find themselves being attacked.[592]

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589 See Nalule C "Report on Citizenship Law: Kenya" https://cadmus.eui.eu/bitstream/handle/1814/66749/RSC_GLOBALCIT_CR_2020_7.pdf?sequence=1&isAllowed=y 25 (Accessed 06-07-2020), *Miguna Miguna v Fred Okengo Matiangi and Others* Petition No. 51 of 2018 [2018] eKLR; *Mahamud Muhumed Sirat v Ali Hassan Abdirahman* and Others, Election Petition No. 15 of 2008 [2010] Eklr, Gasa S "Amendments to Citizenship Act infringe human rights, say lawyers" https://www.dailymaverick.co.za/article/2020-02-14-amendments-to-citizenship-act-infringe-human-rights-say-lawyers/#gsc.tab=0 (Accessed 30-07-2020).

590 For example, see the number of cases where identifications documents have been blocked without any notice, Parliamentary Monitoring Group *"Question NW2763 to the Minister of Home Affairs"* https://pmg.org.za/committee-question/15119/ (Accessed 04-05-2021), see also LHR *"Statelessness and Nationality in South Africa: Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021"* 9,19 and 24 https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (Accessed 04-05-2021).

591 See remarks by the police Deputy Minister Bongani Mkongi https://www.dailymaverick.co.za/article/2019-04-02-government-agrees-to-censure-deputy-police-minister-for-remarks-about-foreigners-say-african-ambassadors/#gsc.tab=0 (Accessed 03-07-2020) and see also an article referring to all powerful politicians alleged to have instigated xenophobia https://www.iol.co.za/news/politics/right2know-blames-mashaba-ramaphosa-zwelithini-for-attacks-on-foreigners-31739481 (Accessed 03-07-2020).

592 Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 14 (Accessed 08-06-2020).

These attacks are not to be condoned whether the people attacked are foreign, refugees or even stateless.

Myanmar is in need of a legal framework on nationality that reflects social equality instead of the military regime rule it is reflecting.[593] For the people that have been denied of their right to nationality, they have also lost their dignity and identity. There is also a need for Myanmar to include in its legal framework processes such as naturalisation which it currently does not have compared to countries like Kenya and South Africa. Further, Myanmar should attempt to recognise all cultural groups within the state without discrimination or grouping them based on who is elite and deserving. This would be the first steps in honouring the internationally required protection towards its people. The main change that is needed in Myanmar is the creation of laws and regulations that are more comprehensive towards the marginalised groups and that acknowledges and regards their existence in the state equally.[594]

593 Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 14 (Accessed 10-08-2020).

594 Ibid.

Chapter 5 - The formation of a statelessness determination procedure in South Africa

The aim of this chapter is to assess the importance of identifying stateless persons and the reasons why there is a need for a determination procedure. Undocumented people will also be referred to for the purposes of determination in that, for instance, if during the determination process the results are that the person is only undocumented, the correct procedure will be followed.[595] In the case that the results indicate that a person is stateless *de jure* or *de facto*, the correct procedure should also be followed. The chapter will further attempt to determine which practices South Africa can emulate in order to establish a Statelessness Determination Procedure (SDP) in light of its international obligations. Chapters 2, 3 and 5 are correlated because the existence of a determination procedure assists in protecting stateless persons and preventing statelessness. The establishment of an SDP is part of a solution in the eradication of statelessness and has been seen to relieve stateless persons from the consequences they face in being stateless.[596]

As discussed earlier, statelessness is not only a problem experienced by foreigners but can also be faced by South Africans who are entitled to the right to nationality but are not because of many reasons. Therefore, it is imperative to find ways in which these people should be recognised and identified accordingly for a solution to be found. The South African Constitution in its preamble stipulates that South Africa belongs to everyone who resides in the Republic and this should apply to everyone, whether undocumented or stateless. Further, the Constitution of South Africa lays as its foundation in sections 1 and 2 the advancement of human rights equally through a manner that respects the dignity of people. Its supremacy is embedded in providing for the unlawfulness of any law or conduct that is inconsistent with the Constitution further imposing that the duties that the Constitution presumes should be carried. Therefore, in this case the duty is for South Africa to recognise the stateless community who are part of everyone who

595 In this regard, see Masey H UNHCR Geneva, Division of International Protection LPPR/2010/01 April 2010 "Legal and Protection Policy Research Series UNHCR and De Facto Statelessness" https://www.unhcr.org/4bc2ddeb9.pdf (Accessed 10-05-2022) 65.

596 Venkov J *"Towards eradicating statelessness – Statelessness Determination Procedures: Part II"* https://www.thetornidentity.org/2018/11/14/statelessness-determination-i/ (Accessed 30-03-2021).

resides in the Republic. The failure to fulfil these obligations should be regarded as unconstitutional.

There are two categories of statelessness which are differentiated by scholars such as Manly. Manly refers to the categories as statelessness *in situ* and statelessness in the migratory as discussed in chapter 2.[597] The difference between the two categories of statelessness calls for two procedures to be followed in terms of identification. Furthermore, using the same determination procedure for recognising both categories would be unfair as they are stateless due to different circumstances. In terms of statelessness *in situ* it has been suggested that instead of using an SDP, naturalisation or recognising the persons involved as nationals, through verification procedures, can be the solution. Statelessness in the migratory will be the one where an SDP will be applicable.[598] The difference in the procedures to be used has also been confirmed by the UNHCR when it suggested that, depending on the situation that led an individual to become stateless, 'nationality campaigns or nationality verification' would be appropriated compared to the SDP.[599]

However, this chapter is limited to the establishment of an SDP. This does not suggest that the question on who qualifies as a 'stateless person' poses no problem in theory or in practice. The fact that, in South Africa, there are no specific regulations in place to determine whether a person is stateless *de jure* or *de facto* poses a problem, which is the reason why this thesis argues for the formation of an SDP. As mentioned in chapter 2 above, both *de jure* and *de facto* stateless persons are likely to experience the same difficulties even though the 1954 Convention on Statelessness focuses only on *de jure* stateless persons. It is the reason that it is suggested that in order to develop a solution on who qualifies as a 'stateless person' a different procedure be used for *de jure* and *de facto*. In relation to *de jure* "[t]he

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597 See Manly M "UNHCR's mandate and activities to address statelessness" in Edwards A and van Waas L (eds) *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

598 Gyulai 2012 *European Journal of Migration and Law* 279.

599 UNCHCR "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons Geneva, 2014" https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 26 (Accessed 30-10-2020).

concept . . . has been criticised as being too narrow". This illustration showcases the difficulties that is found in theory and in practice.[600]

The establishment of an SDP is advantageous to states as it allows them to document data on the population of stateless and undocumented people and what solutions are available for them respectively. It also assists states to figure out the causes of statelessness and their development with the aim to create more solutions to the problem.[601]

5.1 The formation and application of a statelessness determination procedure

South Africa, Kenya and Myanmar do not have SDPs in place. In South Africa, the lack of procedures to follow has been demonstrated in the case of *Mulowayi and Others v Minister of Home Affairs and Another.*[602] This case has exemplified the non-existence or the lack of administrative justice and processes that permit stateless persons or persons who are on the verge of becoming stateless to be protected by and benefit from existing laws. All stateless people should be able to apply for nationality by utilising the existing laws both on the national and international level.[603] Furthermore, undocumented persons should also be afforded protection through existing laws.

Countries such as South Africa, Kenya and Myanmar can emulate the successful procedures that other countries such as Moldova and France have put in place for the determination of persons who are stateless as a solution to protect and prevent the situation from increasing. The SDP process that will be discussed in this chapter is a suggestion of what all three countries, with specific reference to South Africa, should emulate from other states. The three countries can also adopt international law and guidelines provided for by the UNHCR while exhibiting willingness to apply the rule of law. The application of the rule of law must observe an authentic

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600 Opeskin B, Perruchoud R and Redpath-Cross J "Foundations of International Migration" https://www.researchgate.net/publication/292934589_Nationality_and_statelessness (Accessed 10-05-2022) 103.

601 Venkov https://www.thetornidentity.org/2018/11/14/statelessness-determination-i/ (Accessed 30-03-2021).

602 *Mulowayi and Others v Minister of Home Affairs and Another* [2019] ZACC 1; 2019 (4) BCLR 496 (CC).

603 Venkov J "Recent case law on statelessness in South Africa – Mulowayi v Minister for Home Affairs" https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021).

procedure that is available and comprehensible to all stateless people. The need for South Africa to have an SDP is imperative considering the number of cases about persons who are undocumented or stateless that are brought to court or the change in legislation that leads to people being stateless or at risk of becoming stateless.[604] In establishing an SDP, the appropriateness of the procedure is dependent on what the causes of statelessness are in the state concerned and what procedure to be followed if the person is not stateless but undocumented. The aim of having an SDP is for states to be able to distinguish between stateless persons and undocumented migrants and citizens. This allows for the persons involved to be able to exercise the rights that they are entitled to while in the process of nationality acquisition.[605] For those that are undocumented, the process of acquiring documents will be initiated.

It is futile to use the SDP process in the situation of statelessness *in situ* because they already have strong relations with the country in which they are found, in other words their country of origin. Further, the application of the SDP to persons who are stateless *in situ* would only delay the process of them acquiring citizenship.[606] In other words, it means that the procedure is not appropriate for people who have strong links with a state that was established by birth or through residing in a state for a long time.[607] Therefore, due to the connection that these people have, such as being residents of those countries for a long period, the states should seek to authenticate their nationality.[608] While many sources consider that an SDP is not the best practice for statelessness *in situ* and this thesis agrees with the sources, the main focus in this thesis will be for the determination procedure for persons who are stateless through migratory. This is because in a country like South Africa where the procedure has to be established, more needs to be done while considering that the task at hand can be long since *de jure* stateless people have no link to any country

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604 Momoh S O, van Eijeken H, and Ryngaert C "Statelessness Determination Procedures: Towards a bespoke procedure for Nigeria" 2020 *Statelessness and Citizenship Review* 86–111 89.

605 Venkov https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021).

606 Momoh, van Eijeken and Ryngaert 2020 *Statelessness and Citizenship Review* 90.

607 Venkov https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021).

608 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf (Accessed 30-10-2020).

and the lack thereof needs to be investigated compared to stateless *in situ* where a link to a country is easily established through birth for instance.

5.1.1 What is regarded as a statelessness determination procedure?

An SDP is a process of establishing whether a person is considered to be a national of a state in terms of article 1 of the 1954 Convention on Statelessness. The process could be implemented through a judicial or administrative route. After determining the status of a person to be stateless, the state may either grant them nationality or a protected status which will guarantee the person with rights.[609] In order for states to comply with their international obligations to guarantee nationality to people and protect the people's rights that are contained in different conventions, states should be able to identify these stateless people in order to fulfil their obligations.[610] The SDP entails that all the countries that a person has links to should be ascertained to determine whether any of those countries regard the person in question as a citizen.[611] The reason states should undertake this procedure is for the recognition of stateless persons with the aim of conferring them with a legal status and protection.

The SDP comprises of the gathering and investigation of information relating to the rules, policies and practices of the states involved.[612] It comprises the collaboration between states that are linked to the applicant, the UNHCR, agents and the Ministry with the authority to handle foreign issues in those specific states.[613] The personnel that is tasked with the duty to consider and incorporate the 1954 Convention on Statelessness from the initial stages of the procedures all the way to the end, should be well acquainted with and competent to handle the evaluations.[614]

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609 See articles 3-32 of the 1954 Convention on Statelessness.

610 Guterres A (UNHCR) *"Statelessness determination procedures: Identifying and protecting stateless persons"* https://www.refworld.org/pdfid/5412a7be4.pdf 1 (Accessed 03-11-2020), See also Gyulai G "The Determination of Statelessness and the Establishment of a Statelessness Specific Protection Regime" in Edwards A and van Waas L (eds) *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 116-117.

611 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 23-24 (Accessed 30-10-2020).

612 Batchelor C A (UNHCR) "The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation" https://www.refworld.org/docid/415c3cfb4.html 41 (Accessed 2-03-2021).

613 Ibid.

614 Bianchini *Implementation* 173, see also Galligan D and Sandler D "Implementing Human Rights" in Halliday S and Schimidt

If states do not put an SDP in place it means that stateless people remain in the shadows without any form of recognition or acknowledgment of their existence by the states in which they will be residing. This would lead to states not honouring their international obligations to curb statelessness and protect the individuals that find themselves stateless.[615] However, the establishment of an SDP would ascertain that there are resolutions to be reached where stateless people would no longer be marginalised. The resolutions could include being granted citizenship.[616] It is suggested that non-recognition and non-regulation of laws that determine and provide which guidelines to follow to identify stateless persons and a positive way forward after being identified as stateless are a violation of their rights. The South African Government, in this instance, is failing in its duty, as per section 7(2) of the Constitution of South Africa to respect, protect, promote and fulfil the rights in the Bill of Rights. This can be gleaned from South Africa's lack of progressive legislative reform to curb statelessness, as seen in the cases mentioned in previous chapters. The aim is to do the opposite. Therefore, an efficient manner in which to deal with such a situation would be enacting legislation.

The enactment of legislation is an effective means that has already been initiated successfully in Moldova. This is the best example in relation to the three countries that have been discussed in this thesis as Moldova has not signed the 1954 Convention on Statelessness but has implemented comprehensive provisions in their legislation that they have emulated from other practices that are considered to be effective.[617]

The South African judiciary has played its role by intervening where possible when cases of this nature have been taken to courts. However, without the executive and

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P D (eds) *Human Rights Brought Home: Socio-legal Perspective on Human Rights in the National Context* (Hart Publishing 2004) 24 and 27.

615 De Groot G, Swider K and Vonk O *"Practices and approaches in EU States to prevent and end statelessness"* https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536476/IPOL_STU(2015)536476_EN.pdf (Accessed 06-11-2020).

616 UNHCR, *"Expert Meeting: Statelessness Determination Procedures and Status of Stateless Persons – Summary Conclusions"* https://www.unhcr.org/protection/statelessness/4d919a436/expert-meeting-statelessness-determination-procedures-status-stateless.html 2-3 (Accessed 07-11-2020).

617 *Moldova: Law No. 284 of 2011 on Amendment and Completion of Certain Legislative Documents* [Republic of Moldova], 10 February 2012, available at: https://www.refworld.org/docid/4fbdf6662.html (Accessed 7-04-2021).

legislature playing their role the change is minimal and does not change the circumstances of the majority of people who are stateless. The South African Government should seek to provide protection to the stateless community and should not exhibit discrimination and superiority at the expense of violating the rights of vulnerable persons. Statelessness in South Africa, Kenya and Myanmar has depicted the lack of equality, equity tolerance and it supports arbitrary arrests towards people who are unable to defend themselves.[618] It is in this regard that it is suggested that the principles of equity underlying legislation should apply in the case of stateless persons.[619]

The SDP process is suggested in the 1954 Convention on Statelessness, however, there is no stipulation on how countries should establish the statelessness of individuals.[620] In this regard, some countries have managed to initiate and assimilate into their legislation officially recognised processes on determination of stateless persons which are inclusive of administrative procedures. The existence of administrative procedures that regulate the manner in which stateless persons are to be determined allows the affected persons to utilise the administrative outcome as an empowering provision to review the decision or exhaust all available remedies. Further, if judicial processes have been utilised and a judgment has been granted in favour of the affected persons and the department (for instance, the DHA) against which the judgment was issued fails to take any action to implement the judgment, the affected persons have an empowering provision in the form of a judgment order. The judgment is considered as an empowering provision for the affected persons and by not implementing it, the party whom the judgment is against triggers the administrative law right for the affected persons.

The failure to take action by the party against whom the court issued the judgment infringes the constitutional rights of the affected person, which includes the right to

618 See chapters 3 and 4.

619 See the idea of equity in underlying legislation being applied in a different scenario of a marginalised community in South Africa by the Constitutional Court of South Africa in the case of *Daniels v Campbell N.O and Others* 2004 (5) SA 331 (CC) paragraph 19.

620 Article 32 of the Convention relating to the Status of Stateless Persons (1954 Convention on Statelessness), this is also confirmed in Gyulai G "Statelessness Determination and the Protection of Stateless Persons: A summary guide of good practices and factors to consider when designing national determination and protection mechanisms" https://www.refworld.org/pdfid/53162a2f4.pdf 5 (Accessed 11-11-2020).

administrative action. The problem that stateless persons encounter is that due to the lack of legislation that regulates statelessness in most states such as South Africa, Kenya or Myanmar, they have no rights or have limited rights that are difficult to exercise. This is the reason why there are many cases that are taken to court by NGOs such as the LHR and Centre for Child Law, which has proven to be the only way in which stateless persons have access to remedies. However, is this process a viable solution considering that it is not easily accessible to stateless persons? The answer is that it should not be the only available solution hence the proposal of other alternative solutions and administrative procedures that are regulated and making sure that they are well known to the affected persons and more accessible. These can include utilising the services of the Office of the Public Protector which will be discussed later in this chapter.

The question to be asked is whether the decisions by the DHA not to grant nationality to stateless people and not executing the judgments made by courts where they are ordered to act in a particular way should be considered to be administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In the circumstances mentioned, actions by the DHA are both considered to be decisions in terms of section 1 of PAJA. This means that in the case that there is a judgment against the DHA and it has not been implemented such would 'adversely affect' the nationality right of the stateless person/s involved while taking cognisance of the fact that it is a right to have other rights. The fact that the decisions made by the DHA are considered to be administrative in nature and considered to have been in terms of empowering provisions, should warranty the DHA to be held accountable. Stateless people are deprived of their rights in circumstances where the DHA does not act, acts without following procedure or is not held accountable.[621]

The Constitution of South Africa in section 33 empowers everyone with the right to administrative action that is not unlawful, unreasonable and procedurally unfair. In the case that a person has been adversely affected through an administrative action, they are entitled to written reasons. In terms of section 1 of PAJA, an administrative action would be the act to take a decision or an omission thereof by an organ of

621 Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

state while implementing public power or function as provided for in law and such decision adversely affects a person with external legal consequences. Therefore, the objective sought is that when decisions adversely affecting the rights of stateless people, undocumented persons and people on the verge of becoming stateless are taken, the decisions are procedurally fair and resonate with section 3(2) of PAJA.[622] The provision of reasons is considered to assist in improving the quality and rationality of decisions made. The right to reason also has a positive impact in relation to making judicial reviews efficient as it allows the affected person to have the knowledge on how they should proceed with the matter.[623] Reasons give an opportunity for one to either proceed with a matter on appeal or review, correctly re-submit the application or rest the matter.[624]

Further, the decision should comply with section 195 of the Constitution which provides the promotion of the standards of professional ethics to be high and calls for impartiality, fairness, equitability and unbiasedness when making decision. All this is required to be observed by section 195 in a manner which observes transparency and accountability. It is my understanding that most cases that transpire involving decisions taken on issues of being undocumented and/or stateless are administrative in nature and should comply with PAJA.

The association of an SDP process to PAJA is also a way of guaranteeing stateless persons with a regulated process in which a decision could be made as an administrative action and the decision would be considered as an empowering provision which results in any decision maker being held accountable for any action they take or omit to make. As discussed in the previous chapters, there are no regulations or procedures that are provided for in terms of

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622 Section 3(2) of PAJA provides as follows:
'*(a)* A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –
(i) adequate notice of the nature and purpose of the proposed administrative action; (ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.'

623 Kidd M "Reasonableness" in QuInot G (Editor) et al *Administrative Justice in South Africa: An Introduction* (Oxford University Press Southern Africa 2015) 194.

624 Ibid.

statelessness which means that empowering provisions can, in most cases, only emanate from court decisions as it stands, which is a procedure that is not available to all stateless people due to expenses and other barriers. Furthermore, as established in the *Mulowayi and Others v Minister of Home Affairs Another* case, administrative justice and procedural rights are the opportunity for people to enjoy and exercise their substantive rights.[625]

The fact that the Minister of the DHA is failing to execute policies and procedures that regulate statelessness in accordance with PAJA is unconstitutional. These procedures would serve as guidelines on how stateless persons would make applications to be identified as stateless and provide guidance on which steps to take and this could also be included in the proposed legislation. The Minister has failed even when there are judgments that have ordered for the regulation of procedures that stateless persons should follow and what forms they should use for applications.[626] The DHA Minister has made several decisions that have affected the nationality of many South Africans, or the rights of persons who are on the verge of becoming stateless and undocumented persons.[627] These decisions fall under what is defined as administrative action and must be in accordance with the principles of PAJA.

The procedure that the Minister takes to make these decisions should be procedurally fair. This means that the Minister should give notice and provide reasons for the intended action and allow the applicant to give submissions on their

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625 See also Venkov J https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021).

626 *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA), also discussed in *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152 paragraph 17, *Minister of Home Affairs v DGLR* (SCA) (unreported) case number 1051/2015 where in DHA was ordered to publish s 2(2) of SACA regulations and has not done so yet, see also LHR "Statelessness and Nationality in South Africa: Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021" 9,19 and 24 https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (Accessed 04-05-2021).

627 For example, see the number of cases where identifications documents have been blocked without any notice, Parliamentary Monitoring Group *"Question NW2763 to the Minister of Home Affairs"* https://pmg.org.za/committee-question/15119/ (Accessed 04-05-2021), see also LHR *"Statelessness and Nationality in South Africa: Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021"* 9,19 and 24 https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (Accessed 04-05-2021).

case. When the Minister makes decisions without allowing the persons affected by the decision to make submissions, such should be regarded procedurally unfair.[628] In terms of the orders that are granted by courts against the DHA, the Minister of the DHA and the State have an obligation to establish regulatory measures that would allow for the execution and implementation of the orders of court for the recognition of stateless people. Policies and regulations should also be established where enquiries are made on any matters that lead to statelessness and sought to be resolved before withholding or withdrawing nationality.

When the South African Government and the Minister of DHA fail to comply with court orders or fail to initiate the drafting of regulations and legislation that seek to recognise statelessness, such is considered to be discriminatory against the stateless community. The actions of the South African Government are unconstitutional and against the provisions of sections 7(2)[629] and 9(3)[630] of the Constitution of South Africa. The violations of the rights of stateless persons by DHA that have been shown throughout the chapters, calls for the Cabinet and the Minister of the DHA to commence with the processes of drafting legislation on the issue.

Despite all the cases that have ended up in court regarding nationality matters, discrimination against the stateless community continues. The cases that have ended up in court only consider and are limited to the facts and issues of those distinct cases which is not a solution. This kind of litigation (piecemeal litigation) adversely affects the victims as in most cases they cannot afford the cost of litigation.[631] The treatment that stateless people experience where they lack protection by law diminishes, defames and disregards them continuously.

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628 For example, see the number of cases where identifications documents have been blocked without any notice, Parliamentary Monitoring Group *"Question NW2763 to the Minister of Home Affairs"* https://pmg.org.za/committee-question/15119/ (Accessed 04-05-2021), see also LHR *"Statelessness and Nationality in South Africa: Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021"* 9,19 and 24 https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (Accessed 04-05-2021).

629 Section 7(2) enjoins the state to respect, protect, promote and fulfil the rights in the bill of rights.

630 Section 9(3) provides that the state may not discriminate against anyone on one or more grounds, including *inter alia,* race, ethnic or social origin, culture, language or birth.

631 *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bignham N O and Others, Esau v Esau and Others* [2018] ZAWCHC 109; 2018 (6) SA 598 (WCC) paragraph 51.

Lack of specific legislation on statelessness and determination procedures has resulted in administrative decision-makers failing or evading to make positive decisions on statelessness. All cases that have been discussed in relation to South Africa have seen the DHA being taken to court in most circumstances in order for them to grant people nationality. However, observations have been made and the DHA has shown effectiveness in cases where it investigates the nationality or legal status of individuals with the aim of revoking such, but the same commitment is not given in terms of investigating cases with the aim of granting nationality. The Minister of the DHA even appointed a team of experts to investigate and review, all permits categorically, that have been granted between 2004 and 2020.[632] This in most instances would be regarded as being competent on the side of the DHA, however, the question that begs an answer is why is it that such competence is not demonstrated in governmental attempts to reduce statelessness?

The specific regulations and legislation should seek to clarify the process of approaching the authorities of other states and the manner in which the information produced to them will be assessed. This is critical in situations where the applicant has sincerely provided the information that is readily available to them and the state in question is unwilling to partake in the process or delaying the process, therefore, the receiving state should work under the assumption that the applicant is stateless due to being prohibited access to functions attributed to nationality.[633] Further, in order to reduce misinformation and errors, interviews or hearings should be made available with access to interpretation prior to ascertaining an adjudicator.[634]

The above demonstrates that the positive input of administrative decision-makers is required because even if legislation exists which guarantees rights to stateless persons, without the will of administrative-decision makers, the whole purpose could

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632 See Ensor L "Home affairs minister launches probe into permits issued since 2004" https://www.businesslive.co.za/bd/national/2021-02-28-home-affairs-minister-launches-probe-into-permits-issued-since-2004/ (Accessed 01-03-2021), See also Hartle R "Fort Hare professor expelled from SA over bigamous marriage: PhD graduate who renounced his Nigerian citizenship has nowhere to go" https://www.timeslive.co.za/news/south-africa/2021-02-22-fort-hare-professor-expelled-from-sa-over-bigamous-marriage/ (Accessed 01-03-2021).

633 Bianchini *Implementation* 174.

634 Jones M and Houle F 5 "Building a Better Refugee Determination System" 2008 Canada's Journal on *Refugees* 3-11.

be defeated. Kenya has demonstrated the willingness by the administrative-decision makers when they initiated the granting of nationality to stateless people and attempting to find means in which to help many others.[635] Therefore, the willingness can be developed more if legislation specifically adopted for statelessness existed. This is something that can be emulated by both South Africa and Myanmar. In addition, when willingness exists such as in the case of Kenya, the next step would also be to regulate all the administrative guidelines of what is required for a person to apply for nationality or the steps that the administrators used in the circumstances of the one who they already granted nationality.

When considering the manner in which SDP procedures should be established, note should be given to the fact that for the process to be sufficient it should be easily accessible, effective and potentially be instituted on the basis of readily available administrative processes.[636] The procedures upon which the SDP processes should be based could include those that are readily available for refugees.[637] Despite basing the SDP on existing administrative processes, there is a need for training the personnel on statelessness and undertaking a census on the stateless community in order to understand the number of people who are stateless in the state establishing the SDP.[638] When there is a lack of effecting procedures that require for the administrative personnel to be trained, responsive awareness and dissemination of information on the procedural guidelines and what the process is when a person has been identified as stateless, such can create infrequency and turmoil.[639]

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635 Ndubi M "The Makonde: From Statelessness to Citizenship in Kenya" https://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html (Accessed 30-07-2020, see also Wanjohi J "Stateless Shona Girl Granted Kenyan Citizenship Courtesy of Interior Cabinet Secretary Fred Matiang'I" https://www.mwakilishi.com/article/immigration-news/2020-07-29/stateless-shona-girl-granted-kenyan-citizenship-courtesy-of-matiangi (Accessed 30-07-2020), see also NRC "Documentation opens doors for Kenya's stateless Shona community" https://reliefweb.int/report/kenya/documentation-opens-doors-kenyas-stateless-shona-community (Accessed 30-07-2020).

636 Momoh, van Eijeken, and Ryngaert C 2020 *Statelessness and Citizenship Review* 90.

637 See also UN High Commissioner for Refugees (UNHCR) "Commemorating the Refugee and Statelessness Conventions - A Compilation of Summary Conclusions from UNHCR's Expert Meetings" https://www.refworld.org/docid/4f461d372.html 25 (Accessed 14-11-2020).

638 Momoh, van Eijeken, and Ryngaert 2020 *Statelessness and Citizenship Review* 91.

639 Camp-Keith L "Human Rights Instruments" in Cane P and Kritzer H M (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 371.

5.1.3 What constitutes a proper SDP?

The aim and objectives of creating an SDP is to make sure that states are in a position to prevent, protect and identify statelessness while considering aspects such as: (1) the nature of obligation and lawfulness of the procedure; (2) where the SDP will be situated and how it will be setup; (3) the accessibility of the SDP; (4) assurances on the procedures; (5) evaluation of evidence and factual findings; (6) supervision of refugee and statelessness applications; (7) the possibility of naturalisation; and (8) appeal and review proceedings of the decision.[640]

The decisive factors explained below will be used to suggest the kind of SDP that South Africa can develop as a guideline while emulating some experiences that other countries have acquired in their own SDPs. Regard should be made on the fact that while suggesting an SDP that can be developed by South Africa, it should be noted as mentioned in previous chapters that South Africa does not have any legal framework that specifically recognise or identify stateless people. Due to lack of a legal framework on statelessness in South Africa, we have seen a lot of cases being taken to court against DHA and even in circumstances where the courts have made rulings against the DHA, lack of compliance has been a barrier. One of the reasons why there are so many challenges in cases involving statelessness is the lack of a determination procedure and laws that regulate the procedures to be followed in the case that a person is identified as stateless. This has led to a lot of irregularities in the manner in which the DHA has processed the statelessness matters resulting in many rights being infringed and making matters worse as identified in the early chapters.

In order to achieve all the suggestions that have been highlighted, it is also advised that the South African government work together with organisations such as the LHR to develop an action plan on statelessness which is highly recommended by institutions that deal with statelessness.[641] The aim for developing the SDP is to guarantee that statelessness cases are not processed using laws that are not prescribed for it. Therefore, the same way that refugee laws have been developed

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640 Gyulai https://www.refworld.org/pdfid/53162a2f4.pdf 5 (Accessed 11-11-2020), see also Momoh, van Eijeken, and Ryngaert 2020 *Statelessness and Citizenship Review* 91.

641 Suggested in the 5th Annual Southern African Nationality Network virtual meeting and webinar (LHR) held on 11-09-2020.

in line with what has been prescribed in international law conventions, statelessness should also be regulated and form part of the South African laws.

5.1.3.1 The nature of obligations and lawfulness of the procedure

The only manner in which legal obligations and the rule of law will be attached to the SDP is if the procedure is incorporated into the legislation of states. This can be ensured if a committee is mandated to examine the legal recognition of stateless persons, correlated issues and draft statutes that recognise and regulate statelessness. Regulating the procedure guarantees accountability on the part of the departments and stakeholders tasked with implementing the procedure. Further, regulating the procedure guarantees effectiveness and non-ambiguity while at the same time all stateless persons have access to the procedure equally[642] without any form of discretion involved as the standard would be clearly set-out. Regulating the SDP means that any decision that is made through the SDP legally binds any department within the state and it should be complied with and recognised in the country.

In previous chapters we referred to arbitrary detention and deportation of stateless persons, the law should provide that in the period that the determination process is ongoing, stateless people are immune from being arrested or deported for lack of identification documents. This immunity should be recognised especially by the police and the immigration personnel of states.[643] One of the aims for an SDP is to grant individuals with a legal status allowing them to be present in a country. The status allows them to enjoy basic rights as provided for in law and prevents them from being arbitrarily detained by authorities on the basis of lack of identity documentation while they are waiting for determination.[644] The rights being referred to are both substantive and procedural meaning that, substantially, during the determination process one is able to work, access health care services, possibly acquire permanent residence and can even be granted nationality. In terms of

642 Guterres https://www.refworld.org/pdfid/5412a7be4.pdf 5 (Accessed 03-11-2020).

643 See article 87[3] of the *Moldova: Law No. 284 of 2011 on Amendment and Completion of Certain Legislative Documents* [Republic of Moldova], 10 February 2012, available at: https://www.refworld.org/docid/4fbdf6662.html (Accessed 7-04-2021), see also Momoh, van Eijeken, and Ryngaert 2020 *Statelessness and Citizenship Review* 92.

644 Venkov https://www.thetornidentity.org/2018/11/14/statelessness-determination-i/ (Accessed 30-03-2021).

procedure, an individual is given an opportunity to be interviewed in the presence of a lawyer. After the interview process a decision will be given within a rational period in writing together with reasons. The applicant will then be given a chance to contest a decision if not satisfied with the outcome as discussed later in the chapter. During the period of contesting the decision, the state should be banned from deporting and/or detaining the applicant.[645]

In the case of South Africa, if the government decides that the DHA will be the deciding authority for the determination procedure then after granting the stateless status, they should also grant the permanent residence status which will allow for naturalisation in the future. The suggestion is that the DHA can be the deciding authority but it should be assisted by other institutions who encounter stateless people by enabling the institutions to initiate the procedure from their offices. If another body is created for the SDP then this body will have a binding decision over the decision of the DHA and therefore, the DHA would have to grant the permanent residence permit on the basis of the SDP decision.[646]

5.1.3.2 The location and setup of the SDP

In South Africa, because statelessness is not officially recognised and the population of people who are stateless is unknown, it is very difficult to distinguish which kind of statelessness between *in situ* and migratory is primary. In order to understand how the setup of the SDP should be, it is imperative that we observe some of the cases that are taken to court. Observation seems to show that there seem to be a hybrid of some sort. What this means is that parents migrate and give birth in another country, however, due to the fact that their country of origin might only grant nationality by *jus soli* and the country they will be in (in this case South Africa) requires passing nationality by birth if one parent is a citizen; or the

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645 Venkov https://www.thetornidentity.org/2018/11/14/statelessness-determination-i/ (Accessed 30-03-2021).

646 See UN High Commissioner for Refugees (UNHCR) "Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons" https://www.refworld.org/docid/57836cff4.html (Accessed 2-12-2020), *Moldova: Law No. 284 of 2011 on Amendment and Completion of Certain Legislative Documents* [Republic of Moldova], 10 February 2012, available at: https://www.refworld.org/docid/4fbdf6662.html (Accessed 7-04-2021) and Momoh, van Eijeken, and Ryngaert 2020 *Statelessness and Citizenship Review* 86–92.

parents have permanent residency;[647] or through naturalisation of the child born to parents who are non-South Africans or who do not have permanent residence upon acquiring majority.[648] This results in the exclusion of children born to parents who are not documented or are not in possession of any form of legal status. This means that these children and their future generation are at risk of becoming stateless *in situ* while their parents risk being stateless in the migratory like the situation in Kenya.[649]

As already established in the previous chapters, without nationality the rights of stateless people to education for instance are jeopardised.[650] The risk of becoming stateless is also due to the fact that the birth registration process requires the identity documents of the parent/s and should be done within 30 days of the birth. If the registration is delayed the requirements become more stringent and this often leads to non-registration of a lot of children which leads to the risk of being stateless.[651] The situation is made worse because the DHA is reluctant to grant nationality to children born to non-South Africans as seen in the *Minister of Home Affairs v Ali and Others (Mirriam Ali)*.[652]

In the *Mirriam Ali* case the Minister of the DHA was ordered by a court of law to prescribe an application form to be utilised for the application in terms of section 4(3) of the SACA, however, this has not been done to date.[653] In addition to the DHA being reluctant to grant nationality, the statutes relied upon for the acquisition of nationality also provide for stringent rules[654] and are prone to wrong

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647 Section 2 of the SACA.

648 Section 4(3) of the SACA.

649 Wanjohi J https://www.mwakilishi.com/article/immigration-news/2020-07-29/stateless-shona-girl-granted-kenyan-citizenship-courtesy-of-matiangi (Accessed 30-07-2020), see also NRC https://reliefweb.int/report/kenya/documentation-opens-doors-kenyas-stateless-shona-community (Accessed 30-07-2020).

650 See Hobden C "Report on Citizenship Law: South Africa" https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 7 (Accessed 08-06-2020).

651 Ibid 8.

652 *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA).

653 A draft set of regulations was published for comment on 24 July 2020 in GG No 43551, No. R 815.

654 Reed T *"Home Affairs flouts Citizenship Act"* in Tourism Update https://www.tourismupdate.co.za/article/home-affairs-flouts-citizenship-act (Accessed 16-09-2020) as seen in Hobden C *"Report on Citizenship Law: South Africa"* https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf 8 (Accessed 08-06-2020).

interpretation.[655] In most of the circumstances the DHA disputes these matters in court using arguments which are not genuine and bona fide or plead 'bare and ambiguous denial'[656] which is to the disadvantage of stateless persons in such circumstances.

Consideration of the above circumstances and characteristics would assist in understanding the framework which ought to be considered by South Africa. As mentioned in the first chapter, this thesis is about emulating good practices from other countries, it should be observed that in a scenario in Kenya which can also be considered to be what has been defined as a hybrid case in this thesis, an SDP was not required. The hybrid case is a situation where children are born to parents who migrated to a country and have lived in that country for a long period resulting in both the parents and the children becoming stateless. Parents in this circumstance would be stateless in the migratory or *in situ* or both and the children will be stateless *in situ*. This can be seen in the case of the Shona people in Kenya where nationality was granted to some of the Shona people who became stateless as a result of historical migration and ended up being *in situ*.[657] Even though the focus is not on statelessness *in situ*, it is worth mentioning that in a situation where close links or strong bonds exist, justice suggests that good practice would be to consider people who are stateless *in situ* and grant them nationality. The granting of nationality to people who are stateless *in situ* is achieved through 'targeted nationality campaigns'.[658] Therefore, the setup of an SDP in South Africa would be considered to apply for stateless in the migratory and would not be applicable for stateless *in situ*, however, South Africa is advised to grant nationality to all those that have close links in the manner in which Kenya did.[659]

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655 *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA).

656 See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) paragraph 13 and *The Minister: Department of Home Affairs and Others v Jose and Another* [2020] ZASCA paragraphs 18-19.

657 It is therefore suggested that South Africa and Myanmar should emulate from countries such as Kenya, Kyrgyzstan as shown in chapters 3 and 4.

658 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 26 paragraph 58 (Accessed 30-10-2020).

659 Wanjohi J https://www.mwakilishi.com/article/immigration-news/2020-07-29/stateless-shona-girl-granted-kenyan-citizenship-courtesy-of-matiangi (Accessed 30-07-2020), NRC https://reliefweb.int/report/kenya/documentation-opens-doors-kenyas-stateless-shona-

In terms of the discretion of where the institution which will be responsible of the SDP will be situated, the discretion rests upon the states. The procedure can be centralised or not, however, centralisation is common as it is considered as the option that provides for an improvement in the skills of the personnel in charge of the SDP.[660] In contemplating on which will be the most suitable setup for an SDP in South Africa regards should be taken from countries that have an SDP in place such as the UK for instance. The authority in charge of the SDP processes in the UK is the Home Office Department of Visas and Immigration (UKVI). The UKVI is in control of all issues related to citizenship applications from immigrants including the SDP.[661]

While a centralised procedure is the most commonly preferred one, this thesis suggests that a decentralised procedure should be the one that South Africa considers. The reason for this suggestion is because while the DHA is the institution that will be suitable to administer the SDP, stateless persons and undocumented people are encountered by different authorities such as the Department of Education, the Public Protector, social services, health facilities and banks etc. Therefore, even though the DHA is already located in different locations and administers all issues concerned with refugee and immigration, it is suggested that a statelessness unit be established in all the DHA offices and that the DHA becomes the deciding authority while powers to initiate the application for statelessness is given to all the institutions that encounter stateless people. This procedure should be set up on an online system that can be accessed by all other institutions including the Civil Society Organisations such as LHR. Further, in the cases of rural communities where the DHA is not located, it is suggested that mobile units be established that visit such areas in intervals with the aim of making the SDP accessible to everyone equally and without discrimination. In addition to mobile units, places such as the clinics and SASSA pay-points in the rural areas could also

community (Accessed 30-07-2020), see also UNHCR: The UN Refugee Agency *"Kyrgyzstan ends statelessness in historic first"* https://www.unhcr.org/news/press/2019/7/5d1da90d4/kyrgyzstan-ends-statelessness-historic-first.html. (Accessed 24-08-2020).

660 UNCHCR 25 para 57 https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf (Accessed 30-10-2020).

661 Home Office Department of Visas and Immigration (UKVI) "Apply to stay in the UK as a stateless person" https://www.gov.uk/stay-in-uk-stateless (Accessed 27-01-2021).

have access to the online system for SDP applications and referrals for nationality verification and assist the DHA.

A further consideration in the light of a statelessness unit being an unfamiliar procedure to the DHA and all other departments tasked with the obligation, officials tasked with the SDP duties should therefore receive training on statelessness in order to acquire the necessary expertise and experience.[662] The UK has considered the department that has authority over applications of citizenship, refugee and asylum statuses to be the deciding authority in the SDP and South Africa should also do the same.[663] In this case it means that the DHA would make the final decision on whether a person is stateless or not. The DHA would find it easy to handle the SDP in both cases of immigrants and *in situ* persons since already it is the department that handles nationality issues in South Africa.[664]

The fact that different institutions encounter stateless people and a decentralised system has been suggested, it is imperative for a system to be established to make sure that the personnel in such institutions have knowledge of what statelessness is. Further, they should know what is required to assist stateless persons including creating a referral mechanism to transfer cases to the DHA in cases where they are unable to assist.[665] This is an addition to the online system, under the DHA, where such personnel are able to initiate the application process which is accessed by all institutions.

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662 Achiron M and Govil R UN (UNHCR) "Nationality and Statelessness: Handbook for Parliamentarians N° 22" https://www.refworld.org/docid/53d0a0974.html 20 (Accessed 27- 11-2020).

663 Other countries such as Brazil also use departments that are authorised to handle cases of citizenship to deal with statelessness, see the Ministry of Justice and Public Security (Federal Government of Brazil Migrações — Ministério da Justiça e Segurança Pública (justica.gov.br) (Accessed 27-01-2021).

664 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 26-7 paragraphs 59 and 65 (Accessed 30-10-2020).

665 See in general UNHCR "Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4" https://www.refworld.rg/docid/5cb474b27.htm (Accessed 22-02-2021), see also Momoh S O, van Eijeken H, and Ryngaert C*Statelessness and Citizenship Review* 92.

5.1.3.3 The accessibility of the SDP

The procedure would serve no purpose if it were not accessible to stateless people or had a time frame which would disregard them from proceeding with the SDP. Accessibility of the procedure also means that the information about the procedure should be disseminated to stateless persons with assistance such as interpreters and counselling services.[666] The objective of having an interpretation service available is to reduce any form of oversights and misinterpretations when information is collected.

An important note to make is that the application should not require the applicant to have entered the Republic legally. This is due to the fact that one of the major elements of being stateless is lack of identification documents and this includes a passport making it impossible for most of them to have entered other states legally.[667] Imposing legal entry as a requirement defeats the purpose of the effectiveness of the SDP considering that legal entry is not a requirement for asylum seeking applications, it is therefore thought the same should apply for the SDP. There is no protection provided for in the statelessness conventions on the requirement of legal entry by stateless persons with specific references to articles 31 and 33 of the 1951 Refugee Convention and there are penalties attached thereto.[668]

Accessing the SDP application should be made available the same manner in which people applying for their nationality identity cards online can for persons who are able to access online procedures.[669] This can be done with the help of NGOs and other institutions for instance. To ensure that all stateless persons are catered for in

666 UN High Commissioner for Refugees (UNHCR) https://www.refworld.org/docid/57836cff4.html 5 (Accessed 2-12-2020).

667 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 28 paragraph 69 (Accessed 30-10-2020).

668 Ibid 46 paragraph 127.

669 The UK also has an online platform where stateless persons are able to make applications to remain in the UK while being stateless and such platform can be used by South Africa, Kenya and Myanmar for the SDP applications https://www.gov.uk/government/publications/application-to-extend-stay-in-uk-as-stateless-person-form-flrs (Accessed 27-01-2021).

the SDP, authorised officials should be given powers to initiate the procedure ex officio as mentioned above.[670]

Accessibility also means that all rules and regulations in relation to statelessness should be unequivocal and contain accommodating principles including allowing the applicant to submit comprehensive evidence both legally and factually.[671] Proving that one is not a citizen of any state is inevitably practically difficult therefore if the requirements for one to prove that they are stateless are high it will result in the determination and implementation of statelessness impossible.[672] It has been held that if all the requirements for acquisition of nationality have been complied with, the DHA is obligated to grant nationality through the necessary administrative procedures without proceeding with additional deliberations.[673]

The accessibility to information on the SDP should be a priority with the DHA working together with other stakeholders such as the office of the Public Protector, the Department of Education, the Department of Health and Civil society Organisations such as the LHR as they encounter people affected by statelessness. The collaboration is intended to assist in providing people with knowledge of the existence of the procedure. Other tools that can be used by these stakeholders in order to facilitate accessibility is outreach initiatives in the most secluded places such as rural areas.

5.1.3.4 Assurances on the procedures

The SDP should be regarded as any other procedure that is impartial and competent in the manner in which it is applied. This can be guaranteed by ensuring due process. Impartiality means that a solid foundation exists for an SDP that is fair and just. Due process guarantees that stateless persons will be afforded with solutions

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670 See Article 87[1] of Law No. 200 of 16.07.2010 on Foreigners in the Republic of Moldova under the heading "Submission of an Application for the Recognition of Stateless Status" https://www.refworld.org/pdfid/3ae6b4f520.pdf (Accessed 28-01-2021).

671 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf paragraphs 69-70 (Accessed 30-10-2020).

672 Bianchini *Implementation* 173.

673 *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) paragraph 88.

when a decision on the SDP has been made.[674] While the procedure should be impartial, it should also not be applied with inflexible conditions that may generate appalling and prejudicial outcomes. The SDP should have pre-emptions such as fees for the administration procedure or lack of legal-aid. In the case that an administration fee is required, the fee should be minimal and rational in order for applicants to be able to access the procedure.[675] The effectiveness of the SDP is guaranteed if South Africa put in place regulations and procedures that are standard which can be followed by applicants in the same manner other processes such as the asylum process are regulated.[676]

Assurance means that information regarding the SDP is well known to the community and the applicants. Otherwise lack of information would render the procedure unsuccessful to the extent that applicants would have no knowledge of its existence. In cases where the applicants are minor children who are unaccompanied, it should be guaranteed that they receive adequate protection from the authorities throughout the SDP. While applicants are awaiting for the finalisation of the SDP, they should not be subjected to detention and the rights provided for in the laws of the state in which they will be residing should be protected despite the pending outcome of the process. Upon receiving the outcome, due process requires that a reason for the outcome be given. This, in the case of South Africa, would allow for an initiation of review processes in terms of PAJA if the decision is in the negative for the applicants.

5.1.3.5 Evaluation of evidence and factual findings

The evaluation in an SDP is about both the facts and law where the law to be considered should consist of what is provided for in statutes, the manner in which the judiciary has interpreted and applied such law and the practice in different

674 UNHCR Expert Meeting "Statelessness Determination Procedures and the Status of - Stateless Persons, Summary Conclusions" https://www.refworld.org/pdfid/4d9022762.pdf 4 paragraph 10 (Accessed 08-12-2020).

675 UN High Commissioner for Refugees (UNHCR) https://www.refworld.org/docid/57836cff4.html 14 (Accessed 2-12-2020).

676 See the general procedure for asylum application, refugee determination, review and appeal processes provided for on the DHA website http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum (Accessed 05-05-2021).

states.[677] The provision of comprehensive and articulate information to build up a case of statelessness by applicants to the SDP is in most circumstances difficult. This requires assistance from the officials appointed to the cases as they are compelled to provide support.[678] The success of the process is subject to the officers conducting interviews that mutually seek a positive outcome and not confrontational. While conducting fact gathering, the officers should be in a position to discern the evidence adduced between an applicant who is not acquainted with nationality regulations of the countries in which they have links with and persons who reflect lack of interest in adducing information that is needed in the application. In the former situation it is required that the officials offer assistance to obtain the information.[679] This kind of procedure can be imitated from countries such as Moldova and France.[680] Authorised officials in these countries are capable of extracting the applicant's information from the countries they are linked to as supporting information during the SDP.

I. Burden of proof

Burden of proof in many circumstances rests on the party who alleges,[681] in the case of statelessness this means that the person who is stateless would bear the onus of proving statelessness. Despite the standard principle being that he who alleges must prove, in cases of statelessness the burden is suggested to be shared between the applicant and the officials in charge of the application process. This is done for the purpose of determining whether the applicant qualifies to be stateless in

677 George J and Elphic R "Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide" https://www.pulp.up.ac.za/component/edocman/promoting-citizenship-and-preventing-statelessness-in-south-africa-a-practitioner-s-guide 47 (Accessed 16-12-2020).

678 Foster M, McAdam J and Wadley D "Part one: The Protection of Stateless Persons in Australian Law — The rationale for a statelessness determination procedure" 2017 *Melbourne University Law Review* 401-455 451.

679 Carter J and Woodhouse S (Immigration Law Practitioners' Association) "Statelessness and applications for leave to remain: a best practice guide" https://www.refworld.org/pdfid/58dcfad24.pdf 21 (Accessed 23-12-2020).

680 See the French Office for the Protection of Refugees and Stateless Persons (OFPRA) "Guide to procedures at Ofpra-December 2019" https://www.ofpra.gouv.fr/fr/textes-documents/guide-des-procedures (Accessed 28-01-2021), see also Article 87^2 (2) of Law No. 200 of 16.07.2010 on Foreigners in the Republic of Moldova under the heading "Submission of an Application for the Recognition of Stateless Status" https://www.refworld.org/pdfid/3ae6b4f520.pdf (Accessed 28-01-2021).

681 See UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 34 paragraph 89 (Accessed 30-10-2020), see also Monoghan N *Law of Evidence* (Cambridge University Press 2015) 35.

accordance to the 1954 Convention on Statelessness.[682] The evidence to be considered should include the evaluation of the nationality regulations of the countries linked to the applicant together and the applicant's submissions which can be either oral or written or both.[683]

In the case of *The Minister of Home Affairs and Others v Jose and Another*[684] (*Jose* case) the Supreme Court of Appeal of South Africa (SCA) noted that the DHA was at a better position to investigate all allegations put forth by the applicants as they had at their disposal all necessary state equipment to execute.[685] This concern by the SCA proves that a state is at a better position to investigate all the submissions made in an application before a decision is made.

The existence of legislation which specifically implements identification of stateless persons would also have provisions of what the burden of proof would be and the means thereof. It would also assist the judiciary and administrative decision makers on what is entailed in the definition of a 'stateless person'. It is important in instances where nationality is unsuccessful.[686] The difficulty that is faced by stateless persons is that without the legislation that incorporates the internationally recognised principles into national laws, minimum effect exists leading to failure by the stateless to seek protection through courts and the administrative procedures. In a state like Myanmar, it is difficult to access court while in Kenya and South Africa a number of cases have been handled in judicial proceedings.

II. Standard of proof

While the standard norm for proving a case in civil matters is balance of probabilities, in statelessness matters the standard of proof to be met should be 'reasonable degree'. This means that there should be a reasonable degree to the extent that an individual is not considered a citizen in terms of the laws and regulations of any

682 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 34 paragraph 89 (Accessed 30-10-2020).

683 Guterres A (UNHCR) https://www.refworld.org/pdfid/5412a7be4.pdf 5 (Accessed 03-11-2020).

684 *The Minister of Home Affairs and Others v Jose and* Another [2020] ZASCA 152.

685 Ibid paragraph 19.

686 Bianchini *Implementation* 169.

state.[687] The aim in subjecting this kind of standard of proof is to encourage affirmative outcomes.[688] The decision by the adjudicator should be based on whether the information provided by the applicant to substantiate the claim is reliable.[689] However, in the case that the state officials are presented with inadequate evidence, that should not be considered as lack of ability to have proved their case as reasonable degree suggests otherwise.[690] In the case that the applicant intentionally suppresses information that could assist in the determination of their status, such will be regarded as not discharging the burden of proof.

Another issue of concern when decisions are made is to validate that the process is not tainted with arbitrariness because this is not supported by the rule of law and is inconsistent with the rationality obligations that one is expected to demonstrate even in the presence of discretion. Discretion does not require making decisions that result in unfair discrimination.[691] The unfairness of the process materialises when officials allege that they are following their internal rules and policies which is understandable, however, everything they do should be aligned to what the legislation provides for. This is the reason why there is a plea that the recognition and protection of stateless persons be legislated with specific reference to SDP processes being explicitly stipulated. Explicit provisions are required for the purposes of limiting implied rules being relied on with the consequence being the violation of people's rights.[692]

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687 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 35 paragraph 91 (Accessed 30-10-2020).

688 Ho H L A Philosophy of Evidence Law: Justice in the search for truth (Oxford University Press 2008) 173.

689 UN High Commissioner for Refugees (UNHCR) "Note on burden and standard of proof in refugee claims" https://www.refworld.org/docid/3ae6b3338.html (Accessed 5-05 2021).

690 Momoh, van Eijeken, and Ryngaert *Statelessness and Citizenship Review* 97.

691 An example of a situation where a decision was found to be unfair by the Public Protector of South Africa "Report no 27 of 2019/20 on an investigation into allegations of maladministration by the Department of Home Affairs in respect of the alleged improper revocation of a minor child's birth certificate and consequently his South African citizenship" http://citizenshiprightsafrica.org/south-africa-report-no-27-of-201920-on-an-investigation-into-allegations-of-maladministration-by-the-department-of-home-affairs-in-respect-of-the-alleged-improper-revocation-of-a-minor-child/ 25 (Accessed 09-03-2021).

692 Public Protector of South Africa "Report no 27 of 2019/20 on an investigation into allegations of maladministration by the Department of Home Affairs in respect of the alleged improper revocation of a minor child's birth certificate and consequently his South African citizenship" http://citizenshiprightsafrica.org/south-africa-report-no-27-of-201920-on-an-investigation-

5.1.3.6 Supervision of refugee and statelessness applications

Statelessness and refugee obligations by the UNHCR are intertwined especially when consideration is given to the fact that an individual can cease to be a refugee while at the same time remain stateless.[693] In the case that a person lodges both statelessness and refugee applications, they should all be processed without either status taking precedence over the other.[694] The main reason for this consideration is found on the basis that the 1951 Refugee Convention guarantees more rights within states than the rights provided for in the 1954 Convention on Statelessness.[695] Due to the connection that sometimes exists between refugee and statelessness, it is contemplated that a possibility of a mutual determination procedure could be a solution while not withdrawing from the challenges that may occur.[696]

I. Non-disclosure

In terms of situations where the applicant is involved in both processes of statelessness and refugees, discretion is of importance when seeking information from states that the applicants have connection with. The only exception to the discretionary concern would be when the communication is warranted and within the law without communicating the refugee application to the state concerned.[697] Therefore during SDP, discretion should also be applied for applicants who are also refugees and in the case that the applicants are not aware of the refugee process, they should be informed of the refugee processes in order to be able to initiate applications accordingly.[698]

II. Mutual determination procedure framework

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into-allegations-of-maladministration-by-the-department-of-home-affairs-in-respect-of-the-alleged-improper-revocation-of-a-minor-child/ 25 (Accessed 09-03-2021).

693 See UNHCR "Action to address statelessness: A strategy Note" https://www.unhcr.org/protection/statelessness/4b960ae99/unhcr-action-address-statelessness-strategy-note.html (Accessed 12-01-2021).

694 See UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 31 paragraph 78 (Accessed 30-10-2020).

695 Ibid.

696 Ibid 27 paragraph 66.

697 See UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 15 paragraph 33 (Accessed 30-10-2020).

698 Ibid 31 paragraph 79.

A mutual determination procedure has its negative impact in cases where the system is centralised and the same officials work on both the refugee and statelessness determination applications. The main issue that would transpire in such circumstances would be merging the criteria and procedures of asylum and statelessness which is not recommended.[699] Therefore, it is recommended that the officials working on the procedures be separated if the system is centralised. This is the other reason it is suggested that the system in South Africa should not be centralised for the sake of efficiency and inclusivity for all. When an application is a combination of a statelessness and refugee claim, the officials may work together, however, they should maintain privacy to protect the refugee status.[700]

When determination procedures are carried out, a thorough investigation should be done to ensure that any decision taken has been investigated prior. This should be done with the intention of protecting the rights of the applicant. A thorough investigation warrants the decision to be made without the possibility of procedural and substantive flaws like most decisions made by the DHA that have been discussed throughout this thesis.

5.1.3.7 The possibility of naturalisation

If the outcome of the SDP results in a person being stateless, it follows that permanent residency and all basic rights should be granted to enable the individual concerned to carry on with a normal life.[701] Different states approach the positive outcome of statelessness differently as in some instances they do not guarantee a legal status which warrants permanent residency with the rights that are attached to it and the possibility of naturalisation.[702] The aim of the SDP should be to recognise stateless people and grant them with a legal status that allows them to exercise the

699 Momoh, van Eijeken, and Ryngaert 2020 *Statelessness and Citizenship Review* 99.

700 Ibid.

701 Articles 15, 17, 19, 21, 23, 24 and 28 of the 1954 Convention, see also UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 49-53 paragraphs 136-7 and 150 (Accessed 30-10-2020).

702 See UNHCR The UN Refugee Agency "Global Action Plan to End Statelessness: 2014-2024" https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html 16 (Accessed 19-01-2021), this means that if states are willing to deny granting stateless persons with nationality on discriminatory basis it will be difficulty to firstly, create and SDP and recognise the existence of stateless people and secondly, to grant them nationality upon recognising the stateless status.

rights provided for by law.[703] This notion of granting stateless persons with legal statuses that allow for stateless persons to acquire resident permits, basic human rights as provided for both domestically and under international law and lastly, allow for the prospects of naturalisation, is supported by the UNHCR.[704] States should take initiatives such as adopting different measures which include legislative and administrative measures as a guarantee of equality and safeguarding the rights of all the people.

The separation of powers arguments that the state or Minister of DHA usually raises when they are ordered to enact legislation is redundant in the view of what is at stake. This is because the Constitution places an obligation upon courts to certify that both the executive and legislature comply with the Constitution. Further, it is the duty of the judiciary to declare any conduct that that is inconsistent with the Constitution as null and void and provide applicable constitutionally authorised remedies.[705] This position has been supported in the *Jose* matter when the SCA held that courts observe the doctrine of separation of powers, however, they are also obligated in certain cases to direct the Executive on which route to take.[706]

5.1.3.8 Appeal and review proceedings of the decision

It is imperative that stateless persons are afforded a right to appeal any decisions made concerning their right to citizenship and any matter related to the documentation proving their nationality. This can be ensured by making use of the judiciary and administrative route. The judiciary input to oversee the reviews in these cases would be more significant if reasons are given for every decision made.[707] The judiciary and administrative proceedings should be available when nationality

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703 Guterres A (UNHRC) "Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness" https://www.refworld.org/pdfid/4cad866e2.pdf 2 (Accessed 25-01-2021).

704 See UNHCR https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html 16 (Accessed 19-01-2021).

705 *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paragraph 45.

706 *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152 paragraph 22.

707 UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness May 2020 HCR/GS/20/05" https://www.refworld.org/docid/5ec5640c4.html (Accessed 28-08-2020).

is denied (for instance the denial of identification documents upon application) and when it is deprived (when nationality is revoked without notice).[708] Administrative findings denying the renewal of documents that legalises a person's status or like in the instance where the DHA froze the identity documents of thousands of people for alleged fraud.[709] The instances where the Minister of DHA has made decisions without following any form of procedure such as freezing people's identification indicates that the Minister exercised his discretion to an extent. This kind of discretion should be considered as undermining the rule of law and violates the human rights of the people whose nationality has been revoked.

Despite the fact that cases pertaining nationality have received judiciary attention when an opportunity avails, many decisions are made at an administrative level by the Minister of DHA and the personnel of the DHA who in some instances occupy the lower ranks in the ministry. Issues pertaining the issuance of identity documents remain with no supervisory commissions, yet in order for one to be able to vote or exercise other basic rights, an identity document is a requirement.[710]

The fact that a decision that has a negative impact on a person has been made means there should be reasons outlining that outcome. The DHA in many

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708 Parliamentary Monitoring Group "Question NW2763 to the Minister of Home Affairs" https://pmg.org.za/committee-question/15119/ (Accessed 04-05-2021), LHR "Statelessness and Nationality in South Africa: Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021" https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf 9,19 and 24 (Accessed 04-05-2021), see also an example of a situation where a decision was found to be unfair by the Public Protector of South Africa "Report no 27 of 2019/20 on an investigation into allegations of maladministration by the Department of Home Affairs in respect of the alleged improper revocation of a minor child's birth certificate and consequently his South African citizenship" http://citizenshiprightsafrica.org/south-africa-report-no-27-of-201920-on-an-investigation-into-allegations-of-maladministration-by-the-department-of-home-affairs-in-respect-of-the-alleged-improper-revocation-of-a-minor-child/ 25 (Accessed 09-03-2021).

709 Ibid.

710 Parliamentary Monitoring Group "Question NW2763 to the Minister of Home Affairs" https://pmg.org.za/committee-question/15119/ (Accessed 04-05-2021), LHR "Statelessness and Nationality in South Africa: Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021" https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf 9,19 and 24 (Accessed 04-05-2021), see also an example of a situation where a decision was found to be unfair by the Public Protector of South Africa "Report no 27 of 2019/20 on an investigation into allegations of maladministration by the Department of Home Affairs in respect of the alleged improper revocation of a minor child's birth certificate and consequently his South African citizenship" http://citizenshiprightsafrica.org/south-africa-report-no-27-of-201920-on-an-investigation-into-allegations-of-maladministration-by-the-department-of-home-affairs-in-respect-of-the-alleged-improper-revocation-of-a-minor-child/ 25 (Accessed 09-03-2021).

circumstances has declined citizenship to people without tendering any reasons. The DHA in doing this does not follow any form of procedure or follow the court orders made against it. This has reached an extent of courts finding that the DHA does not consider ameliorating the situation especially when the matters are remitted back to the DHA to consider instead of the courts making the orders for nationality to be granted.[711] Remitting the matter back to the DHA is a delay in the process especially if the courts have found the applicants to have met all the requirements.

The same manner in which other decisions that affect people's rights are taken for review and appeal should be assured for negative decisions in the SDP. The review proceedings should be proceeded with in terms of the regulations of administrative and judicial reviews of the state in question. In terms of appeals, the application itself should adjourn any decision until such an appeal has been finalised.[712] This means that stateless people will not be expelled from the country pending finalisation of the appeal. Different states have set up their SDP differently, where the judiciary is in charge of the SDP in other states,[713] while others have a combination of both the judiciary and the administrative procedures as authority of the SDP.[714]

Review processes are imperative because in circumstances where an invalid administrative action is not set aside by a relevant court, it will still be regarded as having legal effect that is binding.[715] In the case of stateless people or nationality

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711 *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) paragraphs 84 and 90.

712 UNHCR and Rosenblat M O "Good practices in nationality laws for the prevention and reduction of statelessness: Handbook for Parliamentarians N° 29" https://www.refworld.org/docid/5be41d524.html 21 and 35 (Accessed 25-01-2021).

713 UNHCR "Mapping Statelessness in Belgium" https://www.refworld.org/docid/5100f4b22.html 48 and 51 (Accessed 25-01-2021), see also European Migration Network "Ad-Hoc Query on recognition of stateless persons" https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2015.675_lu_recognition_of_stateless_persons_wider_diss.pdf 5 (Accessed 25-01-2021).

714 European Migration Network "Statelessness in the European Union" https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_inform_statelessness_en.pdf 5 (Accessed 25-01-2021).

715 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) paragraphs 89 and 103, see also Van Dyk OT *The influence of the Oudekraal and Kirland decisions on the legal status of an invalid administrative action* (LLM thesis University of the Free State 2020) 28 and 29.

having been revoked, if the decision to revoke nationality is invalid it will mean that until such decision has been set aside by a court of law, the invalid decision will have legal consequences. As it has been discussed above and in the previous chapters that accessibility is of importance, it should also be noted that review and appeal processes are protracted and costly which serves as an impediment in serving the beneficiaries of the process. Therefore, it is crucial that states consider administrative tribunals in matters concerning nationality as they provide easy access and are less protracted, rapid and economical.[716]

Countries that only use the judicial process will have a separate procedure for appeal and review from that of the court of first instance, which will be a higher court. Therefore, the rules and regulations to apply in such circumstances will be those that regulate courts in that country in civil matters.[717] Despite which route a country decides to take, whether the SDP is through judiciary, administrative procedure through an existing system in the country or a separate one only meant for the SDP, the key is to ensure equality and fairness of the process within the confines of law.[718] This can be ascertained by the possibility to accessing appeal and review proceedings as provided for in any matters taken to court in accordance to law. Despite which procedure South Africa decides on, the procedure should adjourn any order against the applicant.

While accepting that judiciary oversight is required for the administrative decisions of the executive in relation to nationality matters, there should be more different channels in which the decisions could be reversed which everyone can access. The Office of the Public Protector in South Africa investigated one of the decisions of the Minister of DHA and its findings on denials, revocation of birth registration and deprivation of nationality were against the state.[719] This is an avenue that is easily

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716 Wade H W R and Forsyth C *Administrative Law* 9th ed (Oxford University Press 2004) 906-907, Quinot G and Maree PJH "The Puzzle of Pronouncing on the Validity of Administrative Action on Review" 2015 7 *Constitutional Court Review* 27-42 and Van Dyk *The Influence* 3-4.

717 European Migration Network "Statelessness in the European Union" https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/00_eu_inform_statelessness_en.pdf 5 (Accessed 25-01-2021).

718 Momoh, van Eijeken, and Ryngaert 2020 *Statelessness and Citizenship Review* 100-102.

719 Public Protector South Africa "Report on an investigation into allegation of failure to register the birth of a child and the naturalisation of the mother by the Northern Cape Department of Home Affairs https://citizenshiprightsafrica.org/public-protector-of-south-africa-report-no-38-

accessible to people and can be used more often. It is important that all vulnerable people are educated about information like this in order for them to utilise it as it is not of use to them if they are unaware of its existence.

The Constitution of South Africa in section 182(1) empowers the Public Protector to perform investigations on issues related to the state, within the practice of public administration by any government department where there are suspicions of inappropriate decisions or prejudice. The power that the Public Protector has is not only to investigate but also includes occasional binding power such as in the case of the two reports to provide remedies and resolve issued. Therefore, compliance to the remedial action stipulated by the Public Protector will be compulsory otherwise legal consequences will attach.[720] Therefore, this section gives the Public Protector power to investigate the decisions made by the DHA on issues related to nationality and serves as an alternative accessible option for stateless people to utilise.

The aim for these investigations is so that an appropriate remedy is given, and the Constitutional Court explains that for the remedy to be appropriate, it has to be effective. Ineffective remedies were regarded as undermining the Constitution of South Africa and the values and rights it establishes which will not be upheld.[721] Despite the fact that the function of a Public Protector does not replace the courts', their observations are considered to establish findings that reflects serious misconduct.[722] In terms of the powers that the Public Protector has, where prima facie evidence has been established for serious misconduct in nationality issues, the Public Protector should provide appropriate remedies. This can be an alternative route which can be used by undocumented people and people who are stateless or find themselves on the verge of becoming stateless. The Office of the

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of-2011/ (Accessed 09-03-2021), see also Public Protector South Africa http://citizenshiprightsafrica.org/south-africa-report-no-27-of-201920-on-an-investigation-into-allegations-of-maladministration-by-the-department-of-home-affairs-in-respect-of-the-alleged-improper-revocation-of-a-minor-child/ (Accessed 09-03-2021).

720 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) paragraph 73.

721 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) paragraph 67.

722 Ibid paragraphs 107-8.

Public Protector serves as an effective tool in investigating the DHA and issuing effective solutions.

In the reports that the Public Protector of South Africa has issued, the investigations included oversight on whether the DHA had followed the due process as provided for in PAJA when making the decisions it did and whether the decisions resulted in maladministration. In following the findings of these reports, it can be concluded that the decisions that the DHA makes should be in accordance to PAJA and section 195 of the Constitution of South Africa which provides for the '[b]asic values and principles governing public administration', in other words the decision should have a basis in law. This means that whenever the DHA seeks to decide on any matter, it should first conduct an investigation which allows for the persons involved to make submissions. When the investigation is complete then reasons should be provided for if the outcome is negative.[723]

In relation to South Africa, the DHA has proven to be against granting nationality. The DHA has gone to the extent of considering appealing judgments that have been ordered against it on basis such as questioning whether a court is competent to order the Minister of DHA to grant the applicants with nationality instead of ordering that the Minister should consider the applications.[724] However, even though law requires that the matter be reverted back for consideration by the decision-maker, courts are allowed under certain circumstances to decide for the purpose of finality.[725] The constrains used by the DHA delays the process and causes further prejudice to the applicants because arguing that the case be remitted to the decision maker for a decision to be made afresh is amiss considering there is nothing new to be decided.[726] The court in *Chisuse* held that nationality issues comprise of a

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723 Public Protector South Africa http://citizenshiprightsafrica.org/south-africa-report-no-27-of-201920-on-an-investigation-into-allegations-of-maladministration-by-the-department-of-home-affairs-in-respect-of-the-alleged-improper-revocation-of-a-minor-child/ 4-5 (Accessed 09-03-2021).

724 *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152 paragraph 12.

725 See *Gauteng Gambling Board v Silverstar Development Ltd and Others* [2005] ZASCA 19 paragraph 1.

726 *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152 para 16.

question of law and are not based on discretionary decision-making by relevant authorities as the DHA encapsulates its arguments.[727]

In the *Jose* case [728] the DHA contended that the applicants had not used the correct forms for section 4(3) of the Citizenship act application for citizenship. This is appalling considering that the DHA had been ordered in a previous case[729] to provide the forms. The DHA was therefore making arguments that were contemptuous at the detriment of the applicants.[730] The question that arises then, when the authorities such as the DHA delays the process even after it has unfairly prejudiced the applicants, is what can be done to curb such abuse of power? The Constitutional Court of South Africa held that a cost order from the personal pockets of a public official who holds a representative position can be made in some instances.[731] The Constitution of South Africa allows for the courts to make personal cost orders as a form of guaranteeing accountability from public officials and making sure that suitable standards are met. A personal cost order is applicable in instances like these when public officials such as the DHA litigate in a manner that is nonchalant and in bad faith.[732] Therefore, these are some of the routes that can be used to deter departments such as the DHA that always seek to frustrate the system.

5.2 Conclusion

In conclusion, it suffices to say that providing proof to the negative that one is not a national under the operation of law in any country is difficult and as shown in this chapter, it is a predicament that is faced by stateless persons. It is urged that states should provide assistance in these circumstances as they have the resources needed. States like South Africa that do not have an SDP should also investigate the systems of other states that already have SDPs in place in order to emulate the practices or parts thereof which would match their system.

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727 *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) paragraph 88.

728 *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152 paragraph 17.

729 *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA).

730 *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152 paragraph 17.

731 *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) paragraph 153.

732 *South African Social Security Agency and Another v Minister of Social Development and Others* [2018] ZACC 26; 2018 (10) BCLR 1291 (CC) paragraph 37.

The enactment of legislation that provide express laws, procedures and regulations on the determination and protection of stateless people is essential in South Africa, Kenya and Myanmar. There are a lot of reservations and problems where distinct procedures are not stipulated. Legislation would expressly provide a clear application process to follow and the rights that are guaranteed to applicants. An SDP would establish a culture where the rights of anyone affected by statelessness were addressed in manner that respects equality and non-discrimination. This is on the basis that the legislation would mandate the officials involved to act accordingly without prejudice and transparently knowing that they would be held accountable. The legislation will also prioritise the eradication of statelessness while providing determination and protection processes that are and expressly allow for administrative action procedures to flow easily.

An SDP allows for states to be aware of the extent of statelessness within their territories and be able to create a suitable solution that aligns with the obligations they have internationally and towards their own laws. There are a lot of guidelines that states like South Africa can follow in establishing an SDP that have been highlighted in this chapter such as emulating countries such as Moldova and the UNHCR handbook.[733] While considering the advantages, disadvantages are not to be ignored and the shortcomings of other countries such as Switzerland could also assist in the preparation processes.[734] These shortcomings include clarity on whether a person has a right to remain in a country while the procedure is ongoing,[735] or whether the police can detain applicants during the SDP.

The success of legislating the statelessness procedure and ensuring protection and reduction is determined by the level of willingness and determination the state and all the other stakeholders who have been suggested to become part of the SDP in this process have. The mandate should always be ensuring that everyone is treated

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733 See Moldova on Foreigners in the Republic of Moldova under the heading "Submission of an Application for the Recognition of Stateless Status" https://www.refworld.org/pdfid/3ae6b4f520.pdf (Accessed 28-01-2021) and UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf 49-53 paragraphs 136-7 and 150 (Accessed 30-10-2020).

734 See Hamann K "Statelessness Determination: The Swiss experience" https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/resettlement/hamann.pdf (Accessed 17-04-2021).

735 Ibid.

with respect and dignity and that their basic rights are not violated throughout the process. Legislation on statelessness will stand as authorisation in the SDP that will stipulate all lawful procedures that would align with the requirements that are provided for in PAJA in the pursuit of discouraging unlawful decisions.

6. Conclusion and Recommendations

6.1 Conclusion

This thesis has elaborated on the importance of having a nationality on the basis that it is necessary, even foremost in comparison to civil rights[736] because in essence, it is a right to have rights.[737] The necessity of nationality has been seen throughout the thesis and in chapter 1 it has been illustrated through the work of Arendt where it is established that being stateless is about the question of humanity and how we should, as human beings, be accountable to each other.[738] This means that, because the manner in which we live is closely connected to national states and our identification is also tied to those states, being stateless means that one is not only excluded in a state but also from humanity.[739] With the prevailing uncertainty regarding statistics on how many stateless people there are in the world (although estimates point towards millions), it is estimated that around 90 percent of this group is to be found in only 10 countries. Further, statistics estimate that a million stateless people identify as Rohingya from Myanmar and these numbers keep increasing every year.[740] This increasing number underscores the reason why states need to play a role in the eradication of statelessness because it benefits both the stateless persons and the states as established in chapter 5.

The previous chapters highlighted issues relating to the 1954 and 1961 Conventions on Statelessness and their implementation, with specific regard to the states of Myanmar, Kenya and South Africa. The most significant issue that has been highlighted concerns the determination procedure for stateless persons as a mechanism that needs to be established.

The 1954 Convention on Statelessness is an imperative convention as it has defined who a stateless person is and stipulated what rights should be afforded to them subject to the link they have towards a specific state. The convention is problematic in the sense that its provisions are restricted to stateless persons who are lawfully

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736 Arendt H *The Origins of Totalitariansm* (New York: Harcourt Brace and Jovanovich 1978) 296-7.

737 Ibid.

738 Ibid.

739 Hill S R "American Citizenship" https://medium.com/quote-of-the-week/arendt-on-citizenship-d9e23beb4aad (Accessed 24-03-2021).

740 Venkov *J* https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021).

present in a state and does not cater for those that are unlawfully present in a state. This restriction defeats the purpose as most people who are stateless would have entered a state illegally. This limitation means that the rights provided for in the state, are only accessed by stateless persons who legally entered a state and this is considered to be a fundamental gap that needs remedying.

Despite the fact that the conventions are a fundamental stepping stone to the jurisprudence on statelessness as a human rights problem, they do not provide any procedures on how they can be implemented within states. In addition to the lack of implementation procedures, they do not have any provisions on how to identify stateless persons. Limitations and gaps such as these are replicated in national laws of both countries that are party to the conventions and those that are not but are obligated to recognise stateless people as it has become customary international law. Even though the definition of 'stateless person' has been given, in practice it is construed differently, and this complicates the manner in which stateless persons are identified. It is essential that states adopt and implement SDPs in their national laws and authorise legal statuses for stateless people. The fact that there is a lack of uniform internationally recognised procedures and guidelines for the SDP is what makes the procedures developed in countries that have the SDP different and less effective in practice.

Observations of the different state practices, including those of the three countries that have been discussed in this thesis, suggest that it is important to have implementation procedures because without them the rights provided for in the conventions will be unattainable.[741] Compliance with any convention, in this case the 1954 and 1961 Conventions on Statelessness, is challenging if the recipients of the rights are not acknowledged and conferred with legal status.[742]

In relation to identification procedures being adopted in all three countries that were discussed in this thesis, it has been observed that none of the countries have

741 Bianchini K *Implementation* 159.

742 UNHCR "Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4" https://www.refworld.rg/docid/5cb474b27.html paragraph 189 (Accessed 22-02-2021).

developed an SDP. Kenya has shown limited progress by attempting to grant nationality to a number of stateless people within its territory despite not having a regulated SDP.[743] The South African Government on the other hand has been taken to court on several occasions and judgments have been granted against it ordering that nationality be granted to stateless persons.[744] However, compliance has proven to be difficult as some cases have shown that the DHA does not easily comply with court orders.[745] Myanmar is a different issue in the sense that atrocities that are faced by stateless people in the country have left the majority of them displaced with no prospects of the Government of Myanmar identifying and recognising them formally in the near future.[746] This means that stateless people in the three states are not fully protected. Furthermore, not identifying them means that there is a lack of statistics on the correct figures of people who are stateless.

The treatment that undocumented and stateless people receive in the countries under review in this thesis does not demonstrate protection. Further, this treatment reflects that these states are not accepting the international law obligation they have towards stateless people. The number of individual cases taken to court in South Africa and Kenya indicate that national legislation on statelessness should be adopted with adequate and clear guidelines on how to identify, recognise and protect the beneficiaries of the legislation. The adoption of legislation would allow the process to be available to everyone.

The problem that is identified in all three states is that, in addition to the lack of political will by the governments to assist in eradicating statelessness, there is also

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743 See Wanjohi J "Stateless Shona Girl Granted Kenyan Citizenship Courtesy of Interior Cabinet Secretary Fred Matiang'I" https://www.mwakilishi.com/article/immigration-news/2020-07-29/stateless-shona-girl-granted-kenyan-citizenship-courtesy-of-matiangi (Accessed 30-07-2020), see also NRC "Documentation opens doors for Kenya's stateless Shona community" https://reliefweb.int/report/kenya/documentation-opens-doors-kenyas-stateless-shona-community (Accessed 30-07-2020).

744 See *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (2) SA 396 (SCA); *C and Others v Department of Health and Social Development, Gauteng and Others* [2012] ZACC 1; 2012 (2) SA 208 (CC) for instance.

745 See *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152.

746 See Arraiza J M and Vonk O "Report of Citizenship Law Myanmar" https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 (Accessed 10-08-2020).

an additional factor, that is, the lack of adequate guidelines for decision-makers to follow.

The lack of specific procedures has led to stateless persons encountering difficulties in terms of which administrative procedures they should comply with or which ones to utilise when pursuing remedies. The consequences of such include unwieldy litigation processes which also contain complicated uncertain legal rules. The use of laws that are not specifically enacted for the recognition of stateless persons opens different interpretations by administrative decision-makers, which frustrates the whole process. Accessibility of the procedures is also an issue as courts have on numerous occasions ordered the DHA, in the case of South Africa, to provide forms upon which applications of nationality can be made. However, the DHA has not complied and when the same issues arise in court with applicants having made applications on affidavits, the DHA objects to these applications.[747]

Other obstacles that are faced by people without any form of identification and are on the verge of becoming stateless include being unable to exercise their basic rights such as the right to education,[748] and access to healthcare services. Further, the inability to economically support oneself is also a key characteristic of this cluster of people. This is an issue that has been observed in all three countries and is a violation of the rights of people who are vulnerable. In addition to this is the issue of the possibility of immigration detention due to the lack of legal status while their cases are being considered, which may take a longer period if there is a need to appeal. All these obstacles are inconsistent with the provisions of the statelessness conventions and render their implementation ineffective as they do not consider the fact that the whole predicament is based on lack of documents, therefore requiring documents defeats the purpose of seeking solutions.[749] The UNHCR handbook

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747 See *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152 paragraph 17 and *Minister of Home Affairs v Ali and Others* [2018] ZASCA 169; 2019 (1) SA 396 (SCA).

748 *Centre for Child Law and Others v Minister of Basic Education and Others* (3317/2018) (ECG) unreported (10 December 2018); *Centre for Child Law v Director-General Department of Home Affairs and Others* [2021] ZACC 31; *Centre for Child Law and Others v Minister of Basic Education and Others* [2019] ZAECGHC 126; 2020 (3) SA 141, see also *The Minister of Home Affairs and Others v Jose and Another* [2020] ZASCA 152.

749 Goodwin-Gill G S and McAdam J *The Refugee in International Law* (Oxford University Press 2007) 528-530, see also Bianchini *Implementation* 164.

provides that the procedures are regarded to be fair and efficient only when accessibility is ensured for all.[750]

According to the 1954 Convention on Statelessness, the decision to grant nationality to stateless persons and what rights are attached to that status remains in the hands of states. However, it is observed that all this is impractical if a legal status is not approved.[751]

Considering that statelessness is poorly documented, if at all, in the states discussed in this thesis, it means that the number of stateless people could as well be increasing without any significant solution being provided. It is understandable that internationally, there has been activism aimed at combatting statelessness and providing protection for those who find themselves stateless, but the problem endures.

Nationality is what provides for access to the rights provided for in the laws of all states and this has proven to be a challenge that stateless people face as states are unwilling to grant nationality. In order to protect stateless people, states should be willing to consider incorporating the main conventions in relation to statelessness in their domestic laws. If states like South Africa recognise stateless people within their territory and emulate the procedures that are being used in other progressive states to reduce statelessness, such will expedite the elimination of the problem and would allow for the protection of the vulnerable. However, what militates against this approach is the fact that states are reluctant to relinquish their sovereignty over allowing international legal provisions to be incorporated in their domestic laws.

This thesis aligns with Arendt's view that stateless people are 'right less', although some people may argue that stateless people do have rights to some extent.[752] I, however, disagree because if that was the case, then in reality that enjoyment of rights by stateless people only holds true for very few countries. The states under

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750 UNCHCR "Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons Geneva, 2014" paragraph 68 https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf (Accessed 30-10-2020).

751 See Goodwin-Gill G S "The Dynamic of International Refugee Law' 2013 *IJRL* 651-666 651 and 653.

752 Motimele *Statelessness* 54.

review in this thesis have proven that, for one to be able to exercise the most basic of rights, they have to go through many obstacles such as legal battles to minimally exercise these rights. This was illustrated in the context of South Africa where a legal battle took place for school children to be allowed to attend school for basic education as discussed in chapter 4. Furthermore, stateless people only rely on informal work to survive and they are prone to arbitrary detention. Considering all this and more, the question that lingers is how can it be said they 'have rights to an extent' if they are unable to freely exercise those rights.

In conclusion and providing a summarised answer to the research question and the sub-questions, the evidence has shown that:

(i) South Africa is not in compliance with international law that protects the rights of people who are stateless, undocumented or are on the verge of becoming stateless. This flows from the understanding that there is no law in South Africa that recognises and identifies stateless people, which means that it is impossible for a country to protect a community it does not recognise. Even though South Africa is not party to the two statelessness conventions, it still has an obligation to prevent, recognise and protect stateless people through customary international law. South Africa Africa would be in compliance with international law if it formulates and adopts rules, regulations and procedures that identify, determine and recognise stateless people.

(ii) In terms of whether South African legislation has provisions for access to nationality and issuance of identity documents to stateless people, the answer as stipulated in chapter 3 is that nationality laws in South Africa are inconsistent with what the Constitution provides for, resulting in many uncertainties. The lack of legislation that provides for procedures to be followed in statelessness situations makes it more difficult as people have to rely on the law that already exists. The paucity of these laws, as shown in the previous chapters, is seen in the manner in which the DHA opposes those who intend on utilising these legal rules, and in the disenfranchising interpretation of those laws that the DHA seems to prefer.

(iii) On the issue of whether South Africa has an SDP in place, the answer is in the negative as seen in chapter 5 above, which suggested ways in which South Africa could establish one.

(iv) In answering the question of the extent to which South Africa's nationality legislation is informed and guided by international rules and standards, the thesis uncovered that there exists what could be termed partial compliance. This inchoate compliance flows from the fact that South Africa recognises and revokes nationality as provided for in international law and even grants nationality to children who are stateless or at risk of being stateless. However, there is no law that regulates the identification of statelessness and the procedures to follow for the acquisition of nationality for stateless persons. This makes it difficult for one to acquire nationality if they are stateless. Lastly, in answering the question on whether the selected jurisdictions (Myanmar, Kenya and South Africa) provide adequate protection to stateless people in accordance with international law, the answer is in the negative. This is because in countries like South Africa where existing laws have the potential to protect stateless people, the state has nevertheless failed to do so, resulting in basic human rights being violated. Further, if all these people are not recognised, it is difficult for them to be protected. This is the scenario in the jurisdictions that have been discussed in this thesis. Kenya has initiated a process of granting nationality, however, it is still in its initial stages and Myanmar has not initiated any form of procedure. Therefore, the three countries still have to enact legislation that is adequate to protect stateless people in accordance with international law.

Based on all that has been observed throughout the thesis, the following recommendations are submitted and will be useful to all states referred to in this thesis with specific reference to South Africa.

6.2 Recommendations

On the basis of what has been deliberated throughout this thesis it is recommended that, for South Africa to comply with international law that protects the rights of stateless people or those on the verge of becoming stateless, it should consider the following: (1) ratification of the statelessness conventions; (2) setting up a statelessness determination procedure, including administrative procedures and

guidelines; (3) adoption of specific national legislation on statelessness; and (4) provision of adequate protection status.

6.2.1 Ratification of the statelessness conventions

The South African, Kenyan and Myanmar Governments are encouraged to become parties to the statelessness conventions and participate in the Universal Periodic Review processes related to the conventions. This would also be a way for states to work towards the promotion of the basic rights, recognising and protecting people who are stateless.[753]

All the countries discussed in this thesis, especially South Africa, should accede to all treaties that are related to nationality and statelessness and ensure that they implement them within their territory. For them to fully achieve this, they should incorporate international laws relating to stateless in their national legislation and ensure that they comply with their international obligations in accordance with the UNHCR's handbook.

South Africa is party to the ACRWC which in article 6 calls for every child's birth to be registered and be given a name and nationality. Therefore, South Africa should honour this obligation and ensure that South African laws and procedures comply with article 6.

Full compliance and implementation is also ensured when states provide for training amongst all officials whose work is related to the administration of statelessness and nationality issues across all institutions not only concentrating on the DHA.

Ensuring effective collaboration between Civil Society Organisations and State institutions in nationality issues for the decentralised system's efficiency for the determination and protection of stateless people.

The Government of South Africa is also encouraged that through successful collaboration, they should work towards disseminating information on statelessness to all people and provide them with information of where they can acquire

753 Berényi K *Addressing the anomaly* 233.

assistance. Dissemination of information entails also partaking in research on the issue and the publication of reports on the severity of statelessness in the country.

6.2.2 Setting up a statelessness determination procedure including administrative procedures and guidelines

According to the UNHCR, to effectively protect stateless persons, states should adopt statelessness determination mechanisms.[754] It has been established that states have the potential to create or eradicate statelessness and the creation of an SDP is one way in which states can comply with the latter. The basis of creating an SDP is that for one to be provided with protection, there is a need for them to be identified and further identify the nature of protection needed. Even though the UNHCR handbook, which requires for the implementation of its guidelines in the national legislation in order for the standards it provides to be binding, is not yet binding, states have to be willing to do so in order to eradicate statelessness. In implementing parts of what is provided for in the handbook, states should ensure the existence of procedural fundamentals and seek to eliminate impediments that may lead to applicants not being protected.[755]

In the case of South Africa, it has been observed in this thesis that a decentralised system would be the best with the DHA being the main authority (deciding authority) to handle issues of statelessness. Due to the procedure being decentralised, states are urged to create a system for all institutions (health care facilities and schools for instance) that encounter people who are stateless or undocumented to enable them to initiate the SDP or appropriate procedure. All these institutions should be given the access to initiate proceedings even if the states decide that the deciding authority will be the DHA in the case of South Africa. However, in all states that have been the centre of discussions, the personnel of the identified authority/ies need to be capable of handling the issues in the specific area of law. In addition to expertise,

754 UNCHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf paragraph 62 (Accessed 30-10-2020).

755 Bianchini *Implementation* 173.

they must be neutral and without bias in handling the applications as these values are of importance in all processes.[756]

In terms of the burden of proof, consideration should be given to implementing specific guidelines in that regard. This is in relation to how challenging it is to prove that one is not a citizen or lacks connection with any other state.[757] States are also encouraged to share the burden of finding information on which countries the applicant is linked with as they are at a better position in terms of having the resources needed for such tasks. The threshold of evidence required for the determination of statelessness need not be high as it would defeat the purpose, considering the fact that proving the negative is difficult.[758] States are encouraged to consult the UNHCR handbook on the threshold of evidence as it suggests that the evidence given should only be reasonable.

The determination procedure should also allow for meaningful engagement with the applicants especially in the attempt of establishing ties or links the applicant might have with other countries to which their nationality can be attributed. Meaningful engagement can also be of assistance before a decision is taken against an individual in cases where nationality is revoked as it allows them to make submissions on matters that can potentially affect them negatively.

States are encouraged to ensure that there is a limitation in terms of the discretion that authorities have when considering the naturalisation of people. The procedure should be accessible, and the requirements should not be stringent. When negative decisions are given, the deciding authority should give written reasons for the affected party to challenge the decision in court.

Further, recommendations include the provision of appeal and review processes where nationality has been rejected and ensuring that during this period the affected persons are not deported or detained. All information, rules and regulations relating to nationality issues should also be in accordance with the provisions of the

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756 European Network on Statelessness "Determination and the Protection Status of Stateless Persons" https://www.refworld.org/pdfid/53162a2f4.pdf 9 (Accessed 02-03-2021).

757 Batchelor C A (UNHCR) "The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation" https://www.refworld.org/docid/415c3cfb4.html 41 (Accessed 2-03-2021).

758 Bianchini *Implementation* 173.

Constitution and all relevant legislation. There is a need for the initiation of publishing statelessness statistics and ensuring that they are published annually for progress to be seen.

In setting up an SDP, states should establish an institution that will take charge in determining statelessness while making sure that they are supported by other institutions as suggested in this thesis. A decentralised system is required for the purposes of efficiency.

The determination process calls for the provision of legal services for all people utilising the determination process. The laws relating to nationality matters including the SDP should be equal without discrimination. If any form of costs are required the amount should be minimal and not deter persons from accessing the procedures required.

States are encouraged to take initiative to identify the populations which are at the verge of becoming stateless to provide solutions on how to reduce and prevent statelessness. The initiative should include: administering research and identifying communities affected by statelessness and initiate acquisition of citizenship and the determination of statelessness processes; raise awareness through different institutions participating in outreaches within the population and providing them with information; providing identification documents in the instance where a community was forced to migrate due to conflict or discrimination for instance (Myanmar situation) and in cases where verification of nationality according to domestic laws is impossible states are encouraged to provide the affected individuals with protection while facilitating the granting of citizenship.

6.2.3 Adoption of specific national legislation on statelessness

It has also been established that statelessness does not exist by coincidence; instead it is an outcome of policies, regulations, and laws that the states create. However, states can also be part of the solution by electing to eliminate statelessness through the mitigation of its effects.[759] In order for states to be part of the solution, they need to ratify the statelessness conventions including making sure

[759] Venkov https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021).

that they are in compliance with all international conventions, custom and principles in relation to human rights and nationality.[760] Furthermore, formal legislation should be implemented and must include the provisions and guidelines of the 1954 and 1961 Conventions on Statelessness. The aim to be considered in the adoption of the legislation is to include important procedural guidelines and procedures such as the right to review and appeals and access to these processes as mentioned in chapter 5. The procedures should guarantee that the cases will be deliberated impartially while aiming at providing comprehensive regulations and policies and seeking to assure that even in practice the guidelines are directly followed.

While it has been concluded that statelessness is a human rights violation, states should now seek to work together with the UNHCR[761] in its goal to eradicating statelessness by enacting legislation, regulations and policies addressing statelessness. It is also imperative for the integration of international law as it allows for the formation of national legal frameworks with rights that can be exercised by stateless people. In extension, the framework should also include procedures that can be utilised when the rights have been violated.[762] The importance of incorporating statelessness issues in national legislation is because it guarantees the state as a protector instead of being the perpetrator that violates the rights of the vulnerable.[763] In addition to legislation enactment, it has also been concluded in chapter 5 that another manner in which states can be part of the solution is by establishing SDPs.

The state is also encouraged to consider having meaningful engagement with the stateless community, the public sector (Civil Society Organisations) and all departments that encounter stateless persons. The reason behind this is because they are all at a better position to provide meaningful submissions that can assist in

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760 Venkov https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021).

761 UNHCR "Global Action Plan to end Statelessness 2014-2024" https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html (Accessed 03-04-2021).

762 Clapham A "The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights" in Alston P *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press 1999) 95 and 157, see also Berényi K *Addressing the anomaly* 33.

763 Donnelly J "The Virtues of Legalization" in Meckled-García S and Çali B (eds), *The legalization of Human Rights. Multi-Disciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006) 67.

the enactment of rules and regulations that are beneficial to the stateless community.

It is also suggested that in addition to the adoption of legislation dealing with statelessness, South Africa and other states are also encouraged to eliminate any provisions in existing national legislation that discriminate against stateless people.

The laws of all states should ensure that nationality is acquired by all who are born within their territory and remain until they reach majority especially in cases where the person involved is at risk of being stateless. The procedures for the acquisition of nationality in such circumstances should not be complicated.

In terms of people who are stateless *in situ*, the states are encouraged to provide for accessible procedures to confirm the citizenship of the affected people. This could include different ways to prove ties with a country including testimony for instance.

Existing legislation should provide for nationality to all vulnerable children who are stateless and those that are at risk of being stateless such as abandoned children or foundlings etc. This provision should also be included in the specific legislation that has been recommended. It is also recommended that states ensure that existing gaps in their legislation relating to statelessness are attended to with the aim of making provisions for efficiency and inclusivity. States should provide initiatives that also allows that the systems themselves (the DHA, social services health care facilities and the department of education) are inclusive and that their policies, rules and regulations do not discriminate against undocumented, stateless persons and all who are at risk of becoming stateless.

6.2.4 Provision of adequate protection status

In terms of the solution to the problem, it is suggested that states should be willing to provide legal status and nationality to people who are found to be stateless. It is crucial that states are willing to provide stateless persons with the option of

integration.[764] In cases that the states are willing to provide various kinds of legal permits, the outcome should be to work towards providing an enduring solution.[765]

Statelessness is not a well-known topic to many people within states including those that actually work with stateless persons in governmental departments, therefore, there is a need of information to be developed and disseminated.[766] What is more important is that in a situation where there has been a positive outcome, the procedures that have been followed should be made accessible to everyone including stakeholders, organisations, authorities and lawyers.[767] Adjudicators and legal personnel should receive training on statelessness especially legal-aid personnel.[768]

Providing protection also means that since it has been established that when a person lacks a legal identity it leads to them being at risk of becoming stateless, therefore, countries need to make provisions for birth registration. In countries where birth registration is connected to nationality, denying birth registration causes problems for the future generations.[769] States should seek to ensure that all children born within their territories are registered.

Protection also means that states should be able to allow stateless persons to work and earn a living. Allowing them to work would be protecting them from being socially excluded and thus protecting their fundamental rights.

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764 UNHCR https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf paragraph 22 (Accessed 30-10-2020).

765 Ibid paragraph 148.

766 See also Gyulai G "The Determination of Statelessness and the Establishment of a Statelessness Specific Protection Regime" in Edwards A and van Waas L (eds) *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 126.

767 Bianchini *Implementation* 177.

768 Gyulai *The Determination of Statelessness* 125.

769 See also Venkov https://www.thetornidentity.org/2020/07/06/statelessness-in-south-africa/ (Accessed 29-03-2021), see also Krige J and Panchia Y "The families facing generations of statelessness in South Africa" https://www.aljazeera.com/features/2020/1/28/the-families-facing-generations-of-statelessness-in-south-africa (Accessed 03-04-2021).

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