

A situation of statelessness in Kenya: Are the laws in place and government mitigating actions, sufficient in protecting the children of Nubian descent?

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DECLARATION

I, KHABURE SABINA BEATA, 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.

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ABSTRACT

The Right to a Nationality is an essential facet in the overall wellbeing of any living being, including children. The Right to a nationality is explicitly provided for under Article 53(1)(a) of the Constitution of Kenya and Section 11 of the Children's Act. The Children of Nubian Descent in Kenya have however not fully enjoyed the right to nationality as provided under black letter of the Law. They have been denied the right to nationality from birth, forced to undergo a rigorous discriminatory vetting process leading to the denial of other fundamental rights like health and education. Riddled with the aforementioned challenges, the Nubian Community sought intervention of the African Committee on the Rights and Welfare of the Child. The African Committee declared that the Government of Kenya was in contravention of their Right to nationality, further recommending that the Government of Kenya ought to grant the Nubian Community a nationality and incorporate mechanisms to ensure that no child was left behind.

Despite the decision by the African Committee, no laws have been put in place to uphold the Right to a nationality for Children of Nubian descent. Therefore, this study is conducted based on the following three objectives; determining the laws in place that relate to the status of statelessness, providing an analysis on the effects the status of statelessness has had on the children of Nubian descent and lastly, to investigate the measures the Government of Kenya has taken to mitigate the situation affecting the children of Nubian descent.

LIST OF ABBREVIATIONS

IHRDA	Institute for Human Right’s Development in Africa
NIIMS	National Integrated Identity Management System
NRF	Nubian Rights Forum
OSJI	Open Society Justice Initiative
CRC	The United Nations Convention of the Rights of a child
UNHCR	The United Nations High Commissioner for Refugees
CERD	The UN International Convention on the Elimination of All Forms of Racial Discrimination
The 1954 Convention	1954 United Nations Convention Relating to the Status of Stateless Persons
The 1961 Convention	1961 United Nations Convention on the Reduction of Statelessness
African Committee	African Committee of Experts on the Rights and Welfare of the Child
The African Children’s Charter	African Charter on the Rights and Welfare of the Child

LIST OF LEGAL INSTRUMENTS

National Legislation

Children's Act (No. 8 of 2001).

Constitution of Kenya (2010).

Kenya Citizenship and Immigration Act, No. 12 of 2011.

The Registration of Persons (National Integrated Identity Management System) Regulations, 2020.

International Instruments

African Charter On the Rights and Welfare of the Child, July 1990, CAB/LEG/153/Rev.2.

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

Convention Relating to the Status of Stateless Persons, 1954.

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

International Covenant on Civil and Political Rights, 19 December 1966.

The United Nations Convention on the Rights of a Child, 20 November 1989, General Assembly resolution 44/25.

UNESCO Convention against Discrimination in Education, 14 December 1960.

United Nations Convention on the Reduction of Statelessness, 30 August 1961.

LIST OF CASES

Gillick v West Norfolk and Wisbech Area Health Authority, (1986), The United Kingdom House of Lords.

Institute for Human rights and the development in Africa (IHRDA) and Open Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya, ACERW No. 002/Com/002/2009.

Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR.

Nubian Rights Forum and 2 others v Attorney General and 6 others, Child Welfare Society & 9 others (interested parties) (2020) eKLR.

Open Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communication 317/06, ACmPHR, 2010.

CHAPTER ONE: INTRODUCTION

1.1. Background to the Problem

The Nubian Community in present day Kenya, found their way to Kenya by being forcefully conscripted to the British Colonial forces during the second world war. After the war ended, they requested to be repatriated to Sudan, their homeland , but the British government instead allocated to them parcels of land without any formal land title documents.¹ They were also not granted citizenship. This phenomenon did not cease to exist as the successive governments did not recognise the Nubians as citizens. Currently, children of Nubian descent wait until 18 years to acquire nationality. This leaves them at an uncertain situation, as their prospects are severely limited and are often left stateless.²

The 1954 Convention Relating to the Status of Stateless Persons (“the 1954 Convention”) defines a “stateless person” as “a person who is not considered as a national by any State under the operation of its law”.³ The laws on statelessness are closely linked to the right to a name, birth registration and nationality. These rights have been provided for in the Kenyan context under article 53(1)(a) of the Kenyan Constitution. This article provides that “every child has the right to a name and nationality from birth”. The national legislation focusing on the rights of the Child, have been envisioned in the Children’s Act of Kenya.⁴ These particular class of rights have been envisaged under section 11 of the aforementioned Act.⁵

Furthermore, the African Charter on the Rights and Welfare of the Child (herein after the African Children’s Charter), provides for the right to a name and registration immediately after birth.⁶ It also requires “State parties to ensure that their Constitution and legislation, recognizes certain key principles, according to which a child acquires the nationality of the State in the territory of which they have been born. This is the condition, if at the time of the child’s birth,

¹ Makholo M, ‘Kenya Minorities, Indigenous Peoples and Ethnic Diversity’, 2005, 17 - <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-147-Kenya-Minorities-IndigenousPeoples-and-Ethnic-Diversity.pdf> on 21 September 2020.

² *Institute for Human rights and the development in Africa (IHRDA) and Open Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, ACERW No. 002/Com/002/2009.

³ Article 1, *Convention Relating to the Status of Stateless Persons*, 1954.

⁴ *Children’s Act* (No. 8 of 2001).

⁵ This Section states that; ‘Every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity.’

⁶ Article 6(1), (2) and (3), *African Charter On the Rights and Welfare of the Child*, July 1990, CAB/LEG/153/Rev.2.

he is not granted nationality by any other State in accordance with its laws”.⁷ In the international sphere, the Convention of the Rights of the Child (herein after ‘The CRC’) provides that, “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality”.⁸

On noticing that their pleas of recognition to the Kenyan Government fell on deaf ears, the Nubian Community turned to the Institute for Human Right’s Development in Africa (herein after IHRDA) and the Open Society Justice Initiative (hereinafter OSJI) to jointly file a communication on their behalf to the African Committee of Experts on the Rights and Welfare of the Child(herein after the African Committee).⁹ In its decision, the African Committee proposed that the Government of Kenya should take all essential measures to warrant that the children of Nubian descent that are considered stateless acquire nationality and the proof of such nationality be administered at birth.¹⁰ It also instructed to the Kenyan Government that it ought to report in less than six months, the safeguards it has taken in implementing these rights.¹¹ There has been no proof of such, and the Children of Nubian descent continue to suffer to date.¹²

1.2. Statement of the Problem

The Right to nationality is extremely imperative, as its interest is of a long-term purpose. The realisation of the right brings about an abundance of possibilities for the child to enjoy other rights as soon as possible.¹³ According to the Constitution, children have a right to a name and nationality from birth.¹⁴ In Kenya, the means as to which one can attain citizenship, is either

⁷ Article 6(4), *African Charter On the Rights and Welfare of the Child*.

⁸ Article 7, *Convention On the Rights of the Child*, 20 November 1989, General Assembly resolution 44/25.

⁹ Durojaye E and Foley E, ‘Making a first impression: An Assessment of the Decision of the Committee of experts in the Nubian Children Communication’ 12(2) *African Human Rights Journal* 2012, 566.

¹⁰ *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 69.

¹¹ *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 69.

¹² Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Kenya 1st Periodic Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, 14th Ordinary Session, 2014, 7 - <https://acerwc.africa/wpcontent/uploads/2018/14/khnenya%20Concluding%20Observation%20final.pdf> - on 14 August 2020.

¹³ Doek J, ‘In the best interest of the child: Harmonising laws in Eastern and Southern Africa’, African Child Policy Forum, 2007, 38.

¹⁴ Article 53(1)(a), *Constitution of Kenya* (2010).

by birth or by registration.¹⁵ The process of naturalisation falls under the registration attainment of citizenship, this is seen through article of the Constitution of Kenya, providing that an individual legally living in Kenya for an uninterrupted period of no less than seven years and satisfies any other condition may make application to be registered as a citizen.¹⁶

In light of the above, children of Nubian descent continue to face discrimination when trying to attain nationality in Kenya. This has been described as institutionalised discrimination.¹⁷ A major strain in ensuring the effectiveness of the right to nationality for children of Nubian descent is that a majority of their parents lack proper identity documents. This raises questions as to whether the children of Nubian descent do not satisfy the citizenship requirements under registration.¹⁸ Therefore, the overarching problem that the paper seeks to address is whether the laws in place and mitigation measures implemented by the government of Kenya are sufficient in remedying their situation.

1.3. Statement of Objectives

This research aims to;

- i. Establish the current Kenya's and international legal framework on Statelessness.
- ii. Explore the effects the status of statelessness has had on the children of Nubian descent.
- iii. Determine the current measures the Government of Kenya has taken to mitigate the situation affecting the children of Nubian descent.

1.4. Research questions

The paper primarily focuses on the following research questions:

- i. What is the current legal framework addressing statelessness in Kenya?
- ii. What are the effects the status of statelessness has had on the children of Nubian descent?

¹⁵ Article 13, *Constitution of Kenya* (2010).

¹⁶ Article 15, *Constitution of Kenya* (2010).

¹⁷ Committee on the Elimination of Racial Discrimination, Concluding Observations on the Initial to Fourth Periodic Reports of Kenya, CERD/C/KEN/CO/1-4 ,2011, 21.

¹⁸ Article 15, *Constitution of Kenya* (2010), states that 'A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen'.

- iii. What has the Government of Kenyan done in solving the statelessness of Children of Nubian descent?

1.5. Hypothesis

This paper proceeds on the following hypothesis;

- i. That granting nationality to children of Nubian descent will lead to the protection and enhancement of their rights.

1.6. Research Design and Methodology

This research adopts a doctrinal methodology. This entails the review of primary and secondary sources. The primary sources highlight the Constitution of Kenya. The secondary sources include but are not limited to books, journal articles, case law, reports and online sources.

1.7. Justification of the Study

The reason for this research is to identify the gaps present in the laws, that do not facilitate the registration and granting of nationality to the children of Nubian descent and recommend methods in which the present gaps can be remedied.

1.8. Theoretical Framework

This paper is based on John Rawls' Theory of Justice. The basis of the Theory of Justice is on three elements; "a vision of society as it ought to be, a view of moral theory and its significance and a derivation of principles which will enable an expression of that vision to be enunciated so as to reflect moral theory."¹⁹ According to this theory, the primary intention is the developing of a well-ordered society which eventually advances the good of its members in accordance with a public conception of justice.

John Rawls' suggests a "hypothetical congress of persons" who are to pick out, as the result of dialogue and consensus, the fundamental principles that ought to give guidance to their society, this is known as the original position.²⁰ The original position is only attained if, the persons involved in the selection of principles acquire a veil of ignorance. This veil of ignorance is meant to facilitate the achievement of objectivity.²¹

¹⁹ Curazon P, Lecture notes on Jurisprudence, 2nd edition, Cavendish Publishing Limited, London, 1995, 199.

²⁰ Curazon P, Lecture notes on Jurisprudence, 200.

²¹ Rawls J, A Theory of Justice, revised edition, Belknap Press of Harvard University Press, Cambridge, 1999, 27-28.

This theory revolves around two fundamental principles of justice; right to each individual to have substantial liberty synonymous with the liberty of others.²² John Rawls' second cardinal end to the achievement of justice requires that justice ought to attain equality of all. Nonetheless, the ends of justice can still be met, if the distinctive treatment is in the interest of the least well off in a given society. The attainment of one's nationality is indispensable to a number of freedoms, such as education, healthcare, jobs and equality before the law.²³ The status of statelessness has continued to facilitate inequalities amongst the societies, that do not necessarily benefit the least well off.

1.9. Literature Review

According to the 1949 UN's A Study on Statelessness, stated that de facto stateless persons are persons who, "having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities".²⁴ Although they may retain nationality of a State, their legal bond to that State functions as meaningless, as they are not able to enjoy the protection or benefits usually dependent on citizenship.²⁵ Basically, their status amounts to a situation of statelessness - only that they are not 'stateless' by definition. Cole, in his *Taking Statelessness Seriously*, poses an interesting view on the question of statelessness and nationality, likening nationality to marriage. Here he poses that while one has the option to exit a marriage, it does not translate to one having the option to enter into a marriage immediately after exiting.²⁶ In essence, a person upon leaving their country to get into another because of one reason or another is not ultimately guaranteed nationality upon entry to the new State. He also offers a distinction between the reasons for statelessness, as some are by forced displacement and others by a tenuous connection with migration. Cole also states that there is need for a radical change in the approach of nationality, break out of the usual conversations that political theory is accustomed to having. He suggests a solution to statelessness as

²² Rawls J, *A Theory of Justice*, revised edition, 27-28.

²³ Gurgen S, 'Syrian Descent Children at Risk of Statelessness in Turkey, 2020, 6 <https://www.researchgate.net/publication/340771528>- on 5 August 2020.

²⁴ United Nations Ad Hoc Committee on Refugees and Stateless Persons, *A Study on Statelessness*, UN Doc E/i 112 and Add. 1, 1949, Introduction III.

²⁵ McAdam J, *Climate Change, Forced Migration and International*, Oxford University Press, Oxford, 2012, 140141.

²⁶ Cole P, 'Taking Statelessness seriously' 1(1) *Statelessness and citizenship review*, 2019, 162.

subjecting everyone to the status of statelessness, this ought to enable us to look at the problems within the system.²⁷

Fisher, notes that there has been a rise in contemporary years regarding the scholarship on the topic of statelessness, though the discussion on the basic principles of treaty interpretation ought to be undertaken in order to understand the definition of statelessness.²⁸ As the situation of statelessness continues to grow and be engaged with at the international community, more States are adopting statelessness determination procedures.²⁹ Fisher, further notes that the language used in the CRC was ambiguous, as if indeed States were to only consider granting of a nationality on the sole basis of national law without considering other legal documents then it should have said so.³⁰ Laws affecting nationality such as civil registration law and state practice ought to be considered.

The situation in Africa is an interesting one to consider, as only ten African states have ratified the 1954 Convention, and the national practice on the right to nationality is not at par with the CRC.³¹

John Campbell, in his enduring the problem of statelessness in the Horn of Africa, declares that citizenship in Africa is manipulated and restricted as it denies citizenship rights to those who a State wishes to marginalize. He analyses the situation of Ethiopians of Eritrean descent, their expulsion from Ethiopia and the seizing of national identity documents held by 75,000 individuals before their expulsion.³² In June 2007, the reporting Committee for the UN International Convention on the Elimination of All Forms of Racial Discrimination (herein after the CERD) noted that: “The Committee is concerned about the situation of children of parents of Eritrean origin, who were deprived of their Ethiopian citizenship in the period 1998-2000, and who have not benefited from the January 2004 directive issued to determine the

²⁷ Cole P, ‘Taking Statelessness Seriously’, 164.

²⁸ Fisher B, ‘The Operation of Law in Statelessness Determinations under the 1954 Stateless Convention’ 33(2) *Wisconsin International Law Journal* 2015, 256.

²⁹ European Network on Statelessness, Determination and protection status of stateless persons, 2013, 6-7 -< <http://www.refworld.org/docid/53162a2f4.html>>- on 30 October 2019.

³⁰ Fisher B, ‘The Operation of Law in Statelessness Determinations under the 1954 Stateless Convention’, 263.

³¹ Adjolohoun H, ‘Introductory Note to African Commission on Human and Peoples’ Rights Resolution 234 on the Right to Nationality’ 53(2) *International Legal Materials* 2014, 413.

³² Campbell John, ‘The Enduring Problem of Statelessness in the Horn of Africa: Nation-States and Western Courts redefine nationality’, 23(4) *International Journal of Refugee Law* 2011, 664-665.

status of Eritreans living in Ethiopia.”³³ In 2009, Ethiopia issued a decree to enable Eritreans deported from Ethiopia due to the Ethio-Eritrea war to reclaim and develop their property in Ethiopia.³⁴ The decree has not yet been implemented nor published.³⁵ In 2010, the Director General of Political Affairs in the Ministry of Foreign Affairs mentioned that following the decree made in 2009, thirty claims had been recognized and the property returned.³⁶ Campbell notes that there is evidence, sampling the political and ethnic discrimination against Ethiopian born ethnic Eritreans in all spheres of public life. Currently many lack legal status in Ethiopia and are especially vulnerable to further abuses of their human and civil rights.

In West Africa, specific to Ghana, there are a number of populations that are at risk of statelessness. According to Atuguba, Tuokuu and Gbang, the Nomadic Fulani’s and other undocumented migrants, Most immigrants in Ghana who do not obtain citizenship of Ghana may be living in Ghana “unlawfully” or may have permanent residence or residence permits.³⁷ Physical traits, name, language or the inability to speak an indigenous Ghanaian language, and other idiosyncrasies of applicants can lead to unlawful denials of qualified persons to certain services of the state that can be considered essential and imperative for the exercise of one’s rights as a citizen.³⁸ Persons derived of citizenship in the 1960 Ghanaian Constitution, were consequently denied citizenship when the 1969 Constitution came into force. This led to the inheritance of the status of statelessness by the descendants of these class of individuals. It is also to be noted that Ghana is yet to ratify any of the two conventions concerning Statelessness.³⁹

³³ Reports Submitted by States Parties under Art. 9 of the Convention: Ethiopia', United Nations International Convention on the Elimination of all forms of Racial Discrimination, CERD/C/ETH/7-16; 2008, 138.

³⁴ Campbell John, 'The Enduring Problem of Statelessness in the Horn of Africa: Nation-States and Western Courts redefine nationality', 663.

³⁵ Campbell John, 'The Enduring Problem of Statelessness in the Horn of Africa: Nation-States and Western Courts redefine nationality', 662.

³⁶ Campbell John, 'The Enduring Problem of Statelessness in the Horn of Africa: Nation-States and Western Courts redefine nationality', 663.

³⁷ Atuguba R, Tuokuu F and Gbang V, 'Statelessness in West Africa: An Assessment of Stateless Populations and Legal, Policy and Administrative Frameworks in Ghana' 8(1) *Journal on Migration and Human Security* 2020, 23-25.

³⁸ Atuguba R, Tuokuu F and Gbang V, 'Statelessness in West Africa: An Assessment of Stateless Populations and Legal, Policy and Administrative Frameworks in Ghana', 27-28.

³⁹ UNHCR, 'Statelessness in West Africa: Turning your world upside down', 2015, 11 -<
<https://www.unhcr.org/ecowas2015/Statelessness-in-West-Africa.pdf>>- on 1 November 2020.

Samantha Chrimes notes on the fact of indigeneity and Kenya's Nubians. The discussion on inter-ethnic relations in Kenya has been the basis of ethnic clashes and tension, Samantha suggests a shift in the attention to the dynamic nature of indigenous ethnic groups and ethnic strangers.⁴⁰ The Nubian community, formed the backbone of the British military, they were later settled in Kenya, Kibera, and have been here since the 1920s. The Nubian Community, claims that they should be considered as one of the tribes in Kenya, asserting that their difference ought to grant their sameness.⁴¹ To elaborate, majority of the community identifies as being indigenous to Kibera, in achieving such a recognition it will grant them equal citizenship, education and employment among other civic rights and duties. Furthermore, it is the Nubians' glaring ethnic stranger status that makes this case different from others in Kenya.⁴² This further leads to the inheritance of the status of statelessness of Children of Nubian descent, which is the principal focal point of this research.

Notably, the research understands that the situation presented in Africa is somewhat interesting, it is clearly envisaged that there are many gaps in their national laws on the granting of citizenship. There is evidence that even where the law clearly provides for the right to nationality, States are reluctant to grant nationality to certain groups of people and violate their Constitutional obligations. The research aims to provide a filler to this lacuna, providing for a sustainable means in eliminating statelessness as an end, regarding the Children of Nubian descent in Kenya.

1.10. Limitations

The area of study is the right to nationality of children of Nubian descent. This is to be done within the jurisdiction of Kenya, but references will be drawn from different jurisdictions to further inform the research. Due to the qualitative nature of the study, its accuracy is limited to the information obtained from doctrinal research.

1.11. Chapter Breakdown

Chapter one: It gives a brief overview of the research paper. It introduces the problem and outlines the objectives the paper seeks to fulfil by the end of the study. It provides the theory

⁴⁰ Chrimes DS, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 51(2) *The Journal of Modern African Studies* 2013, 331.

⁴¹ Chrimes DS, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 331-332.

⁴² Chrimes DS, 'Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?', 339.

the paper is based on and gives insight on the literature to be used in the paper. It concludes by giving a breakdown of the chapters the paper expounds on.

Chapter two: This chapter speaks to the theoretical framework of the study. By providing a background and a detailed account, to John Rawls theory of Justice, the research seeks to reconcile the theory to the objectives of the research.

Chapter three: This chapter answers the question of what the laws are surrounding the status of statelessness. It also analyses the different legal frameworks from the point of view of Kenya, Africa and the entire globe.

Chapter four: This chapter seeks to analyse the status of statelessness specific to children of Nubian decent. It then looks into the measures the government of Kenya has made to address the situation, if any.

Chapter five: This chapter concludes the research. Offering recommendations concerning the right to a nationality for children of Nubian descent and the Response of the government of Kenya.

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1. Introduction

Article 53(1) of the Constitution envisions the right to a name and nationality from birth for every child. The children of Nubian descent have however been denied this right, hence continuing the vicious cycle of statelessness that the community has for so long been part of. Every person intrinsically has an inviolability founded on justice, even the welfare of society cannot undermine it.⁴³ In this effort, John Rawls' theory of justice denies any forms of utilitarianism, as the sum of advantages enjoyed by the majority cannot outweigh the sacrifices imposed on a few individuals.⁴⁴ Therefore, in a just society, the rights secured are not limited either by political bargaining or in view of social interests. Consequently, the right to a nationality is granted to children under the laws of Kenya, in efforts of upholding justice, this right should not be limited as it places the Children of Nubian descent at a point of disadvantage.

This chapter delves into discussing John Rawls' Theory of justice as the theoretical framework underpinning the research.

2.2. John Rawls' Theory of Justice

The theory of Justice was first posited in the year 1971, it mainly touches on the maximization of liberty, equality for all and fair equal opportunity.⁴⁵

The theory of Justice is based on three elements; "a vision of society as it ought to be, a view of moral theory and its significance and a derivation of principles which will enable an expression of that vision to be enunciated so as to reflect moral theory."⁴⁶ According to this theory, the main goal is the developing of a well-ordered society which will advance the good of its members in accordance with a public conception of justice.

John Rawls' suggests a hypothetical congress of persons who are to choose as the result of discussion and agreement, the basic principles that ought to guide their society, this is known as the original position.⁴⁷ The original position is only attained if, the persons involved in the

⁴³ Rawls J, *A Theory of Justice*, revised edition, 3.

⁴⁴ Rawls J, *A Theory of Justice*, revised edition 3.

⁴⁵ Freeman M, *Lloyd's Introduction to Jurisprudence*, Sweet and Maxwell, 2014, 583.

⁴⁶ Curazon P, Lecture notes on Jurisprudence, 199.

⁴⁷ Curazon P, Lecture notes on Jurisprudence, 200.

selection of principles acquire a veil of ignorance. This veil of ignorance is meant to facilitate the achievement of objectivity.⁴⁸

According to Rawls, primary goods are the things that every rational individual is assumed to need as regards their life plan.⁴⁹ This class of goods, can be defined as that which is necessary for a rational person to meet their rational desires, the necessary means to an end.⁵⁰ These social primary goods include; rights, liberties, opportunities and powers, though Rawls suggested that the most important primary good was self-respect.⁵¹ The resolution of those in the original position ought to be the division of these social primary goods in an equal manner unless unequal distribution of one or all of them would lead to the benefit of the least advantaged members of society. The secondary goods are that which a person individually thinks is necessary for him to live a good life.⁵²

He further elaborates on two fundamental principles of justice as fairness, these principles are congruent with disparate types of democratic regimes. The people ought to choose which system works for them in view of their historical traditions and institutions. The first being the right to each person having the most extensive liberty compatible with the liberty of others.⁵³ Basic liberties include; liberty of conscience, freedom of speech and assembly among others. John Rawls' second cardinal end to the achievement of justice stipulates that justice must achieve equality of all.⁵⁴ John Rawls also stated that differential treatment can be permitted if it ascertains the well-being of the least well off in a given scheme. The second cardinal is

⁴⁸ Rawls J, *A Theory of Justice*, revised edition, Belknap Press of Harvard University Press, Cambridge, 1999, 118.

⁴⁹ Rawls J, *A Theory of Justice*, revised edition, 54.

⁵⁰ Wanjala S, 'Substantive over Procedural Law in Kenya; Gains Under the 2010 Constitutional Dispensation' LLB Dissertation, Strathmore University, Nairobi, 2017, 5.

⁵¹ Rawls J, *A Theory of Justice*, revised edition, 54.

⁵² Cropp N, 'The Social Utility of Rawls Theory of Justice: Can it Help Us Avoid Unjust Systems', *UCL Jurisprudence Review* 1998, 189.

⁵³ Rawls J, *A Theory of Justice*, revised edition, 53.

⁵⁴ Rawls J, *A Theory of Justice*, revised edition, 53.

closely tied to the just savings principle, which is a requisite for the intergenerational security of justice.⁵⁵

Rawls acknowledges the fact that these two principles may conflict, and to resolve this, Rawls suggests that the people in the original position ought to have priority rules. The first rule of priority is that of liberty.⁵⁶ The restriction of liberty is only to be done for the sake of liberty.

There are two cases; the denial of liberty to one must strengthen the total system of liberty shared by all and it must be accepted by those with lesser liberty. The priority of justice over efficiency and welfare, is the second priority rule.⁵⁷

Justice is fairness, but liberty is all important. Liberty is the public rules of the basic structure of society. The norms surrounding basic liberties apply to all persons equally.

The research the posits that the underlying objective of this theory was to achieve the Rule of law. Rawls states that the Rule of Law is ‘the regular and impartial administration of public rules applied to the ‘legal system’’.⁵⁸ He goes on to define a legal system as “a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation”.⁵⁹ This definition can be further interpreted into four characteristics; the ability for the concerned to abide by the laws, similar treatment of similar cases, law must be applied non-retroactively and natural justice must be applied.⁶⁰

Rawls’ conception grants a larger interpretation of the term liberty, it includes; fairness, justice, democracy, human rights and human dignity.⁶¹

2.3. Critiques of John Rawls’ Theory of Justice

According to Dworkin, the ‘original position’ fundamentally is potentially erroneous as the opinion held by the hypothetical congress, may differ with or without the veil.⁶² This is because

⁵⁵ Curazon P, Lecture notes on Jurisprudence, 200.

⁵⁶ Rawls J, *A Theory of Justice*, revised edition, 215.

⁵⁷ Rawls J, *A Theory of Justice*, revised edition, 215.

⁵⁸ Rawls J, *A Theory of Justice*, revised edition, 207.

⁵⁹ Rawls J, *A Theory of Justice*, revised edition, 207.

⁶⁰ Radin M, ‘Reconsidering the Rule of Law’ in Bellamy R (ed) *The Rule of Law and Separation of Powers*, 2nd Series, International Library of Essays in Law and Legal Theory, Burlington, 2005, 788.

⁶¹ Rodriguez D, McCubbins M and Weingast B, ‘The Rule of Law Unplugged’, 59(6) *Emory Law Journal*, 2010, 1455.

⁶² Curazon P, Lecture notes on Jurisprudence, 202.

a person may be more aware of the advantages and disadvantages of the decisions made pertaining to his social position without the veil.

Further, Rawls has been criticised on the ground that if those in the original position were free from reality, background and experiences, how then would they arrive at significant deductions regarding their world and social arrangements within it.⁶³

Additionally, what guarantees that those in the original position would gravitate towards the social primary goods?⁶⁴ What stops them from an inclination to an authoritarian system of efficiency? In the case that they arrive at an order of goods that is prefaced upon severe control ‘in the name of a greater freedom’, what ought to transpire then?

There is detection of a preference by American liberals in the 1970s, towards a more egalitarian society. This seems to be the case with Rawls.

2.4. Relevance of the Theory to The Rights to a Nationality for Children of Nubian Descent

To begin from where this very theory is premised, at the original position, where the law makers ought to forget their realities and all other factors that influence their day-to-day life in order to achieve objectivity. This point of view offers a very good basis of objection to the response and action that the Kenyan Government has so far taken. The granting of nationality to the Nubian community has been described as institutionalised discrimination, this has been the opinion of the Kenya National Commission of Human Rights.⁶⁵ The laws in Kenya are not fair to those of a stateless status, this has also been seen in the situation affecting those of Pemba and Makonde descent.⁶⁶

This original position ought to make laws and rules that enable the social primary goods of the citizens to thrive. The right to name and registration at birth is imperative as without it, the child is endangered of being blocked out of society, denied the right to an official identity, a recognised name and nationality.⁶⁷ It also opens the door to the enjoyment and realisation of other socio-economic rights. It can however be argued that the right to registration does not

⁶³ Curazon P, Lecture notes on Jurisprudence, 202.

⁶⁴ Curazon P, Lecture notes on Jurisprudence, 202.

⁶⁵ Child Rights International Network, ‘Kenya: How to get recognised – Nubian Children and The Struggle for Citizenship’, 2 -< https://archive.crin.org/sites/default/files/kenyacasesstudyfinal_1.pdf>- on 25 September 2020.

⁶⁶ Ndubi M, ‘The Makonde: From Statelessness to Citizenship in Kenya’ 2017 -< <https://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html>>- on 25 September 2020.

⁶⁷ *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 38.

fully grant the child full enjoyment of rights, the absence of registration can also lead to the child suffering a considerably.⁶⁸

The primary and secondary goods are of utmost importance to children of Nubian descent. This is because in order for their rational desires to be met, the right to a nationality ought to be granted to them. Nationality is a prerequisite, as it opens doors and affords certain protections that are necessary for the proper growth and development of children.

The two principles of justice; one premised on liberty and the other premised on justice as equality for all. He places a caveat upon the possible limitation of rights, only if such a limitation is to benefit those in a vulnerable situation. The status of statelessness has generally been attached to communities comprising the minority and marginalised.⁶⁹ Children of Nubian descent experience differential treatment as opposed to other children in Kenya, the Committee found that such treatment is not seen as proportional to a legitimate State interest or necessary to meet any other particular interest.⁷⁰ The objective of the State ought not to accelerate the occurrence of Statelessness but ought to prevent it.⁷¹ The rule of law, according to the research, is however not being maintained and practised. This is because it is clear that the Nubian community has lived within Kenya since the colonial period, hence making them properly suited to be granted nationality by registration and finally by birth.⁷² The rule of law is also not being maintained as the Children of Nubian descent are being denied their right to a nationality under Article 53 of the Constitution of Kenya. The Rule of law is also highly disregarded, in that the government of Kenya is yet to properly implement the directions given by the African Committee of Experts.⁷³

⁶⁸ Fokala E and Chenwi L, 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee' 6 *African Journal of Legal Studies*, 2013, 365.

⁶⁹ United Nations High Commissioner for Refugees, 'Coalition on every Child's Right to a Nationality: Working together to end childhood statelessness', 2018, 2 - <https://www.unhcr.org/ibelong/wpcontent/uploads/IBELONG_Minority-Children-and-Statelessness.pdf>- on 9 October 2020.

⁷⁰ *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 57.

⁷¹ Fokala E and Chenwi L, 'Statelessness and Rights, 368.

⁷² *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 3.

⁷³ Fokala E and Chenwi L, 'Statelessness and Rights, 362.

2.5. Conclusion

John Rawls Theory of Justice supports the assertions made regarding the children of Nubian descent having the right to be recognised and fully enjoying their liberties without the incumbency of any political theory or social situation. It is therefore important that the right to nationality, under Article 53, is granted to children of Nubian descent in order to maintain justice as fairness and the liberty for all.

CHAPTER THREE: LEGAL FRAMEWORK ON THE STATUS OF STATELESSNESS

3.1. Introduction

The status of statelessness is not limited to a specific geographic area. It is however a phenomenon that is manifest across the globe. Due to this, there have been multiple laws and regulations implemented by the different regulatory bodies and different States providing for statelessness and its prevention. This chapter delves into discussing the legal framework surrounding statelessness. The discussion covers the national (specific to Kenya), regional and international legal frameworks. This chapter then concludes with stating whether the laws in Kenya are sufficient to deal with the status of statelessness.

3.2. National Legal Framework

Kenyan citizens benefit from the expansive bill of rights provided for by the Kenyan Constitution. Article 13(2) of the Kenyan Constitution states that ‘citizenship may be acquired by birth or by registration’. The Kenyan Government has espoused regulations providing for circumstances by which a person can become a Kenyan citizen, this is found under Chapter III of the Constitution of Kenya and the Kenya Citizenship and Immigration Act of 2011. The two subsequent Constitutional articles speak to the essentials of these two practices. Kenyan citizenship by birth is envisioned under Article 14 as read with Clause 30 of the Sixth schedule of the Kenyan Constitution. The conditions involved are that one ought to be born of a Kenyan citizen, a child from an unknown background found in Kenya who appears to be below the age of 8 years and finally a person who ceased being a Kenyan citizen.⁷⁴ Citizenship by registration requires the following conditions: if one is married to a Kenyan citizen for a period of 7 years, if one is lawfully residing in Kenya for a consecutive period of 7 years and a non-citizen adopted by a citizen.⁷⁵

Stateless persons and their descendants have also been given a place in the law on how to gain citizenship. Stateless persons, if living in Kenya for a continuous period since 12th December 1963 are deemed to be legal residents and eligible to gain citizenship, in so far as they have; the ability to speak and understand Swahili or a local language; not been convicted of a crime

⁷⁴ Article 14, *Constitution of Kenya* (2010).

⁷⁵ Article 15, *Constitution of Kenya* (2010).

and sentenced to 3 years or more in prison; have the intention to live in or continue to have close relations with Kenya after attaining registration and finally, understand what is required

of them as citizens of Kenya.⁷⁶ Descendants of stateless persons can also gain citizenship if at the age of 18: their parents are eligible to be registered under section 15 of the Kenya Citizenship and Immigration Act; they were born in Kenya and continue to live in Kenya; have not for a moment possessed a passport or identification documents of any other country; have not been convicted of any crime and sentenced to a period of more than 3 years; the ability to speak and understand Swahili or a local dialect; has the intention upon attaining citizenship to continue to live or maintain a close relationship with Kenya and understands what is required of them as a Kenyan citizen.⁷⁷ This effort made by the Legislature is extremely important in finding a legal basis for granting the children of Nubian descent a nationality. However, it is problematic as it offers no recourse in solving childhood statelessness, as one has to wait till the age of 18 to attain citizenship.

Furthermore, the Constitution of Kenya on account of article 2(5) and 2(6) allows for international law to be included in Kenya's legal framework. Kenya is party to the African Children's Charter and the Convention on the Rights of the Child, it is however not party to the 1954 UN Convention nor the UN Convention on the prevention of statelessness.⁷⁸ A Draft Protocol to the African Charter on the Right to Nationality and the eradication of Statelessness in Africa was adopted by the African Commission on Human and Peoples rights during its 18th extraordinary session on 2 August 2015 in Nairobi, Kenya, though it is not clear as to whether Kenya has ratified it.⁷⁹ The UN Convention on the prevention of statelessness offers a legal framework in assisting its member States on the means as to which children without a nationality can attain one, this may be a step in the right direction that Kenya is missing out on.

3.3. Regional Legal Framework

The right to nationality and statelessness among children is found under the African Children's Charter. The aforementioned charter was adopted in 1990, came into force in 1999 and its monitoring organ is the African Committee of Experts on the Rights and Welfare of the Child

⁷⁶ Section 15, *Kenya Citizenship and Immigration Act*, No. 12 of 2011.

⁷⁷ Section 17, *Kenya Citizenship and Immigration Act*, No. 12 of 2011.

⁷⁸ -< <http://kenyalaw.org/treaties/>>- on 30 January 2021.

⁷⁹ -< <http://refugee-rights.org/meeting-of-au-member-states-on-the-draft-protocol-on-the-right-to-a-nationalityin-africa/>>- on 10 February 2021.

(herein after African Committee). Article 6 of the African Children’s Charter governs the right to a name, nationality and birth registration. Article 6(3) of the African Children’s Charter provides that “Every child has the right to acquire a nationality” and 6(4) requires States Parties to grant nationality to an otherwise stateless child born in their territory. These rights have been explored in detail by the African Committee in both the General Comment of the African Children’s Committee ACERWC/GC/02 (2014), adopted in April 2014 and also the in the *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) v Kenya*. The jurisprudence provided by the General Comment and the decision offer a good premise on discussing the interpretation of the statelessness and the right to a nationality.

To begin with, the African Committee in its general comment on Article 6 of the African children’s charter, stated these six key principles as the guiding factors to the implementation of article six of the African Children Charter. The principles are as follows; non-discrimination, best interests of the child, survival, development and protection, participation, interdependence and indivisibility of the rights within article 6 and interdependence and indivisibility of the rights within the African Charter.⁸⁰ All these principles are relevant in understanding the problem of child statelessness and the protection of children’s right to a nationality. .

The best interest principle as discussed by the African Committee, is provided for under Article 4(1) of the African Children’s Charter.⁸¹ The policies, laws and programmes relating to the development of birth registration system and the acquisition of a nationality must be in conformity with the best interests of the child.⁸² The principle of non-discrimination encompasses an allowance for children to have the right to a nationality irrespective of any status surrounding their reality.⁸³ The report of the UN Secretary General, stated that ‘where a child is precluded from obtaining a nationality on discriminatory grounds, it amounts to

⁸⁰ *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, 8.

⁸¹ Which States that, ‘In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration’.

⁸² *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, 15.

⁸³ Institute on Statelessness and Inclusion, ‘Addressing the Right to a nationality through the Convention on the Rights of the Child’, 2016, 8 -< https://files.institutesi.org/CRC_Toolkit_Final.pdf>- on 20 October 2020.

arbitrary deprivation of nationality'.⁸⁴ The African Committee also noted that no ground can justify a child's deprivation of their right to acquire a nationality under article 6 of the Charter.⁸⁵

The Right to a name, registration and nationality is crucial to a child's identity, it also contributes to the prevention from harmful practices that usually threaten children whose identity cannot be established.⁸⁶ Thus, enhancing their survival, development and protection. As far as may be possible, the child ought to be given the opportunity to be heard and to take into consideration the child's views if they are capable of communicating them in judicial and administrative proceedings where issues relating to name, nationality or identity are at stake.⁸⁷ The right to a name, registration and a nationality are interdependent and indivisible. In complying with obligations reducing statelessness, states ought to ensure that all children born in its territory are registered.⁸⁸

Secondly, in making its decision the African Children's Committee made relevant ratio decidendi and obiter dicta, the research seeks to mention that which it finds profound. To begin with, the effort of making the child wait until 18 years of age to apply for a nationality does not seem to fall within the spirit of Article 6 of the African Children's Charter, nor promotes the child's best interest.⁸⁹ Further, in fulfilling its duties under Article 6 of the African Charter, a State ought to ensure that a child born within its territory, acquires nationality at the time of their birth, if nationality is not granted by another State.⁹⁰ State parties ought to prevent statelessness in the best way possible. The committee further noted and commended Kenya for the implementation of Article 14 of the Kenyan Constitution, though it presents a caveat stating that the provision is not sufficient in preventing statelessness.⁹¹

⁸⁴ UN General Assembly, "Secretary-General report on Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless", A/HRC/31/29, 16 December 2015, 8.

⁸⁵ This stems from Article 3 of the African Children's Charter. It provides that; 'Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

⁸⁶ *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, 18.

⁸⁷ Article 4(2), *African Charter on the Rights and Welfare of the Child*.

⁸⁸ *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, 23.

⁸⁹ *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 42.

⁹⁰ *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 50.

⁹¹ Article 14(4), *Constitution of Kenya* (2010), it states 'A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth'.

The African Children's Committee further declares that the obligation of State Parties under the African Children's Charter is to ensure that all children are registered immediately after birth is not limited to its laws, but also extends to addressing de facto limitations and obstacles to birth registration.⁹² In addition to this, the obligation found under Article 6(4) of the African Children's Charter, is that State parties ought to ensure that all necessary measures are taken to prevent the child from having no nationality.⁹³

From the discoveries made by looking at the regional instrument applicable to Kenya, it would appear that Kenya has not complied with the decision of the African Committee. A common thread that seems to be flowing in the Kenyan regulation is the requirement for descendants of stateless persons to attain the age of 18 to apply for citizenship, being in contravention of the Child's best interest and is not in the spirit of the African Children's Charter, as stated by the African Committee.

Nevertheless, the African Children's Charter and the African Committee emphasise on the importance of child registration and granting nationality at birth, but it does not give guidance to member States as to how the registration of stateless children ought to be done.

3.4. International Legal Framework

Article 15 of the Universal Declaration of Human Rights states that "everyone has the right to a nationality, and no one shall be arbitrarily deprived of his nationality or denied the rights to change his nationality".⁹⁴ This recognition by the general international community facilitated the recognition of the right to a nationality as a fundamental right of every human being. According to the 1954 UN Convention, a stateless person is defined as "one who is not considered a national by any state under the operation of its law".⁹⁵

In specific regard to children, article 7(1) of the CRC recognises the right to a nationality providing that; "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents".⁹⁶ It further goes on to state that the implementation of these rights ought to be done in accordance with their national law and the obligations under

⁹² *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 40.

⁹³ *IHRDA and Open Justice Initiative v The Government of Kenya*, ACERW, 52.

⁹⁴ Article 15, *Universal Declaration of Human Rights*, 10 December 1948.

⁹⁵ Article 1, *Convention Relating to the Status of Stateless Persons*, 1954.

⁹⁶ Article 7(1), *The United Nations Convention on the Rights of a Child*, 20 November 1989.

the relevant international instruments in this field, in particular where the child would otherwise be stateless.⁹⁷

Further, the 1961 UN Convention on the Reduction of Statelessness (herein after the 1961 Convention) is quite comprehensive in informing States parties the specific circumstances in which special measures are required and demarcating appropriate safeguards in granting nationality. It also provides guidance on the implementation on the right to a nationality, offering means to avoiding situations of statelessness. This is provided under Article 1 of the 1961 Convention which prescribes the means as to which a State that does not confer nationality through birth, can grant nationality to children born within its territory. It provides that nationality ought to be granted subject to one or more of the following conditions: “that the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State; that the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State and that the person concerned has always been stateless”.⁹⁸

Similarly, countries where descent from a parent, holding their nationality does not confer nationality provides for methods on which children with such a reality can attain a nationality. To begin with: “that the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State; that the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State; that the person concerned has not been convicted of an offence against national security and that the person concerned has always been stateless”.⁹⁹

Acceding to the 1961 Convention is extremely important as it is a way for States to demonstrate their commitment to human rights specifically the right to a nationality. Providing also for means as to which States can address inefficiencies that arise as a result of different perspectives to the attribution of nationality worldwide. The 1961 Convention notes that one ought to continuously live in the country for a period of less than three years after lodging the application for citizenship. This is of great importance, if done properly, stateless children

⁹⁷ Article 7(2), *The United Nations Convention on the Rights of a Child*, 20 November 1989.

⁹⁸ Article 1(4), *United Nations Convention on the Reduction of Statelessness*, 30 August 1961.

⁹⁹ Article 4(2), *United Nations Convention on the Reduction of Statelessness*, 30 August 1961.

could attain citizenship before the age of 4. This would reduce the level of statelessness and eventually eradicate it, as the inheritance of the stateless status would no longer be rampant. Further, the 1961 convention also mentions that citizenship ought to be granted nationality before the age of 23, this also leaves room for interpretation. As opposed to the Kenyan legislation where one has to wait to turn 18 before applying for citizenship, the age limit has been expanded and lowered allowing for even those below the age of 18 to apply for citizenship.

Other legal instruments have also provided for these right including the: International Covenant on Civil and Political Rights, which states that every child has the right to acquire a nationality;¹⁰⁰ the Convention on the Rights of Persons with Disabilities which provides that children with disabilities have a right to a nationality;¹⁰¹ Convention on the Elimination of All Forms of Discrimination Against Women which enables women to have an equal rights with men in granting their children nationality,¹⁰² among others.

3.5. Conclusion

The legal framework relating to the status of statelessness is broad. By dint of Article 2(6) of the Kenyan Constitution, upon ratification, international treaties and conventions become part of Kenyan law. Unfortunately, Kenya is neither party to the 1954 UN Convention nor the 1961 UN Convention. This creates a situation as Kenya is left without a guiding mechanism as to how the implementation on the prevention of statelessness ought to occur. The laws in Kenya appear to be slightly problematic as one has to attain the age of 18 to apply for citizenship, thereby enhancing the problem of childhood statelessness. The administrative application of Kenyan laws, as seen through the comments of the African Committee, does not seem to coincide with the prevailing spirit of the Right to a nationality.

¹⁰⁰ Article 24, *International Convention on Civil and Political Rights*, 19 December 1966.

¹⁰¹ Article 18, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965.

¹⁰² Article 9, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979.

CHAPTER FOUR: EFFECTS OF STATELESSNESS ON CHILDREN OF NUBIAN DESCENT AND MEASURES TAKEN BY GOVERNMENT TO ADDRESS THEIR PLIGHT

4.1. Introduction.

This chapter delves into analysing the effects that the status of statelessness has had on the children of Nubian descent. It also looks into the measures the government of Kenya has made to address the situation and whether this has been adequate.

4.2. Effect of the status of Statelessness on the Rights of Nubian Children.

In an attempt to enforce their rights, the IHRDA and the OSJI on behalf of Children of Nubian descent, sought the intervention of the African Children's Committee. The Kenyan government was found to be in contravention of the right to a name and nationality, right to health, right to education and was also found to be acting in a discriminatory manner with regards to the application of its laws.¹⁰³ The part below delves into a discussion of how the status of statelessness has affected the rights of children of Nubian descent.

a) The Right to education

To begin with, the right to education is provided for under article 53(1)(b) of the Kenyan Constitution. The fundamental principles underpinning the right to education are the principles of non-discrimination, solidarity, equality of opportunity and treatment and universal access to education.¹⁰⁴ According to Article 1 of the *1960 UNESCO Convention against Discrimination in Education* such “distinction, exclusion, limitation or preference may be manifested in depriving any person or group of persons of access to education of any type or at any level; of limiting any person or group of persons to education of inferior standard; or of establishing or maintaining separate education systems or institutions for persons or groups of persons.”¹⁰⁵ From this, it can be determined that the right to education is limited when any of the three is found to be carried out. In the case of children of Nubian descent, they have limited access to educational facilities. This is attributed to the fact that this community has been provided with

¹⁰³ *IHRDA and ASJI on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, ACmHPR, 69.

¹⁰⁴ -< <https://en.unesco.org/themes/right-to-education/fundamental-principles>>- on 4 February 2021.

¹⁰⁵ Article 1, *UNESCO Convention against Discrimination in Education*, 14 December 1960.

minimal schools and a disproportionately nether allocation of resources in the sphere of education, leading to their educational needs being overlooked as well.¹⁰⁶ Further evidence of this can be drawn from a case study done by Institute on Statelessness and Inclusion, of a child of Nubian descent in Kenya named Sultan. Before he enrolled in Form 1, Sultan stayed at home for a period of one year because of the lack of a birth certificate, which caused him emotional distress as most of his peers were at school while he was at home.¹⁰⁷ This example goes on to show the inequalities brought about by the denial of birth registration to all.

b) The Right to Health care

To begin with the right to health care has been enshrined under article 53(1)(c) of the Kenyan Constitution. The children of Nubian descent have challenges accessing health services. Their unconfirmed status as nationals to the Republic of Kenya has led to a disproportionate access to available healthcare resources.¹⁰⁸ Their community has been economically disadvantaged in the distribution of facilities and resources, as their cry for a nationality has led to the overlooking of health care services over a period of time.¹⁰⁹ They have had minimal access to health services than comparable communities who were not comprised of children of Nubian descent, their health needs have not been provided for even in the context of resources available for the fulfilment of this right.¹¹⁰ This can also be evidenced by the fact that Sultan could not find his health card and he also could not showcase the hospital attendance register as the clinic where he received medical attention as a little boy was closed.¹¹¹ This goes further to show that the healthcare resources provided for the Nubian community, though already limited, continues to deteriorate.

c) Right to name and nationality

The birth certificate granted by the Government of Kenya directly stipulates that it is not evidence of nationality thereby leaving even registered children stateless.¹¹² The children of

¹⁰⁶ Fokala E and Chenwi L, 'Statelessness and Rights', 370.

¹⁰⁷ Institute on Statelessness and Inclusion, 'The World's Stateless Children', Wolf Legal Publishers, Netherlands, 2017, 201.

¹⁰⁸ Fokala E and Chenwi L, 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee', 6 *African Journal of legal Studies*, 2013, 368.

¹⁰⁹ General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, 32.

¹¹⁰ *IHRDA and ASJI on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, ACmHPR, 62.

¹¹¹ Institute on Statelessness and Inclusion, 'The World's Stateless Children', 201.

¹¹² *IHRDA and ASJI on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, ACmHPR, 43.

Nubian descent, as opposed to other children in Kenya, do not have a licit expectation of recognition as nationals on attainment of adulthood as they are not accorded identification cards, which forms an essential aspect nationality.¹¹³ This uncertainty proves to be limiting to the future prospects of the children of Nubian descent and often leaves them stateless.

d) Racial and ethnic discrimination

There are rigorous, discriminatory measures for granting citizenship to Nubians. It is done through a vetting process that requires Nubians to produce supporting documents for Kenyan nationality, such as their grand parents' identification documents, which other Kenyans do not have to provide.¹¹⁴ They have to be interrogated by the vetting committee who grants approval, before them visiting the Magistrates' Court in order to swear an affidavit underpinning their assertion for citizenship and pay a court fee.¹¹⁵ The Nubian Community is not regarded citizens of Kenya or in their land of origin, they are thus declared de facto stateless people.¹¹⁶

The KNCHR in its report stated that "the process of vetting Nubians is discriminatory and violates the principle of equal treatment. Such a practice has no place in a democratic and pluralistic society".¹¹⁷ This has been described as institutionalised discrimination.¹¹⁸ Discriminatory treatment, can be justified on the basis that the established reasons for possible limitations are; legitimate, proportionate with and absolutely necessary.¹¹⁹ The African Children's Committee stated that, "that the current discriminatory treatment of the Government of Kenya in relation to children of Nubian descent is not "strictly proportional with" nor

¹¹³ *IHRDA and ASJI on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, ACmHPR, 43.

¹¹⁴ Open Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communication 317/06, ACmPHR, 2010, 30.

¹¹⁵ *The Nubian Community in Kenya v. The State of Kenya*, ACmPHR, 33.

¹¹⁶ Chrimes D, 'Indigeneity and Kenya's Nubians: Seeking Equality in difference or sameness', 332.

¹¹⁷ KNHCR, 'An Identity Crisis? Study on the issuance of national identity cards in Kenya', 2007, 24 <http://citizenshiprightsafrika.org/wp-content/uploads/2016/04/KNCHR_Identity-crisis_2007.pdf>- on 7 January 2021.

¹¹⁸ Committee on the Elimination of Racial Discrimination, Concluding Observations on the Initial to Fourth Periodic Reports of Kenya, CERD/C/KEN/CO/1-4, 2011, 21.

¹¹⁹ *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* [2016] eKLR.

“absolutely necessary” for the legitimate State interest to be obtained”.¹²⁰

4.3. The Measures that the Government of Kenya has undertaken following the decision at the African Children’s Committee.

In September 2015, the Department of Civil Registration in Kenya, in collaboration with the Nubian Rights Forum (herein after NRF) and the UNHCR, began campaigns for birth registration of all children especially in Kibera.¹²¹ Nubian elders were also included in the vetting committee.¹²² This creates a semblance of fairness as the community itself is involved in determining who forms part of the community and who is entitled to citizenship .

In January 2019, Kenya introduced a new digital identification system. Apart from the risk that unregistered individuals might be left out of the National Integrated Identity Management System (hereinafter NIIMS), applicants are required to provide sensitive information to acquire IDs as well as unique identification number known as *Huduma Number*.¹²³ The information required included each person’s nationality, place of birth, parentage, marital status, education background, employment status, disability, agricultural activities, and biometrics.¹²⁴ Requiring that extent of information is significantly burdensome but is also in violation with Article 31 of the Kenyan Constitution with regards to the right to privacy but it also risks a further entrenchment of discrimination of marginalized groups in Kenya.¹²⁵ This eventually led to the *Nubian Rights Forum and Others v. Attorney General and others* case being heard in the Kenyan High Court in 2019. The High court in its determination prohibited the

¹²⁰ *IHRDA and ASJI on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, ACmHPR, 57.

¹²¹ KNCHR, ‘Briefing Report on The Implementation of the African Charter on the Rights and Welfare of the Child: To African Committee of Experts on the Rights and Welfare of the Child’, 2020, 10 -< <https://www.knchr.org/Portals/0/KNCHR%20Briefing%20Report%20on%20the%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child%20.pdf>>- on 20 January 2021.

¹²² KNCHR, ‘Briefing Report on The Implementation of the African Charter on the Rights and Welfare of the Child’, 10.

¹²³ Regulation 4, *The Registration of Persons (National Integrated Identity Management System) Regulations*, 2020.

¹²⁴ Open Society Justice Initiative, ‘Kenya’s National Integrated Identity Management System’, 2020, 2-3 <https://www.justiceinitiative.org/uploads/b107f39d-a904-4c0a-9dd7-7ec1fe6b0100/briefing-kenya-niims20200129.pdf>- on 15 February 2021.

¹²⁵ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* (2020) eKLR

implementation of NIIMS until an appropriate and comprehensive constitutional regulatory framework on its implementation.¹²⁶

The UN High Commissioner for Refugees convened a High-Level Segment on Statelessness (HLS) on 7 October 2019.¹²⁷ During this segment Kenya made a number of commitments in efforts of reducing and eventually eradicating statelessness. To begin with Kenya pledged to re-establish the task force on stateless and to legitimize the draft National Action plan to abolish statelessness followed with its implementation by 2019.¹²⁸ It also pledged to accede to the 1954 UN Convention and the 1961 by 2021.¹²⁹

4.4. The effectiveness of the Measures undertaken by the Government of Kenya.

In 2013 the OSIJ and the NRF began a paralegal project in Kibera. This was implemented in order to assist members of the Nubian community obtain all the documents enclosed under a proper functioning CRVS. Its records track application processes for each form of documentation, developing an important fount of information on the implementation of the Decision.¹³⁰ The records provided by the NRF and OSIJ through their paralegal project in Kibera, illustrate that Nubians continue to suffer discrimination in access to proof of their nationality. For example, the civil registration office in Nairobi, has given timelines for the processing of civil documentation including birth certificates. In particular, birth certificates are to be processed within a single day, while in reality, the average time for processing late birth applications among NRF clients was 41 days.¹³¹ This elaborates that although birth certificates were being granted to children of Nubian descent, it was happening at a slower rate showing that the measures put in place are inefficient.

In 2014, the African Committee considered Kenya's submission in uniformity with the obligation found in Article 43 of the African Charter. The committee noted with concern that the issue of children of Nubian descent was still present, it also emphasized the non-

¹²⁶ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* (2020) eKLR.

¹²⁷ UN Refugee Agency, 'High Levels Segment on Statelessness: Results and Highlights' 2019, 3 <<
<https://www.refworld.org/pdfid/5ec3e91b4.pdf>> on 2 February 2021.

¹²⁸ UN Refugee Agency, 'High Levels Segment on Statelessness: Results and Highlights', 61.

¹²⁹ UN Refugee Agency, 'High Levels Segment on Statelessness: Results and Highlights', 61.

¹³⁰ Briefing Paper: Implementation of *Nubian Minors v Kenya*, 2014, 2 <<
<https://www.justiceinitiative.org/uploads/799e453a-6e30-4760-aa81-3dc3de4a8eaf/litigation-implementationbriefing-nubian-children-20170606.pdf>>- on 5 December 2020.

¹³¹ Briefing Paper: Implementation of *Nubian Minors v Kenya*, 2014, 4.

implementation of its decision of 2011.¹³² It further urged Kenya to urgently take measures to comply with the decision of the Committee as well as that of the Commission.¹³³ This also serves as a benchmark, elaborating that by the time it was 2014, the Kenyan Government still had not done anything to mitigate the situation facing children of Nubian descent.

Furthermore, in 2017, a review of the decision made by the African Committee was held in Lesotho, both representatives of the Kenyan Government and the Nubian Community were present. Here, the OSJI and the NRF made comprehensive proposals to the Kenyan government and the Committee on how the implementation of the decision can be achieved.¹³⁴ They made a couple of observations and recommendations pertaining to the decision made by the African Committee. Illustrating that;¹³⁵ ‘vetting based on Ethnicity still continued, the right to an education was still interfered with as children without birth certificates were disenfranchised from sitting national exams. During the vetting process, the Nubians are still expected to present documentary proof of their application, these documents have no statutory or regulatory guidelines, nor does the vetting process have a guideline as to what may be asked. This is further proof that the Kenyan government had not entirely put to stop the injustices and the plight that the children of Nubian descent were facing’.

Kenya indeed established the national taskforce for identification and registration of eligible stateless persons as Kenyan citizens, their tasks include but are not limited to developing a criteria for eligibility and verification of nationality for stateless persons.¹³⁶ In 2021, Kenya is yet to ratify the 1954 Convention and the 1961 Convention, thereby denying itself and the affected community a framework on how these class of children can be granted nationality.

¹³² African Union, Concluding Recommendations by the African Committee of experts on the Rights and welfare of the Child on the Kenya 1st Periodic report on the Status of implementation of the African Charter on the Rights and Welfare of the Child, 2014, 7.

¹³³ African Union, Concluding Recommendations by the African Committee of experts on the Rights and welfare of the Child on the Kenya 1st Periodic Report’, 4.

¹³⁴ Bigham L, ‘Nubian Children Denied a Future’, -< <https://www.justiceinitiative.org/litigation/children-nubian-descent-kenya-v-kenya>>- on 5th December 2020.

¹³⁵ Open Society Foundations, Namati and Nubian Rights Forum ‘Briefing Paper: Implementation of *Nubian Minors v Kenya*’, 2014, 3-6.

¹³⁶ ‘The National Taskforce for the identification and Registration of Eligible Stateless Persons as Kenya Citizens’ Gazette Notice No. 7881.

From the above, it is clear that the Kenyan government may still have more to do in order to completely fulfil its obligations as a member State of the CRC, African Children's Charter and its Constitution under Article 53.

4.5. Conclusion.

The status of statelessness has had far reaching effects on the various communities affected by this status. The children of Nubian descent are not exempt from this predicament and has had its

fair share of plight in the struggle for recognition. Although the community sought help from the African Children's Committee, they continue to struggle as neither of the decision have been implemented nor the current laws in Kenya sufficient to remedy the current situation at hand. Hopefully, with more child focused organisations engaging in intensive lobbying, the decision from the African Children's Committee will be implemented in its entirety and the laws under Kenya's legal framework will be reformed to ensure that the children of Nubian descent are protected, and their rights enhanced.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

The research paper sought to address the question of nationality for Children of Nubian descent and whether the measures to mitigate their situation have been implemented. In addition to that, whether such mitigation measures have had an effect on the Children of Nubian descent, as adequate or inadequate.

The first chapter set to introduce the research problem, presented the research questions that would be answered and the hypothesis upon which the research would be premised on. The second chapter delved into discussing the theoretical framework that supports the right to nationality and non-discrimination of children of Nubian Descent. The third chapter discussed the legal framework on statelessness touching on the national, legal and international framework. Chapter four comprised of the effects that the status of statelessness has had on the Children of Nubian descent, an analysis on the mitigation the Kenyan Government has undertaken to help situation if any and whether such mitigation was effective.

The research is thus concluded by expounding on the conclusions arrived at in the course of this study and offering recommendations that may remedy the problem.

5.2. Conclusion

The Nubian Community in Kenya still do not have basic citizenship rights after living in Kenya for five generations. The situation only seems to get worse as the status of statelessness is inherited from generation to the next leaving the community vulnerable and without recourse. As stated in the case of *Gillick v West Norfolk and Wisbech Area Health Authority*, a child's best interest is of paramount significance.¹³⁷ In order to ensure that the child's best interest is met, equal recognition and non-discrimination as to the right to nationality of Children of Nubian descent ought to be upheld. Kenya is left without a guiding framework as to how the implementation on the prevention of statelessness ought to occur. The laws in Kenya appear to be slightly problematic as one has to attain the age of 18 to apply for citizenship, thereby enhancing the problem of childhood statelessness. The decision of the African Children's Committee is yet to be fully implemented and children of Nubian descent are yet to reap the benefits of its implementation. Taking cognisance of the entire research, the research concludes as follows; the Children of Nubian descent have faced challenges brought about by their lack of nationality and status of Statelessness. This has proved to be an impediment to their growth

¹³⁷ *Gillick v West Norfolk and Wisbech Area Health Authority*, (1986), The United Kingdom House of Lords.

and development as a people. The right to a nationality is of great importance as without it, one's link to a nation and rights is extinguished, this seems to be the fate of the Nubian Community as the right to health, education among other rights have been adversely affected. The Kenyan Government in its attempt to mitigate the circumstances has failed to provide adequate measures of mitigation.

5.3. Recommendations

5.3.1. Acceding to the 1954 United Nations Convention Relating to the Status of Stateless Persons Convention and the 1961 United Nations Convention on the Reduction of Statelessness.

By Acceding to the 1961 Convention and the 1954 Convention, Kenya demonstrates its commitment to human rights specifically the right to a nationality. Also providing for a means as to which Kenya can address gaps the gaps resulting from Kenya's current legal framework.

5.3.2. Re-enforcing the National Task Force on Statelessness

The Kenyan government had pledged to re-enforce the National Task Force which it did under the wing of the Cabinet Secretary for Interior and Co-ordination of National Government.¹³⁸ However this was short lived as the tenure was limited to a year.¹³⁹ This research recommends that the task force ought to be re-established and the tenure be increased to five years, this would enable the identification and registration of eligible stateless persons in Kenya. This length of time would see to it that children being born during that period are adequately registered hence reducing childhood statelessness.

5.3.3. Re-implementation of the amendments to the Registration of Persons Act.

The High court instructed the Kenyan Government to re-implement the amendments to the Registration of Persons Act, in a manner that was appropriate and served the persons of Kenya.¹⁴⁰ The dissertation research, opines that the amendments ought to be reconsidered and

¹³⁸ 'The National Taskforce for the identification and Registration of Eligible Stateless Persons as Kenya Citizens' Gazette Notice No. 7881.

¹³⁹ 'The National Task force for the identification and Registration of Eligible Stateless Persons as Kenyan Citizens' Gazette Notice No. 7881.

¹⁴⁰ *Nubian Rights Forum and 2 others v Attorney General and 6 others, Child Welfare Society & 9 others (interested parties)* (2020) eKLR.

re-implemented in a manner that is inclusive of minority communities in Kenya, enhancing their rights and needs.

5.3.4. Unconditional Birth Registration

In its 2014 Global Action Plan to end Statelessness, the UNHCR identified this action as one to be carried out by States in an effort to end statelessness within 10 years.¹⁴¹ Despite the legal framework surrounding the Right to Birth Registration present in Kenya, together with the responsibilities under international law, it is apparent that the Registry of Births in Kenya fails to observe these obligations and continues to deny registration to Children of Nubian Descent. The rights to a nationality and birth registration are ones which are afforded to the child and thus, the documentation status of the parent should have no effect thereon.¹⁴² The implementation of a policy of unconditional birth registration will acknowledge the distinct dangers facing children, ensuring that all children have a legal means to prove their nationality, children like Sultan can find recourse and solace in knowing that they too are equal.

5.3.5. Focus of Advocacy Groups and Child Organisations on Promotion and Preservation of the Right to Nationality by Children of Nubian Descent.

Advocacy groups and Child Focused Organisations should advocate for the promotion and preservation of the right to a nationality. This may include advocating for changes in the law eradicating the discrimination against the Children of Nubian Descent in attaining a Kenyan Nationality. An example of such an organisation that already exists in Kenya is NRF and the OSJI in making recommendations to the Kenyan Government on how it can implement the decision made by the African Children's Committee.¹⁴³

¹⁴¹ UNHCR, 'Global Action Plan to End Statelessness: 2014-2024', 2014, 18 - <https://cms.emergency.unhcr.org/documents/11982/52805/UNHCR%2C+Global+Action+Plan+to+End+Statelessness+in+10+Years%2C+2014+%28in+particular+Actions+2+and+6%29/afd4ef64-5bf1-48c0-bc771385578a7c18>- on 7 January 2021.

¹⁴² Lee M, 'Is South African Refugee Law Creating a Stateless Generation?', Unpublished LLM Thesis, University of Cape town, Cape town, 2019, 53.

¹⁴³ Open Society Foundations, Namati and Nubian Rights Forum 'Briefing Paper: Implementation of *Nubian Minors v Kenya*', 2014, 3-6.

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