
**GENERATIONAL STATELESSNESS AND RIGHTS: A CASE
OF CHILDREN FROM THE NUBIAN COMMUNITY IN
KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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08 January 2020

Word count: 9417

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Acknowledgements

I would like to thank my supervisor, Mr Josephat Kilonzo for providing guidance and feedback that was instrumental in writing this dissertation. I would like to thank him for being patient with me and responding to all my questions and queries throughout the research process. I greatly appreciate his support and willingness to share knowledge on laws pertaining to the rights of children.

I am also very grateful for the love and support that I received from my mum. Lastly, I would like to say a heartfelt thank you to my friends Flora Ikua, Winnie Lumonya, and Ruby Simiyu for giving me moral support.

Declaration

I, ANTOINETTE MOSEKA MUIIMI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Mr. Josephat Kilonzo

List of Abbreviations

ACERWC: African Committee of Experts on the Rights and Welfare of the Child

COK: Constitution of Kenya (2010)

CRC: Convention on the Rights of the Child

ECtHR: European Court of Human Rights

IHRDA: Institute for human rights and development in Africa

KCPE: Kenya Certificate of Primary Education

UNHCR: United Nations High Commission for Refugees

UDHR: Universal Declaration on Human Rights

List of Statutes

Children Act Chapter 141 (Kenya)

Constitution of Kenya (2010).

Registration of Persons Act, Chapter 107 (Kenya).

List of UN and Regional Instruments

African Charter on the Rights and Welfare of the Child

United Nations Convention on the Rights of the Child

United Nations Convention Relating to the Status of Stateless Persons

Universal declaration on Human Rights, 10 December 1948, 217 A (iii).

List of Case Law

Genovese v Malta (2012).

Institute for human rights and development in Africa (IHRDA) and Open society justice

Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya (2009).

Abstract

Statelessness leaves individuals in vulnerable situations, it is primarily associated with lack of having ties to a country or in other words lack of nationality. Where certain individuals lack nationality, they fall victim to discrimination within a given state, this is often the case for minority groups such as the Nubian people. They often lack adequate representation in government which makes it difficult for their matters to be addressed with urgency. The Government of Kenya has made attempts to deal with this issue however it is still a big problem amongst minority communities. This study seeks to explore the rights of children from stateless groups in Kenya with a focus on the Nubian children. The study is based on two theories: the theory of basic needs proposed by John Burton and the theory of justice proposed by John Rawls.

The findings of this study indicate that statelessness in Kenya is caused by legal and administrative factors. It demonstrates that granting citizenship rights to the Nubian children will allow them to equally enjoy the rights provided for under the *(2010) Constitution of Kenya*. Results from this study revealed that refusal to recognise Nubian children as Kenyan nationals has affected their access to education, healthcare and employment opportunities. The study concludes that the legal framework lacks effective measures to eradicate statelessness and does not adequately guarantee the protection of rights of children from stateless groups.

CHAPTER ONE: INTRODUCTION

1.1 Background

Nationality provides the linkage between a person and a particular state. According to Article 15 of the Universal Declaration on Human Rights (UDHR), the right to nationality belongs to each person and allows one to enjoy citizenship rights. Nationality can be defined as ‘a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties’.¹ Citizenship refers to members within a polity who are conferred with certain rights and entitlements contingent on membership.² The privileges associated with becoming a citizen include the right to actively participate in society through voting and the right to make free political choices. In Kenya, according to Article 13 (2) of the *Constitution of Kenya (2010) (COK)* citizenship can be acquired through birth or registration.

Moreover, the Children’s Act of Kenya and the *COK* accords that every child shall have the right to nationality from birth and to a name.³ Article 7 of the *UN Convention on the Rights of the Child (CRC)* states that a child’s right to nationality is acquired at birth.⁴ States must ensure that the right to nationality is secured without discrimination.⁵ Article 19 of the *Constitution of Kenya (2010)* states that human rights are to be protected in order to preserve the dignity of individuals and communities to promote social justice.

Although every person can have the right to nationality the same has not been experienced by every individual resulting in them becoming stateless in their host country.⁶ Under the *United Nations Convention Relating to the Status of Stateless Persons*, a stateless person is defined as one who is not considered a national by any state under the operation of its law.⁷ The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) emphasises that statelessness has a fatal effect on children, they cannot enjoy entitlements of basic rights such as: freedom of movement, education and healthcare.⁸ The ACERWC declared that Kenya’s

¹ Nottebohm case (*Liechtenstein v Guatemala*), Advisory opinion, ICJ reports, 1955.

² Henrard K, ‘The shifting parameters of nationality’, *Netherlands International Law Review* 65, 2018, 276.

³ Section 53 1 (a), *Constitution of Kenya (2010)* and Section 11, Chapter 141, *Children’s Act (Kenya)*.

⁴ Article 7, *Convention on the rights of the child*, 20 November 1989, UNTS Vol. 577.

⁵ *Genovese v Malta*, ECtHR, Judgment of 11 January 2012, para 34.

⁶ Chrimes S, ‘Statelessness, identity cards and citizenship as status in the case of the Nubian of Kenya’, 1 (18) *Citizenship Studies*, 2014, 15.

⁷ Article 1, *United Nations convention relating to the status of stateless persons*, 28 September 1954, 360 UNTS. 117.

⁸ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 46.

refusal to recognise Nubian children as Kenyan nationals was a clear violation of international law and domestic law.⁹ The ACERWC observed that statelessness is contrary to the best interests of the child.¹⁰

Statelessness is a global problem that gained recognition in the 20th Century.¹¹ In 2019 UNHCR estimated that there are about 10 million stateless persons worldwide.¹² Due to lack of specific information on affected populations particularly on documentation in Kenya the number of stateless persons is unclear as there has been no census taken to determine the figures.¹³ Despite the absence of data on the exact number of stateless persons in Kenya, it is evident that various groups, like the Nubian Community, in Kenya continue to experience statelessness.¹⁴

The Nubian community originates from the Nuba mountains in central Sudan and about 100,000 descendants were brought to serve the British in Kenya during the colonial period.¹⁵ The Nubians were forced to serve the British army as soldiers in the King's Rifles Army (KRA) to guard the railway in the 1900's and many of them settled in Kenya and were granted a decree by the British authorities.¹⁶ The Nubians settled in Kibera which was a remote military ground and the land was considered to be quite valuable although because they were considered by the British as a small ethnic group they were not granted any legal claim to the land and their tenure was based on their status as former servants of the Crown.¹⁷ Therefore, this meant that the government could evict them at any time because they had no title to the land.¹⁸

The Nubian have considered Kibera as their ancestral home because it is where the British allowed them to settle.¹⁹ At Kenya's independence the government argued that the Nubian

⁹ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 69.

¹⁰ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09,46.

¹¹ UNHCR, Statistical reporting on statelessness, 2019, 1.

¹² UNHCR, Statistical reporting on statelessness, 2019, 1.

¹³ Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 2010, 3.

¹⁴ Manby B, *Statelessness and citizenship in the East African Community*, September 2018, 53-54.

¹⁵ Chrimes S, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 51 (2) *The Journal of Modern African Studies*, 2013, 332.

¹⁶ Parsons, T, 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location', 30 (1) *The International Journal of African Historical Studies*, 1997, 88.

¹⁷ Parsons, T, 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location', 89.

¹⁸ Parsons, T, 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location', 120.

¹⁹ Parsons, T, 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location', 88.

community's right to apply for automatic citizenship ceased with the end of colonial rule.²⁰ As a result of this they suffered citizenship-based discrimination and have problems obtaining 'Kenyan identity cards or passports which made it difficult for them to access services such as the right to vote, travel employment and higher education'.²¹ Children of the Nubian community have inherited the consequences of the historical institutional discrimination suffered by their descendant.²² Nubian parents face difficulties when it comes to registering the birth of their children, as hospitals cannot issue birth certificates because Nubian parents lack a valid identification card.²³

In *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, the ACERWC declared that Kenya's refusal to recognise Nubian children as Kenyan nationals was a clear violation of international law and domestic law.²⁴ The committee also observed that statelessness is contradictory to meeting the best interest of the child, it leaves children with an uncertain future, it affects the realisation of their socio-economic rights such as access to health care and education because they cannot benefit from the majority of constitutional rights.²⁵ The ACERWC therefore recommended that Kenya should enact the necessary legislation to ensure that children of Nubian descent can acquire Kenyan nationality and implement birth registration systems that are non-discriminatory.²⁶

²⁰ Kiereini D, 'How Kenya's Nubian community became stateless', Business Daily, 5 May 2016 -<
<https://www.businessdailyafrica.com/lifestyle/society/How-Kenya-s-Nubian-community-became--stateless-/3405664-3191290-ym8sk6/index.html>> on 15 September 2020.

²¹ Kiereini D, 'How Kenya's Nubian community became stateless', Business Daily, 5 May 2016 -<
<https://www.businessdailyafrica.com/lifestyle/society/How-Kenya-s-Nubian-community-became--stateless-/3405664-3191290-ym8sk6/index.html>> on 15 September 2020.

²² Manby B, 'People without a country: the state of statelessness', *17 Insights on Law and Society*, 2017, 4.

²³ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 4.

²⁴ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 69.

²⁵ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 46.

²⁶ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 69.

1.2 Problem Statement

Ideally, every child has a right to name and nationality and that every child shall be registered immediately after birth.²⁷ Nationality carries along other rights such as the right to education, free health care, freedom of movement and residence and political rights.²⁸

Nubians in Kenya have suffered citizenship-based discrimination because Kenya does not consider Nubians its nationals.²⁹ Children of the Nubian community have inherited the consequences of the historical institutional discrimination suffered by their descendant.³⁰ Nubian parents have difficulty registering the birth of their children as hospitals cannot issue birth certificates because Nubian parents lack a valid identification card.³¹

In response to these problems, this paper seeks to analyse the rights of stateless children and stateless persons generally in Kenya and propose reforms to nationality laws in Kenya to curtail discrimination.

1.3 Significance of the Study

This study has both academic and policy relevance. From an academic point of view, it will contribute to increase knowledge of stateless groups rights protections and in particular the rights of children from stateless groups.

This research will be of importance to policy makers as it will address the gaps that are present in the law and suggest possible recommendations that will make the legal system more effective in protecting the rights of children from stateless groups.

1.4 Statement of Aims and Objectives

The general aim of this research is to explore the rights of children from stateless groups in Kenya with a focus on the Nubian children.

My specific objectives are as follows:

²⁷ Article 6, *African Charter on the rights and welfare of the child*, 11 July 1990.

²⁸ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 46.

²⁹ Forced Migration Review Report, *Kenyan Nubians: standing up to statelessness*, 2009, 19.

³⁰ Manby B, 'People without a country: the state of statelessness', 17 *Insights on Law and Society*, 2017, 4.

³¹ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 4.

- 1) To evaluate the impact of statelessness on children and their enjoyment of human rights particularly looking into the case of the Nubian children.
- 2) To investigate the effectiveness of measures adopted by domestic law to eradicate statelessness as well as protection of rights of children from stateless groups in Kenya with a focus on the Nubian children.

1.5 Research Questions

The following research questions will guide this dissertation:

- i) How does Kenya's legal framework contribute to statelessness?
- ii) To what extent has the status of Nubian Children as non-citizens limited their enjoyment of human rights?
- iii) To what extent are the measures put in place by domestic and international laws effective in eradicating statelessness and ensuring rights of children from stateless groups in Kenya are protected?

1.6 Hypothesis

- 1) The status of Nubian children as non-citizens has limited their enjoyment of human rights.
- 2) The legal framework lacks effective measures to eradicate statelessness and does not adequately guarantee the protection of rights of children from stateless groups.

1.7 Research Methodology

This research will use a doctrinal methodology which involves using the law and legal commentary from primary and secondary sources. This includes the use of statutes, case law, books, journals, newspapers, and reports to obtain information on the issue of statelessness.

1.8 Literature Review

This review will entail outlining the ideas of scholarly outputs, identifying gaps and summarizing their overall contributions. Statelessness is a global issue that has been largely neglected. Contemporary scholars like Lambert urge the international community to focus on

protecting stateless persons.³² A trend has emerged amongst authors like Krakow and Waas in taking a rights-based approach to critique the effectiveness of policies that protect stateless persons. One major issue in the literature on statelessness is the lack of a consistent data collection method to identify statelessness and ascertain its scope.

According to Manly and Waas statelessness is the absence of a legal bond of nationality.³³ However, Manly's definition provides a limited scope in understanding statelessness. Therefore, Tendayi and Cole have provided a wider scope by defining it as positive exclusion of persons due to administrative barriers in a state.³⁴ Based on these definitions a stateless child is therefore a child with no legal bond of nationality.³⁵

Through analysing the provisions of the *convention on stateless persons* in line with Bianchini's critique it is evident that it lacks adequate measures of implementation as state parties are left to interpret and apply the rights of stateless persons.³⁶ Bianchini agrees with Waas that the treaty does not clearly identify those who can benefit from it.³⁷ To prove lack of nationality an applicant must make a genuine claim that they do not belong to any state, which is difficult to determine.³⁸

Contrasting views exist on the issue of protection of de jure and de facto stateless persons. A de facto stateless person is one whose nationality is ineffective while a de jure stateless person is one who is not considered a national by any state under the operation of its laws.³⁹ Weissbrodt and Collins claim the convention automatically disregards de facto stateless persons.⁴⁰ Kingston argues that protection should include individuals who are inside their country of nationality and cannot enjoy nationality rights.⁴¹ Waas disagrees with the inclusion for protection of de facto stateless persons in her view the distinction is irrelevant as they should

³² Foster M, Lambert H, 'Statelessness as a human rights issue: A concept whose time has come, 28 *International Journal of Refugee Law* 4, 2016, 564.

³³ Waas L and Manly M, 'The state of statelessness research' *Tilburg Law Review* 19, 2014, 4.

³⁴ Bloom T, Tonkiss K and Cole P, *Understanding statelessness* 1st ed, Routledge, Abingdon, 2017, 12.

³⁵ Fokala E and Chenwi L, 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee', *African Journal of Legal Studies* 6, 2013, 359.

³⁶ Bianchini K, 'The stateless person definition in selected EU member States: variations of interpretation and application' *36 Refugee Survey Quarterly* 3, 2017, 81.

³⁷ Bianchini K, 'The stateless person definition in selected EU member States: variations of interpretation and application' *36 Refugee Survey Quarterly* 3, 2017, 84.

³⁸ Bianchini K, 'The stateless person definition in selected EU member States: variations of interpretation and application' *36 Refugee Survey Quarterly* 3, 2017, 84.

³⁹ Waas L, *Nationality Matters in international law*, Intersentia, Oxford, 2008, 20.

⁴⁰ Weissbrodt D and Collins C, 'The human rights of stateless persons' *28 Human Rights Quarterly*, 2006, 251.

⁴¹ Kingston L, 'Statelessness as a lack of functioning citizenship', *Tilburg Law Review* 19, 2014, 127).

be identified through effective procedures.⁴² Scholars such as Bhabha have stated that there is a close relationship between birth registration and de jure statelessness for children, the lack of birth registration means that a birth certificate cannot be obtained and as a result leaves the child without any legal identity within a specific state.⁴³

Statelessness is caused by many factors Hassmann and Roberts claim that it is due to: undocumented migrants and victims of human trafficking.⁴⁴ Belton is of a different view that a majority of stateless persons have never migrated but are denied citizenship.⁴⁵ Banerjee on the other hand argues that discriminatory nationality laws are the major cause of statelessness.⁴⁶ States have manipulated the process of acquiring citizenship and have made it absolutely out of reach for stateless persons.⁴⁷ Fokala states that countries like Kenya have failed to effectively address the question of granting citizenship to stateless children from the Nubian community.⁴⁸ Additionally, Abubakar outlines that state officials in Kenya have misinterpreted provisions in the 2010 Constitution to deny citizenship to members of the Nubian community.⁴⁹

There is a general acceptance in many scholarly works that statelessness limits the enjoyment of rights. According to Bhabha statelessness in the 21st century has major repercussions on children due to the fact that states do not accord stateless children social protection, this makes them susceptible to abuses such as unlawful detention and in the case of unaccompanied child migrants they are deported.⁵⁰ Bhabha argues that most scholars have neglected the serious effects statelessness has on children and she suggests that analysing children's rights violations

⁴² Waas L, *Nationality Matters in international law*, Intersentia, Oxford, 2008, 24-25.

⁴³ Bhabha J, 'From citizen to migrant: The scope of child statelessness in the twenty-first century' in Bhabha J (ed) *Children without a state a global human rights challenge*, The MIT press, 2011, 7.

⁴⁴ Hassmann R and Roberts M, *The Human Right to Citizenship: A Slippery Concept*, University of Pennsylvania Press, Philadelphia, 2015, 5.

⁴⁵ Belton K, *Statelessness in the Caribbean: The Paradox of Belonging in the Postnational World*, University of Pennsylvania Press, Philadelphia, 2017, 13.

⁴⁶ Banerjee S, 'Statelessness: a Global challenge', 1 *journal of corporate governance and international business law* 1, 2018, 32.

⁴⁷ Petroziello A, 'Statelessness as a product of slippery statecraft: a global governance view of current cases, actors and debates', *Statelessness and Citizenship Review*, 2019, 140.

⁴⁸ Fokala E and Chenwi L, Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee, *African Journal of Legal Studies* 6, 2013, 362.

⁴⁹ Zein A, 'Memory, identity and pluralism in Kenya's Constitution building process' in Ghai Y and Ghai J (eds) *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, Global Centre for Pluralism, 2013, 31.

⁵⁰ Bhabha J, 'From citizen to migrant: The scope of child statelessness in the twenty-first century' in Bhabha J (ed) *Children without a state a global human rights challenge*, The MIT press, 2011, 2.

that are associated with statelessness helps in understanding their genesis, that will then provide suggestions on how to address it.⁵¹

Children are amongst the vulnerable persons within the society and they need care, education, health, health developmental services amongst others.⁵² Stateless children face, their right to health cannot be realised without substantive protection from the state.⁵³ Due to their ambiguous legal status access to clean water for their livelihood is not secured.⁵⁴ Furthermore, Stein argues where children are separated from their parents and the child has no evidence of identification it infringes the child's right to be cared for, since their parents cannot be traced.⁵⁵ It is worth noting that initiatives by international bodies such the UNHCR's '#ibelong campaign' in Belton's view are incomprehensive as they do not provide elaborate guidelines on how to eradicate statelessness.⁵⁶

In conclusion, scholars have provided vast information to aid in understanding statelessness. However, the question as to which state is obligated to grant nationality to stateless persons remains unanswered. Additionally, they do not provide specific guidelines as to what appropriate procedures are required to identify the category of stateless persons who are protected under the Convention. Scholars have pegged their views on the natural rights theory advocating that nationality must be granted to all persons. This paper seeks to address the knowledge gap by expounding on what effective procedures need to be put in place and how they are to be implemented by states and particularly Kenya in respect to the children of Nubian Descent.

⁵¹ Bhabha J, 'From citizen to migrant: The scope of child statelessness in the twenty-first century' in Bhabha J (ed) *Children without a state a global human rights challenge*, The MIT press, 2011, 2.

⁵² Worster W, 'The obligations to grant nationality to stateless children under customary international law' 27 *Michigan State International Law Review* 3, 2019, 442.

⁵³ Kingston L, Cohen E and Morley C, 'Debate limitations on universality, the right to health and the necessity of legal nationality', *International health and human rights*, 2010, 3.

⁵⁴ Krakow C, 'The International Law and Politics of Water Access: Experiences of Displacement, Statelessness, and Armed Conflict', 12 *MDPI* 2, 2020, 4-6.

⁵⁵ Stein J, 'The prevention of child statelessness at birth: The UNCRC Committee's role and potential', 24 (3) *International Journal of Children's Rights*, 2016, 603.

⁵⁶ Belton K, 'Ending statelessness through belonging: A transformative agenda?', 30 *Ethics and international Affairs* 4, 2016, 426.

1.9 Limitations

The possible shortcoming that may arise when conducting the study is with regards to limited access to data. This is due to lack of adequate documentation throughout the years ascertaining the current situation of stateless children from the Nubian community.

1.10 Delimitations

The most important delimitation to this study is that it will provide a narrow scope mainly focusing on the treatment of stateless children particularly the Nubian children.

1.11 Chapter Breakdown

Chapter 1: Sets to introduce the background of this study, the problem statement, significance of the study, statement of aims and objectives, research questions, the hypothesis, research methodology, literature review, limitations, delimitations and the chapter breakdown.

Chapter 2: Theoretical framework based on the theory of distributive justice and the theory of basic needs.

Chapter 3: Examining the situation of statelessness and the legal standards set out by Kenyan law.

Chapter 4: Focuses on critically analysing the protection of rights of the Nubian children in Kenya. Additionally, this chapter will explore the challenges limiting the enjoyment of citizenship rights for the Nubian children.

Chapter 5: Finally concludes the paper and provides recommendations for an effective legal framework.

Chapter 2: STATELESSNESS THROUGH THE LENS OF THE THEORY OF DISTRIBUTIVE JUSTICE AND THE BASIC NEEDS THEORY

2.1 Introduction

The theoretical framework that is applied in this paper is hinged on a human- rights based approach with the theory of basic needs proposed by John Burton and the theory of justice proposed by John Rawls. Human rights according to Cranston can be understood as a ‘universal moral right, something which all men everywhere at every time ought to have, something of which no man may be deprived of, and something which is owing to every human being simply because they are human’.⁵⁷ The theories selected are aimed to address statelessness as a human rights problem.

2.2 Theory of Basic Needs

The theory of basic needs is human centred and tries to look into the goals human beings pursue to achieve happiness. The theory examines the essentials necessary for survival which are both physical and non-physical elements which according to Marker include freedom, distributive justice and identity.⁵⁸ Abraham Maslow states that all human beings have basic needs which include physiological needs such as food, water, clothing, shelter which are critical in ensuring the sustainability of the society.⁵⁹

Additionally, human beings require security needs such as protection from ‘chaotic situations and social disorder which often threaten the peaceful co-existence of people in a society’.⁶⁰ These human needs are interdependent. Maslow outlined that for example in children if they are hungry then they are unable to meet their cognitive needs to learn and acquire new skills that are important for their self-development.⁶¹

⁵⁷ Cranston M, *What are human rights*, Basic books Inc, New York, 1962, 36.

⁵⁸ Walsh D, ‘How a human needs theory understanding of conflict enhances the use of consociationalism as a conflict resolution mechanism: the good Friday agreement in Northern Ireland’, 15 *Ethnopolitics Global Review* 3, 2016, 286.

⁵⁹ Aruma E, Hanachor M, ‘Abraham Maslow’s hierarchy of needs and assessment of needs in community development’ 5 *International Journal of Development and Economic Sustainability* 7, 2017, 19.

⁶⁰ Aruma E, Hanachor M, ‘Abraham Maslow’s hierarchy of needs and assessment of needs in community development’ 5 *International Journal of Development and Economic Sustainability* 7, 2017, 20.

⁶¹ Dunlap L, *What all children need theory and application*, 2nd ed University Press of America, Lanham, 2.

In Burton's view a person cannot give their needs away they are non-negotiable.⁶² The fulfilment of needs for one person should not bar another individual from acquiring these basic needs there is an element of reciprocity in respecting the needs of other people.⁶³ The need for identity and security is important for individual's and statelessness does not provide this. According to Burton in a society that hinders the fulfilment of these human needs conflict arises and leads to the establishment of institutions that are unable to achieve them.⁶⁴

Statelessness affects freedom and identity as these stateless persons are not granted nationality which leaves them vulnerable, they are not accorded the same protection under the law as citizens. The circumstance of being stateless leads to conflict when it comes to protecting interests such as the need to own property which they cannot enjoy. Stateless children are denied the enjoyment of basic needs such as access to health care which Maslow outlines is a need that every person should be entitled to.⁶⁵ Maslow elaborates that people want to experience a sense of order predictability and control in life and this can only be achieved where a person has freedom.

Statelessness leaves children in an unpredictable place because it means that no state is taking up the responsibility to ensure that the best interests of the child are protected in compliance with the 4 cardinal principles under the *CRC*.⁶⁶ They are denied access to free education which is integral to the development of the child as it impacts the opportunities that will be available to them as well as the quality of life in the future.⁶⁷ It is evident that statelessness leads to a range of human rights violations and prevents the fulfilment of human needs. This theory is aimed to help in understanding the struggle faced by stateless children in the full enjoyment of rights.

⁶² Walsh D, 'How a human needs theory understanding of conflict enhances the use of consociationalism as a conflict resolution mechanism: The good Friday agreement in Northern Ireland', 15 *Ethnopolitics Global Review* 3, 2016, 287.

⁶³ Walsh D, 'How a human needs theory understanding of conflict enhances the use of consociationalism as a conflict resolution mechanism: the good Friday agreement in Northern Ireland', 15 *Ethnopolitics Global Review* 3, 2016, 286.

⁶⁴ Walsh D, 'How a human needs theory understanding of conflict enhances the use of consociationalism as a conflict resolution mechanism: The good Friday agreement in Northern Ireland', 15 *Ethnopolitics Global Review* 3, 2016, 286.

⁶⁵ Mcleod S, 'Maslow's hierarchy of needs' Simply Psychology, 2018, <<https://www.simplypsychology.org/simplypsychology.org-Maslows-Hierarchy-of-Needs.pdf>> on 8 October 2020.

⁶⁶ Article 3 (1) *Convention on the rights of the child*, 20 November 1989, Vol 1577, p. 3.

⁶⁷ Idris F, Hassan Z, Ya'acob A, Gill S and Awal N, 'The role of education in shaping youth national identity' *Procedia Social and Behavioural Sciences* 59, 2010, 443.

2.3 Theory of Distributive Justice

The establishment of the concept of social contract by Jean- Jacques Rousseau to understand how society works provided a basis for John Rawls Theory of Social Justice in the twentieth century.⁶⁸ Rawl's establishment of social justice calls for public institutions to respect the fundamental rights of individuals and to exercise responsibility in ensuring the delivery of public goods to all.⁶⁹ He elaborates that institutions must conform to moral principles as a basic structure of the society in order for it to be just and create a realistic utopia.⁷⁰

According to Alfasi and Fenster they state that Rawls saw justice as a logical basis for social behaviour that reasonable people who find themselves behind a 'veil of ignorance' choose.⁷¹ This abstract veil can be stated as a neutral position where biases do not affect an individual's understanding of perceptions of fairness and justice, in Jon Mandle's view behind the veil of ignorance people will not modify principles to benefit themselves at the detriment of other individuals.⁷²

Rawls makes the assumption that when an individual's pursuit for happiness is guided by rationality, free individuals would be likely to respect each other's basic rights and distribute social goods in a fair manner.⁷³ Rawl's theory of distributive justice advocates that equality must be linked to all liberties.⁷⁴ Therefore, to constitute a society that is socially, politically and culturally just the theory of distributive justice must be based on two principles, the first being that each individual has inalienable basic rights and liberties and secondly equal opportunities must be provided to all individuals within the economic context.⁷⁵ This means that all individuals should have the opportunity to hold positions within the society, it further incorporates that goods should be distributed fairly and inequalities in wealth and social

⁶⁸ Bercuson J, *John Rawls and the history of political thought*, Routledge, New York, 2014, 62.

⁶⁹ Ahmed N, 'Social Justice: A Coveted Component of Socio-Legal System of Pakistan in Theoretical and Analytic Content' 12 *Journal of Islamic State Practices in International law* 1, 2012, 4.

⁷⁰ Simmons J, 'Ideal and nonideal theory' 38 *Wiley Periodicals, Inc. Philosophy & Public Affairs* 1, 2010, 7.

⁷¹ Alfasi N, Fenster T, 'Between socio-spatial and urban justice: Rawls principles of justice in 2011 Israeli protest movement' 13 *Planning Theory* 4, 2014, 411.

⁷² Mandle J, *Rawls A theory of Justice*, Cambridge University Press, New York, 2009, 38.

⁷³ Alfasi N, Fenster T, 'Between socio-spatial and urban justice: Rawls principles of justice in 2011 Israeli protest movement' 13 *Planning Theory* 4, 2014, 411.

⁷⁴ Dutta S, 'Rawl's theory of justice; An analysis' 22 *IOSR Journal of Humanities and Social Science* 4, 2017, 41.

⁷⁵ Dutta S, 'Rawl's theory of justice; An analysis' 22 *IOSR Journal of Humanities and Social Science* 4, 2017, 42.

positions should be arranged in a manner that benefits the marginalised groups within a given society.⁷⁶

Statelessness hinders the enjoyment of liberties such as access to free health care, freedom of movement, and denies children access to free education which does not accord equal opportunity for stateless children. This goes against the cardinal principles that states are supposed to uphold in protecting the rights of children, stateless children face discrimination when it comes to the enjoyment of rights and freedoms.⁷⁷ It makes it difficult for them to acquire meaningful work in the future and hold important positions in society, it does not uphold the principles of distributive justice as it prevents them from enjoying social goods.

Every child is granted the right to express themselves freely on matters concerning them.⁷⁸ However, it is seen that states tend to ignore the interests of stateless children. In line with Rawls theory it can then be stated that a state that fails to address the issue of statelessness is built on unjust institutions that are not trying to redress the inequalities that exist in a society.⁷⁹ This theory is aimed at elaborating the detrimental effects of statelessness and will contribute in understanding the degree to which nationality laws and minority rights touching on stateless persons have been implemented in Kenya.

2.4 Conclusion

In conclusion, the theory on basic needs and the theory of distributive justice elaborate the struggle faced by stateless children in the full enjoyment of rights. Statelessness leaves children in an uncertain legal position as no state takes responsibility to care for them. Based on the theory of basic needs statelessness prevents the fulfilment of basic needs such as health care. Additionally, it is also an impediment to the enjoyment of liberties and under the theory of distributive justice Rawls states that it facilitates inequalities within the society as stateless children are not accorded the same opportunities as citizens.

⁷⁶ Alfasi N, Fenster T, 'Between socio-spatial and urban justice: Rawls principles of justice in 2011 Israeli protest movement' 13 *Planning Theory* 4, 2014, 411.

⁷⁷ Article 2, *African charter on the rights and welfare of the child*, 11 July 1990.

⁷⁸ Article 3 (1) *Convention on the rights of the child*, 20 November 1989, Vol 1577, p. 3

⁷⁹ Mandle J, *Rawls A theory of Justice*, 54.

Chapter 3: HOW DOES KENYA’S LEGAL FRAMEWORK CONTRIBUTE TO STATELESSNESS?

3.1 Introduction

The circumstance that stateless peoples are faced with has caused globe concern and there has been a drive to find a solution to the problem. However, it is evident that because statelessness arises from various causes connected to either political, social, and economic contexts ‘there is no singular appropriate way to respond’.⁸⁰ Statelessness should not be merely viewed as a status of victimhood but we should look at stateless persons through the way they diversely engage with states in asserting their claims to be recognised.⁸¹ Bloom expounds on the idea that statelessness can also be viewed as intersecting with other sources of exclusion such as xenophobia and claiming of membership in the face of colonisation.⁸² It is worth noting that Kenya is not a signatory to the *1954 United Nations Convention Relating to the Status of Stateless Persons* or the *Convention on the Reduction of Statelessness 1961*.⁸³ Despite this Kenya still has an obligation to address issues on statelessness because it falls under the ambit of human rights and Kenya is party to other international conventions such as the *African Charter on the Rights and Welfare of the Child* that is aimed to protect the rights of a child as well as the *African Charter on Human and Peoples’ Rights*.⁸⁴ Due to the fact that statelessness has different lenses upon which one can explore, this paper aims to provide a legal analysis of statelessness under Kenyan law.

3.2 Statelessness in Kenya

In Kenya, a majority of the stateless persons come from ethnic minorities who are termed as ‘un-Kenyan’ because of their link to other states.⁸⁵ During the period of colonisation, the British brought many people from different countries to work in farms as well as to provide labour for commercial enterprises that were located in Kenya.⁸⁶ During the transitional phase of many states into independence, newly formed states like Kenya had to create a framework to determine which people would be considered Kenyan citizens. The laws required that in order for residents to be considered Kenyan citizens they had to register and pay a fee as

⁸⁰ Bloom T, Tonkiss K and Cole P, Understanding statelessness, 2.

⁸¹ Bloom T, Tonkiss K and Cole P, Understanding statelessness, 2.

⁸² Bloom T, Tonkiss K and Cole P, Understanding statelessness, 3.

⁸³ Bloom T, Tonkiss K and Cole P, Understanding statelessness, 119.

⁸⁴ Bloom T, Tonkiss K and Cole P, Understanding statelessness, 119.

⁸⁵ Institute on statelessness and inclusion, *The world’s stateless children*, January 2017, 32.

⁸⁶ UNHCR, *Statelessness and citizenship in the East African community*, September 2018. 47.

outlined in the 2nd schedule of the *Citizenship Act of Kenya (1963)*. Persons of African descent were required to meet certain requirements in order for them to be eligible for registration such as being of good character and has been a resident for a period of not less than ten years and is not a citizen of another sovereign state.⁸⁷

Many Africans did not apply for citizenship and only 3911 Asians and Europeans applied and were registered as citizens.⁸⁸ This meant that those who did not register would have to go through rigorous vetting procedures to prove that they had legal ties to Kenya, before being issued an identity card and were also required to produce other documents such as their grandparents birth certificates.⁸⁹ These difficulties were felt by groups such as the Makonde people who are originally from Mozambique and were brought by the British in the 1950's to work on sisal plantations and the Nubian community who arrived in Kenya in the early 1900's to serve the British army.⁹⁰

The Nubian people have faced several barriers when it comes to acquisition of citizenship. After they were demobilised by the British army they were not accorded British citizenship despite their service to the crown, the Kenyan government refused to officially recognise them as a Kenyan tribe this therefore subjects them to institutional discrimination when it comes to the process of issuing official documents such as an identity card or passport.⁹¹ Nubians are vetted based on their non-native identity, rather than on the basis of evidence of parentage or birth which are more applicable in proving entitlement to legal nationality.⁹² Furthermore, as a result of their status as stateless persons a majority of Nubians live in temporary establishments and do not hold title deeds, this leaves them as mere squatters as they do not have secure land tenure.⁹³

The Nubian community's status as non-citizens of Kenya has lead them to face discrimination when it comes to accessing social goods such as education and employment, 50% of Nubian families earn an income of less than 10,000 Kenyan shillings which limits restricts their access to basic needs such as housing, food and water.⁹⁴ For the Nubian children secondary and higher

⁸⁷ Section 3, *Citizenship Act*, 1963.

⁸⁸ Rotchild D, Kenya's Minorities and the African Crisis over Citizenship, 9 *Institute of race relations* 4, 422

⁸⁹ UNHCR, *Statelessness and citizenship in the East African community*, September 2018, 32.

⁹⁰ UNHCR, *Statelessness and citizenship in the East African community*, September 2018, 48-55.

⁹¹ Forced Migration Review Report, *Kenyan Nubians: standing up to statelessness*, 2009, 19.

⁹² Chrimes S, 'Statelessness, identity cards and citizenship as status in the case of the Nubian of Kenya', 339.

⁹³ Forced Migration Review Report, *Kenyan Nubians: standing up to statelessness*, 2009, 19.

⁹⁴ Chrimes S, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 339.

education are inaccessible and only 2% of them have tertiary education.⁹⁵ Historically, there has been very little representation of the Nubians in government which has led to the lack of concern in addressing the problems faced by the community.⁹⁶

On the other hand other communities such as the Makonde people have also faced barriers when it comes to acquiring Kenyan citizenship by registration due to: the fee ascribed to registration as well as the expectation that the British would return them back to Mozambique.⁹⁷ Additionally, the Zimbabwean missionaries who came into Kenya before independence, are still not recognised as citizens and hence cannot be granted identification cards which means that they are unable to be formally employed, access finance and for their children they are unable to go to university.⁹⁸ Historically, it is evident that the procedures set up by the government of Kenya made it more difficult for people from these ethnic groups to attain citizenship and were hence left stateless.

3.3 Legal and Administrative Challenges as the Root of Statelessness in Kenya

The causes of statelessness can be divided into two categories: legal and administrative, with regard to legal causes laws such as the *COK* and the *Kenyan Citizenship Act* have gaps as they do not provide sufficient protection to prevent persons from being rendered stateless and lack adequate measures to ensure stateless children acquire nationality.⁹⁹

Although the *COK* has made steps in removing gender discrimination in acquiring nationality and the *Kenyan Citizenship and Immigration Act of 2011* under section 15 recognises stateless persons, the shortfall is that the Act does not include provision on the procedures that need to be taken during the vetting process to acquire citizenship, this has affected the effective implementation of the law in dealing with the problem of stateless persons. The *Kenyan Citizenship and Immigration Regulations of 2012* only provides guidelines where one is making an application to the cabinet secretary when applying for citizenship by registration. Normally the vetting process takes place before making an application to the cabinet secretary.¹⁰⁰ During the vetting process an ad hoc special committee is formed to examine

⁹⁵ Chrimes S, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 341.

⁹⁶ Chrimes S, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 341.

⁹⁷ UNHCR, *Statelessness and citizenship in the East African community*, September 2018, 48.

⁹⁸ UNHCR, *Statelessness and citizenship in the East African community*, September 2018, 50.

⁹⁹ Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 2010, 5.

¹⁰⁰ African Committee of Experts on the Rights and Welfare of the Child, *Written comment on Implementation*, May 2017, 8-9.

applications for identification cards lodged by ethnic groups, this process is unregulated by law and the committee has absolute discretion on how the vetting process is to be conducted.¹⁰¹

Additionally, administrative causes stem from the under-regulated nature of Kenya's regulatory practices concerning the vetting process of acquiring citizenship.¹⁰² For an application to proceed to the vetting committee it must be accompanied by a recommendation letter from the local administration, the main reason why this is problematic, is because it creates room for corruption where the chiefs ask the applicants for more money than they should ordinarily pay.¹⁰³ The same chief is the one that sits on the vetting committee and this affects its impartiality which acts as a barrier for ethnic groups to obtain an identification card which will allow them to enjoy the same benefits as citizens.¹⁰⁴ There is lack of procedural and substantive justice when it comes to the vetting process, the right to a fair hearing is not actualised due to the lack of an impartial committee and the means to appeal the decision of the committee are unknown to many which hinders the exercise of an individual's right to appeal.¹⁰⁵

3.4 Acquisition of Citizenship Under the Constitution of Kenya 2010

Under the *COK* citizenship can be obtained in two ways either by birth or through registration. For acquisition by birth this is only applicable to individuals born in Kenya and one of their parents must be a Kenyan citizen for one to be eligible as a citizen on this ground as stated under Section 14 (1) of the *COK* Article 14 (4) of the *COK* can be seen as a progressive step in combating statelessness for children because it provides that any child who is born in Kenya and whose parents nationality is unknown shall be assumed to be Kenyan citizen by birth. Citizenship can also be obtained through registration as stated under Article 15 of the *COK*

¹⁰¹ Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 15.

¹⁰² Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 2010, 5.

¹⁰³ Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 16.

¹⁰⁴ Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 17.

¹⁰⁵ Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 19.

under this mode of acquiring citizenship residents who have lived in Kenya for more than 7 years are eligible as well as non-Kenyan children who are adopted by a Kenyan citizen.¹⁰⁶

Under the previous *Repealed Kenyan Constitution*, there were no provisions that related to stateless persons and *section 83* of the *Repealed Constitution of Kenya* states that to obtain citizenship by birth one parent must be a Kenyan citizen.¹⁰⁷ The Constitution also outlined that only fathers can transfer their citizenship and this is discriminatory because it would mean that children born abroad whose mother is Kenyan and their father is foreign will not be able to obtain citizenship on grounds of descent.¹⁰⁸ *The repealed Constitution of Kenya* had many shortcomings and therefore the COK came to address issues of discrimination when it comes to how citizenship can be transferred from a parent to a child as well as provide citizenship for children whose parents' nationality is unknown.

3.5 Registration of Persons Act

This act covers the various procedures involved in registering persons and is the legal framework that is currently governing the issuance of identity cards in Kenya. As per *section 6 (1)* of the *Registration of Persons Act Cap 107* it elaborates that every Kenyan at the age of 18 should register as a Kenyan citizen. An individual's age and the proof of citizenship is important when it comes to the process of registration. To emphasize on this rule 4 of the *Registration of Persons Rules 1948* requires the production of certain documents such as a birth certificate or a baptismal certificate issued by a minister of a religious institution in Kenya, that is to be given to the registration officer in order for the process to begin.

The enjoyment of rights and freedoms in Kenya is greatly determined on whether one possesses an identity card which is evidence of their citizenship. The importance of this is outlined under *section 10* of the *Registration of Persons Act CAP 107* in carrying out any lawful or judicial task one needs to produce their identification card to apply for things such as permits and licenses. Additionally, gaining access to government services such as e-citizen requires an individual to possess an identification card and must be a Kenyan citizen or a foreign resident.¹⁰⁹ Additionally, when it comes to applying for a Huduma number one of the

¹⁰⁶ Article 15, *Constitution of Kenya* (2010).

¹⁰⁷ Article 83, *Repealed Constitution of Kenya* (2001).

¹⁰⁸ Section 90, *Repealed Constitution of Kenya* (2001).

¹⁰⁹ - < <https://accounts.ecitizen.go.ke/register/citizen> > on 12 November 2020.

requirements needed are details from a national identification card.¹¹⁰ It therefore means that if an individual does not own a national identification card they are ineligible to apply for a huduma number which is a unique number that is supposed to identify all persons in the country and is to be used to access government services.¹¹¹ The Act goes even further to make it punishable for failure to register for an identification card upon attaining the age of majority.¹¹² However, the Act does not provide a means to which stateless persons can acquire citizenship through registration; they are left outside the ambit of the law as the *Registration of Persons Act CAP 107* only applies to people who are considered Kenyan citizens.

3.6 Conclusion

In conclusion, from the colonial era there was emphasis on the importance of registering for citizenship it gave individuals the ability to enjoy rights such as the right to own property. Minority groups such as the Nubians who were unable to secure Kenyan citizenship by registration are denied access to social goods and are barred from enjoying the rights that are granted under the *COK*. Stemming from the supreme law of the land which is the *COK* all the way to statues, it is evident that the legal framework recognises the existence of stateless persons within the society. However, the Kenyan government has developed procedures that have made it more difficult for people from ethnic minority groups to acquire citizenship and have therefore been left stateless. The law has failed to put in place effective mechanisms to eradicate statelessness, there are still many gaps in the law that need to be addressed.

¹¹⁰ - <<https://www.hudumanamba.go.ke/wp-content/uploads/2019/05/Huduma-namba-form.pdf> > 12 November 2020.

¹¹¹-<<https://www.klrc.go.ke/index.php/klrc-blog/645-the-bliss-of-niims-paradise-the-legal-context-for-the-huduma-namba#:~:text=The%20Huduma%20Namba%2Cbeing%20a,government%20and%20the%20private%20sector.>> on the 13 November 2020.

¹¹² Section 14(2), Chapter 107, *Registration of Persons Act* (Kenya).

CHAPTER 4: TO WHAT EXTENT HAS THE STATE UPHELD THE RIGHTS OF THE NUBIAN CHILDREN?

4.1 Introduction

This chapter provides a discussion on the protection of children's rights among the Nubian community. It also provides a discussion on the difficulties faced by Nubian children as a result of the Kenyan government's refusal to recognise the Nubian community as Kenyan nationals. Additionally, the chapter examines whether the government has taken any steps to implement the decision made by the ACERWC to provide adequate protection for the rights of children. Through the decades the Nubian community has continuously been denied Kenyan citizenship and have become known as stateless persons, the children of the Nubian descendants have fallen victim to this peril and have inherited the consequences of the historical institutional discrimination suffered by their descendant.¹¹³

In an effort to protect children Kenya enacted the *Children Act* in 2001 that protects the right to nationality for children.¹¹⁴ Despite this the Act did not make any effort to address the issues faced by the Nubian children in particular because of the government's unwillingness to amend the *Citizenship Act* and ensure that it is in harmony with the *Children Act*.¹¹⁵ As noted in chapter one, in the struggle to acquire citizenship in 2009, a communication was made to the ACERWC by the IHRDA to elaborate the gross violations that Kenya was doing against the Nubian children.¹¹⁶ Additionally, the adoption of the COK emphasised on the idea that every individual has an equal right to be granted nationality however it did not tackle how nationality is to be dealt with when it comes to stateless persons. Given the vulnerability of children not being in the position to defend themselves the state ought to come in to protect their rights and defend them from human rights violations.¹¹⁷

¹¹³ Manby B, 'People without a country: the state of statelessness', 17 *Insights on Law and Society*, 2017, 4.

¹¹⁴ Section 11, Chapter 141, *Children Act* (Kenya).

¹¹⁵ Fokala E and Chenwi L, Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee, *African Journal of Legal Studies* 6, 2013, 362.

¹¹⁶ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09.

¹¹⁷ Save the Children, *Advancing children's rights a guide for civil society organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child*, 2010, 72.

4.2 Challenges Limiting Nubian Children's Enjoyment of Citizenship Rights

4.2.1 Discrimination

The goal of a democratic society is to ensure that all individuals enjoy human rights. Under Article 3 of the *African Children's Charter* every child is entitled to enjoy these rights notwithstanding the background of their parents or legal guardians it protects the principle of non-discrimination.¹¹⁸ Additionally the *CRC* under Article 2 imposes a duty on the state to ensure that all the rights enshrined in the Convention are protected for each child without discrimination of any kind. Article 27 of the *COK* also elaborates that everyone is equal before the law and should be accorded equal protection of their rights, the state should not discriminate directly and indirectly against any person on any grounds.

Children from the Nubian community face institutional discrimination, they are arbitrarily subjected to a tedious process of vetting by state officials that requires them to show their grandparents nationality and get approval from elders and several state officials.¹¹⁹ This is not the same for children who come from other communities because they are officially recognised as ethnic communities that have their historic origins in Kenya and are hence recognised as Kenyan nationals.¹²⁰ The systemic denial of Kenyan nationality for children of Nubian descent was deemed by the ACERWC as being a violation of a child's right to non-discrimination protected under Article 3 of the *African Children's Charter* because Nubians satisfy the constitutional requirement to acquire Kenyan nationality.¹²¹

Discrimination on grounds of ethnicity or race is a jus cogens norm that states cannot derogate and it leads to violation of human dignity and the child's best interest.¹²² In the Nubian children's case the ACERWC analysed the matter by looking into whether the discrimination was due to a legitimate interest on the part of the state and whether it was justifiable, in

¹¹⁸ Fokala E and Chenwi L, Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee, *African Journal of Legal Studies* 6, 2013, 367.

¹¹⁹ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 55.

¹²⁰ Minority rights group international, *Kenya: Minorities, indigenous peoples and ethnic diversity*, 2005, 9.

¹²¹ Durojaye E and Foley E 'Making a first impression: an assessment of the decision of the committee of experts of the African Children's Charter in the Nubian children communication' 12 *African Human Rights Law Journal* 2, 2012, 567.

¹²² *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 56.

applying the proportionality test there was no evidence that proved it was justifiable.¹²³ The state of Kenya was accused of not curbing statelessness by putting in place several barriers that affect the ease of acquiring Kenyan nationality.¹²⁴

Up to date the Kenyan government has failed to resolve the issue of discrimination amongst members of the Nubian community when it comes to the process of acquiring citizenship. Nubian community continues to face discrimination when it comes to the process of acquiring citizenship the vetting process has caused major delays as Nubians are first required to go through this process before making an application for documents such as an identification card this means that they end up being late to officially submit the applications to registration officials.¹²⁵ To deal with this issue the vetting process should be eliminated and the Nubian children should be permitted to apply for an identification card without having to go through this process. Discrimination as a hinderance to enjoying a multitude of rights not only directly affects a child but can also indirectly affect them, if their parents face discrimination a domino effect takes place and they automatically fall victim.

4.2.2 Education

There are several laws that protect the right to education because they recognize that it is an important right that affects the future life a child will have. Education offers children the opportunity to actively participate in the democratic society and opens up prospects such as acquiring employment.¹²⁶ In many instances countries have denied the enjoyment of this right by persons from stateless communities; this leaves them marginalised and disempowered in the community.¹²⁷ The *1954 United Nations Convention Relating to the Status of Stateless Persons* stipulates that the right to education will be accorded to stateless children on favourable grounds and states should ensure that these children have access to studies and any foreign school certificates should be recognised by the state.¹²⁸

¹²³ Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya, ACERWC Comm.002/09, 57.

¹²⁴ Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya, ACERWC Comm.002/09, 57.

¹²⁵ African Committee of Experts on the Rights and Welfare of the Child, *Written comment on Implementation*, May 2017, 8-9.

¹²⁶ Waas L, *Nationality Matters in international*, 340.

¹²⁷ Waas L, *Nationality Matters in international*, 340.

¹²⁸ Article 22, *United Nations convention relating to the status of stateless persons*, 28 September 1954, 360 UNTS. 117.

Additionally, Article 11 of the *African Children's Charter* guarantees the right to education and requires states to take all appropriate measures to ensure that this right is actualised this includes building schools having teachers with qualification, equipment and also access.¹²⁹ Under Section 7 of the *Children Act* free basic education is compulsory and every child is entitled to it.¹³⁰ Article 53 of the *COK* stipulates that every child has the right to free compulsory education, the same is stated under Article 28 of the *CRC* the convention recognises the importance of protecting the right of the child to education and outlines that this right must be achieved gradually on the basis of equal opportunities.

In the case for the Nubian children there was de facto inequality in access to education as the Kenyan government failed to provide educational resources in areas where the Nubian children live which in turn meant that children were unable to access schools this was a clear violation of Article 11 of the *African Children's Charter*, Article 28 of the *CRC* and Article 53 of the *COK*.¹³¹

The Kenyan government has failed to facilitate access to education for all Nubian children. Although the government stated that they would subsidise secondary education a major issue still lies with regards to accessibility.¹³² The ACERWC in their briefing paper on implementation showed that Nubian primary school children were denied the opportunity to sit their Kenya Certificate of Primary Education (KCPE) exams due to lack of documents such as a birth certificate.¹³³ KCPE exams are a requirement before joining high school therefore, the sad reality remains that even if Nubian children are able to access primary school they will not be able to go further than that.

¹²⁹ Article 11 (3), *African charter on the rights and welfare of the child*, 11 July 1990.

¹³⁰ Section 7, Chapter 141, *Children Act* (Kenya).

¹³¹ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 65.

¹³² ACERWC, *29th Session of the African Committee of Experts on the Rights and Welfare of the Child*, 9 May 2017, 16.

¹³³ African Committee of Experts on the Rights and Welfare of the Child, *Briefing paper: Implementation of Nubian minors v Kenya*, February 2014, 4.

4.2.3 Health

The right to health is recognised as a fundamental human right that is indispensable; it elaborates that the healthcare system must have facilities that ensure every person is able to attain the highest standard of health.¹³⁴ This right is protected under Article 26 of the UDHR, Article 24 of the *CRC* that requires states to ensure that every child within their jurisdictions enjoys the highest attainable standard of health and Article 43 of the *COK* that states every person has the right to the highest attainable standard of health. Health is seen as a social and human good for the fulfilment of the right to health there must be access to quality health care services and availability of medical equipment.¹³⁵ It is worth noting that although the right to health is protected under international law stateless persons need political recognition for this right to be actualised.¹³⁶ The understanding of this right being universal imposes three obligations on states: they must not interfere with the enjoyment of this right; they must take the required measures to avoid the interference of private individuals and business organizations with the enjoyment of this right; and they must facilitate and promote the right to health.¹³⁷

Majority of individuals who are denied the right to the highest attainable standard of health come from vulnerable groups such as the Nubian children. When it comes to protecting this right for children states must ensure that other rights such as food and water are guaranteed in the case of Kenyan the ACERWC found that the Nubian children in comparison to children from other communities were provided fewer medical facilities and resources which makes it difficult for them to enjoy this right.¹³⁸ Under the *CRC* state parties are obligated to take measures of combating diseases and malnutrition by providing clean drinking water, the convention draws a link between access to clean water and the right to health.¹³⁹

¹³⁴ *CESCR General comment No14: The right to the highest attainable standard of health*, 11 August 2000, 1.

¹³⁵ Kingston L, Cohen E and Morley C, 'Debate: Limitations on universality: the right to health and the necessity of legal nationality' *International health and human rights*, 2.

¹³⁶ Kingston L, Cohen E and Morley C, 'Debate: Limitations on universality: the right to health and the necessity of legal nationality' *International health and human rights*, 3.

¹³⁷ Kingston L, Cohen E and Morley C, 'Debate: Limitations on universality: the right to health and the necessity of legal nationality' *International health and human rights*, 3.

¹³⁸ *Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya*, ACERWC Comm.002/09, 61.

¹³⁹ Article 24 (1) *Convention on the Rights of the Child*, 20 November 1989, E/CN.4/RES/1990/74.

Furthermore, the World Health Organisation emphasized that having access to clean water leads to a sustainable life and one can reap the tangible benefits of health.¹⁴⁰ This inequality is linked to their lack of nationality, research has shown that stateless persons face more barriers when it comes to access to healthcare and end up receiving lower standards of care because of their status.¹⁴¹ This means that Nubian children are more susceptible to overall poor health, higher rates of infection, chronic illnesses and increased mortality.¹⁴² To access social goods such as health facilities more often than not documentation of nationality is required, stateless children do not benefit from subsidized vaccination programs, their parents are forced to pay more money for their child to access basic health care services and they are not registered at birth which can sometimes bar them from being legally vaccinated.¹⁴³

With regards to actualising the right to health care for Nubian children the Kenyan government in 2017 stated that they would ensure the development of health facilities and make non-discrimination a central issue in the health sector however, progress has not been seen, no efforts have been made through for example campaigns and training of staff members in the health sector to elaborate the issue of discrimination.¹⁴⁴ The Open Society Justice Initiative and Centre for Minority Rights Development have criticized the government on the basis of failing to accelerate the implementation process.¹⁴⁵

4.2.4 Birth and Nationality Registration

The right to nationality carries with it a protective and enabling element that ensures individuals are not left vulnerable to arbitrary exercise of public and private power as well as access to rights and resources.¹⁴⁶ This right is protected internationally under Article 15 of the *UDHR* it encompasses the prohibition of arbitrary deprivation of one's nationality as well as protection against statelessness. For children Article 7 of the *CRC* imposes a duty on states to ensure that a child is to be registered after birth and they have the right to acquire a nationality the same is

¹⁴⁰ World Health Organisation, Guidelines for drinking-water quality, 2011, 1.

¹⁴¹ Kingston L, Cohen E and Morley C, 'Debate: Limitations on universality: the right to health and the necessity of legal nationality' *International health and human rights*, 5.

¹⁴² Kingston L, Cohen E and Morley C, 'Debate: Limitations on universality: the right to health and the necessity of legal nationality' *International health and human rights*, 7.

¹⁴³ Kingston L, Cohen E and Morley C, 'Debate: Limitations on universality: the right to health and the necessity of legal nationality' *International health and human rights*, 7.

¹⁴⁴ ACERWC, *29th Session of the African Committee of Experts on the Rights and Welfare of the Child*, 16.

¹⁴⁵ ACERWC, *29th Session of the African Committee of Experts on the Rights and Welfare of the Child*, 17.

¹⁴⁶ Owen D, 'On the right to have nationality rights: Statelessness, citizenship and human rights' *Netherlands International Law Review*, 2018, 301.

echoed in *Article 6 of the African Children Charter*. Article 14 of the *COK* states that a person can acquire citizenship by birth only if their mother or father is a citizen and Article 14 (3) of the *COK* provides that where a child is found in Kenya and their nationality and parents are unknown, they are to be presumed as citizens of Kenya.

It has been argued that the lack of universally applicable principles for determining nationality has led to many discrepancies when ascertaining the legal status of a person.¹⁴⁷ Where a child is not registered at birth they are in danger of being excluded from the society and denied the right to an official identification, a known name and country of origin.¹⁴⁸ For the Nubian children their births remain unregistered and even though they are registered it does not confer nationality rights which renders them stateless.¹⁴⁹ There is therefore an important link between registering a child in a reliable authentic system to prevent the risk of statelessness.¹⁵⁰ The requirement of birth registration goes beyond just passing it also includes dealing with all other limitations and obstacles that act as barriers.¹⁵¹

One of the major barriers put in place by the Kenyan government is forcing Nubian children to wait until the age of 18 to apply for nationality, this does not align with achieving the child's best interest.¹⁵² The limitation on acquisition of nationality for Nubian children was described by the ACERWC in 4 ways: birth; descent; registration; and naturalisation.¹⁵³ Although matters Relating to nationality often fall within the ambit of domestic regulation they must still be in line with rules of international law and therefore this limits the state's discretion in dealing with matters of nationality.¹⁵⁴

¹⁴⁷ Reedy S and Ramaprasad A, 'Reframing the problem of statelessness: quest for a supra-legal perspective' 20 *Oregon review of international law* 2, 2019, 377.

¹⁴⁸ Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in *Kenya v The Government of Kenya*, ACERWC Comm.002/09, 38.

¹⁴⁹ Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in *Kenya v The Government of Kenya*, ACERWC Comm.002/09, 40.

¹⁵⁰ Reedy S and Ramaprasad A, 'Reframing the problem of statelessness: quest for a supra-legal perspective' 20 *Oregon review of international law* 2, 2019, 378.

¹⁵¹ Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in *Kenya v The Government of Kenya*, ACERWC Comm.002/09, 38.

¹⁵² Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in *Kenya v The Government of Kenya*, ACERWC Comm.002/09, 42.

¹⁵³ Institute for human rights and development in Africa (IHRDA) and Open society justice initiative on behalf of children of Nubian descent in *Kenya v The Government of Kenya*, ACERWC Comm.002/09, 49.

¹⁵⁴ Ganczer M, 'The right to a nationality as a human right?' *Hungarian Yearbook of International Law and European Law* 15, 2014, 17.

In a bid to implement the recommendations provided by the ACERWC, the government mentioned that will make implement measures to ensure stateless persons are eligible to register for citizenship, establish a guideline on vulnerable children, distribute registration guidelines to registration agents as well as place monitoring plans in health facilities to ensure that every birth is registered at any maternal health outlet as well as establish mobile registration point to register children after birth.¹⁵⁵ However, none of these have been realised and the ACERWC observed that the high cost of birth certificate application, the high transportation fee to the registration centre and the prolonged process of acquiring a birth certificate act as a deterrence.¹⁵⁶ The government has not been able to establish mobile birth registration points for mothers to apply for birth certificates which would help in registering many children from the Nubian community.¹⁵⁷

4.3 Conclusion

The status of the Nubian children as stateless has posed great difficulty in the enjoyment of various rights. It is worth noting that the need for citizenship rights is not just based on theory, it is fundamental for the enjoyment of various human rights. The effects of statelessness are felt by a child from their young age up to their adult life, having no ties to a state means that in future children from communities that are considered stateless such as the Nubian children will have difficulties in obtaining employment opportunities in careers that pay well as well as enjoying the right to own property. These limitations are based on the state oppressing a certain community of people.

Additionally, the barriers that stateless children face when it comes to access to educational facilities affects their development and lowers their prospects within society. The *CRC* under Article 29 emphasises on the important role that education has to play, it not only allows the child to acquire knowledge on various subjects but it is also geared towards the development of the child's personality, talents and mental and physical abilities to their fullest potential. It

¹⁵⁵ ACERWC, *29th Session of the African Committee of Experts on the Rights and Welfare of the Child*, 9 May 2017.

¹⁵⁶ African Committee of Experts on the Rights and Welfare of the Child, *Written comments on: Implementation*, 4 May 2017, 11.

¹⁵⁷ African Committee of Experts on the Rights and Welfare of the Child, *Written comments on: Implementation*, 4 May 2017, 11.

is therefore in the state's best interest to protect the rights of children as it will be viewed as investing in the future.¹⁵⁸

¹⁵⁸ Fokala E and Chenwi L, Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee, *African Journal of Legal Studies* 6, 2013, 372.

CHAPTER 5: CONCLUSION AND RECOMMENDATION

5.1 Introduction

Throughout the years children of the Nubian community has faced high levels of institutional discrimination as a result of generational statelessness that stems from their ancestors not being recognised as Kenyan citizens. This is against international law and national laws such as the *COK* that guarantees the protection of children as they are seen as vulnerable persons.

The first chapter set to introduce the research problem and research questions that were answered by the hypothesis that the research is based on. The second chapter delved into discussing the theoretical framework that supports the idea that statelessness is a human rights problem that has detrimental effects on the life of a child. Chapter three discussed the legal standards set out by Kenyan law to address statelessness. Chapter four analysed the protection of rights of the Nubian children and the challenges they face. Lastly, this chapter winds up the research by elaborating on how the conclusions came to be during this study and offers recommendations that may help in addressing the issue of generational statelessness amongst Nubian children.

Due to their status as stateless children they tend to fall outside the state's protection system which makes them susceptible to harmful practices such as exploitation.¹⁵⁹ It is therefore important to comprehend the situation faced by minority groups such as Nubian children, the barriers faced in the process of acquiring citizenship for these minority groups as well as the advantages of having citizenship. It is evident that because the Nubians are not considered an ethnic group, they cannot enjoy Kenyan citizenship equally.¹⁶⁰

Based on chapter 1 the findings of this study indicate that statelessness is a worldwide problem and the real insight into the specific figures of stateless persons worldwide is not accurately known, this is due to governments neglecting to update data on this matter.¹⁶¹ Chapter 3 of this study showed that in Kenya statelessness is as a result of both administrative and legal factors, members of communities such as the Nubians fall victim to this phenomenon. It is worth noting that the Kenyan government has taken certain steps to reduce the number of people who are

¹⁵⁹ Stein J, 'The prevention of child statelessness at birth: The UNCRC Committees role and potential', 600.

¹⁶⁰ Chrimes S, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 332.

¹⁶¹ UNHCR, Statistical reporting on statelessness, 2019, 1.

stateless and this can be seen with the reduction of stateless persons in Kenya from 18,500 in 2016 to now 6,272.¹⁶²

The figures of stateless persons in Kenya are still high and although steps have been taken to spearhead granting citizenship to Nubian children, chapter 4 of the study was able to reveal that it is still not a guarantee that even after they go through the vetting process that they will acquire citizenship. The vetting process demands for an extensive list of documents to be produced such as parents death certificates if they are deceased and even sometimes a copy of the ID of the building caretaker.¹⁶³ Chapter 3 discussed the issue of the unregulated nature of the vetting process, there are no proper procedures that have been put in place and this consequently limits the number of Nubian children who can acquire a national identification card. In line with the discussion in Chapter 2 statelessness is seen to have detrimental effects on children it has denied Nubian children the freedom of movement, right to education, access to employment opportunities and the right to own property.

Based on the research done in chapter 1, 2, 3 and 4 of this study granting nationality to minority groups such as the Nubian children allows them to equally participate in society and enjoy the rights and freedoms citizens are granted under the *COK*. The Findings have demonstrated that throughout the different generations the Nubian community still faces difficulties in the acquisition of Kenyan citizenship, the problems is still faced by the community up to date even after the *African Committee of Experts on the Rights and Welfare of the Child* urged the Kenyan government to grant Nubian children nationality as an obligation under international law.

5.2 Conclusion

It is evident that in the 2019 census the Kenyan government took steps to document the number of stateless persons in Kenya and in the KNBS report the Nubians were included as one of Kenya's ethnic groups. The reality remains that even though this was done Nubian children are still threatened by statelessness the law has not fully tackled the issues of child statelessness and institutional discrimination is still rampant in the process of acquiring citizenship for members of communities like the Nubians. Generally, states have the freedom to determine

¹⁶² Kenya National Bureau of Statistics, *Kenya population and housing census Volume IV: Distribution of population by socio-economic characteristics*, 2019, 424.

¹⁶³ Waziri K, 'The ones who are, but don't exist: being Nubian and Kenyan' *The Elephant*, 5 July 2019 - <<https://www.theelephant.info/reflections/2019/07/05/the-ones-who-are-but-dont-exist-being-nubian-and-kenyan/>> on 22 December 2020.

policies on nationality however the lack of a standard global nationality system has left them to abuse this power and exclude certain communities from being participating members in the society.¹⁶⁴

The Kenyan government's refusal to automatically grant Nubian children Kenyan nationality is an irrefutable display of the state's failure to protect the interest of children. The Kenyan laws on citizenship are yet to be tailored to cater for individuals born to stateless parents. In conclusion, the status of Nubian children as non-citizens has greatly limited their enjoyment of human rights and the legal framework both nationally and internationally lacks effective measures to eradicate statelessness and does not adequately guarantee the protection of rights of children from stateless groups.

5.3 Recommendations

To ensure appropriate measures are taken to eradicate statelessness and ensure adequate protection of the rights of stateless children certain changes need to be made. Based on the findings this paper will provide solutions to deal with the issue at hand.

5.3.1 Effective and Flexible Registration System

To effectively address the issue of stateless children the Kenyan government needs to make the registration system effective and flexible. This can be achieved through collaboration with NGOs and international bodies such as UNICEF to establish mobile registration units in areas where members of communities that are considered stateless are located to make it more accessible.¹⁶⁵ Furthermore it is important for the state to make registration compulsory and ensure that birth certificates are issued to every child including those from minority groups to prove Kenyan nationality.

5.3.2 Retrospective Registration

Retrospective registration for Nubian children whose births are unregistered could also be introduced, this process can be done through local court hearings.¹⁶⁶ Additionally, in line with the decision given by the ACERWC legislative reforms need to take place in order to ensure

¹⁶⁴ Stein J, 'The prevention of child statelessness at birth: The UNCRC Committees role and potential', 600.

¹⁶⁵ Stein J, 'The prevention of child statelessness at birth: The UNCRC Committees role and potential', 620.

¹⁶⁶ Forced Migration Review Report, *Kenyan Nubians: standing up to statelessness*, 2009, 22.

that a child's citizenship is confirmed as close to birth as well as the introduction of a law that governs how the vetting process ought to take place to deal with the issue of discrimination amongst the Nubian children.

5.3.3 Training of Staff in the Birth Registration Department

Lastly, extensive training and capacity building need to be provided to officers that deal with birth registration, this is aimed at improving the integrity of their work to reduce cases of corruption in the system as well as address certain issues such as discrimination and its detrimental effects. To ensure that birth registration officers are carrying out their duties effectively there needs to be more oversight from the Ministry of Interior and Coordination of National Government to assess the procedures applied when it comes to birth registration.

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