

Analysing the international legal framework on nationality: An African and Asian perspective

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Abstract

This article examines the prevention of and protection against statelessness through analysis of case law and laws that have dealt with this matter both internationally and at a regional level, with specific reference to two continents (Africa and Asia). The analysis also includes the remedies that are available to individuals who are stateless as well as the enforcement thereof. Cognisance is given to statelessness being a state of not belonging to any country, or not being recognised as a national of any country. The article also analyses how colonialism contributed to people being stateless and how laws have changed beyond the colonial era. Emphasis is placed on the need for consensus between states on what measures should be regarded when determining citizenship. The desktop, library research approach will be used in this research. Primary and secondary sources will be consulted. Case law, conventions and statutes will be the main sources of law. The research will evaluate the differences between the selected jurisdictions' nationality laws. The way that nationality rules have been applied in those jurisdictions will also be determined by consulting case law. Additionally, journal articles, opinion pieces, and other internet-based resources will be used as secondary sources for the research. These sources offer valuable insights into the concerns expressed by interested parties about nationality and the elements that each jurisdiction has taken into account and needs to incorporate into their legal framework.

Keywords: Nationality, statelessness, Africa, Asia, colonial

Introduction

International law has many sources that prohibit statelessness. These include the Universal Declaration of Human Rights (UDHR), in article 5¹ and article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Law (1930) which regulates the principle of nationality under domestic law.² There are also human rights conventions such as; the International Convention on the Elimination of All Forms of Racial Discrimination, the ICCPR, the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Nationality of Married Women, the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the African Charter on the Rights and Welfare of the Child (ACRWC).³ However, the instruments that specifically set out the rights of stateless people are the 1954 Convention Relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness (Conventions on Statelessness). Statelessness has components such as race, gender and ethnicity and such can be seen in the conventions mentioned above.

Historically states have had the discretion to grant nationality, this position continued post the establishment of the UDHR in 1948 which made provisions for the right of nationality for every person.⁴ In the case that a state has not yet developed any regulations determining the right to nationality, there are basic principles in place that can be considered. Some of the principles are: (i) the obligation to grant nationality to children who are born in a state and are at risk of being

¹ Article 5 provides that, '[no] one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.

² See *Van Zyl and Others v Government of the Republic of South Africa and Others* [2008] 1 All SA 102 (SCA); (SCA); 2008 (3) SA 294 (SCA), see also Shearer R and Oppeskin B "Nationality and Statelessness" in Oppeskin B, Perruchoud R and Red-Cross *Foundations of International Immigration law* (Cambridge University press 2015) 93.

³ The right to nationality is provided for, and some articles also provide for protection against statelessness, in the following articles: articles 1 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 24 of the International Covenant on Civil and Political Rights, articles 7(2) and 8 of the Convention on the Rights of the Child, article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, articles 1-3 and 7 of the Convention on the Nationality of Married Women, article 18 of the Convention on the Rights of Persons with Disabilities, article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 6 of the African Charter on the Rights and Welfare of the Child.

⁴ Article 15 of the Universal Declaration of Human Rights 1948.

stateless,⁵ (ii) prohibition of discrimination in cases related to granting of nationality and (iii) exercising due process in granting and withdrawing nationality.⁶ This norm of granting nationality to prevent statelessness was reiterated in the 1961 Convention on Statelessness in article 1 which stipulated that '[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless'. The right to nationality is provided for without any form of discrimination in the International Convention on the Elimination of Racial Discrimination (CERD).⁷ CERD does not discriminate by distinguishing between citizens and non-citizens, further it provides that when it comes to the issues of naturalisation, nationality or citizenship, persons of all nationality should be treated equally.⁸ The paper proceeds from the standpoint that quite often, nationality and citizenship in international law are used interchangeably in order to define a legal relationship that exists between a person and the state. However, in most instances, the term nationality is usually used in international treaties.⁹ Furthermore, for ease of reference, the 1954 Convention on statelessness defines a 'stateless person' as someone who is not considered as a national by any state under the operation of its law.¹⁰ This means that statelessness is a state of not belonging to any country, or not being recognised as a national of any country. In-depth guidelines on interpreting this definition have been provided by UNHCR, which states that determining statelessness should be a 'mixed question of fact and law'.¹¹ The reason for this is

⁵ Manby B "Statelessness and Citizenship in the East African Community" <https://data2.unhcr.org/en/documents/download/66807> 72 (Accessed 09-07-2020). The principle appeared for the first time in The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.

⁶ Manby B "Citizenship Law in Africa: A Comparative Study" <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 11 (Accessed 31-03-2020).

⁷ Article 5 of the Convention on the Elimination of Racial Discrimination (CERD) provides that 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (iii) The right to nationality'.

⁸ Articles 1(1) and (2) of CERD provide that:

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

See also Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination against Non-citizens, 2005 and Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 72-73 (Accessed 06-04-2020).

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

¹⁰ Article 1 of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention on Statelessness).

¹¹ Citizenship Rights in Africa Initiative "Statelessness" <https://citizenshiprightsafrika.org/theme/statelessness/#:~:text=UNHCR%20Guidelines%20adopted%20in%20>

because practice may make people stateless as the state interprets the application of its law. Therefore, regional instruments should consider formulating a distinct definition of statelessness that includes such guidelines.

Other United Nations (UN) treaties provide minimum standards in terms of nationality laws. However, there is soft law in the form of a United Nations High Commissioner for Refugees (UNHCR) Handbook that gives guidelines on prevention of childhood statelessness. Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC) provides every child with a right to a name, to be registered at birth and to nationality.¹² In 2011 the African Committee of Experts on the Rights and Welfare of the Child (the Committee) delivered the first judgment on the merits of a communication in which it interpreted article 6 of the ACRWC. The decision was in relation to the Nubian children in Kenya where the Committee of Experts held that Kenya violated its obligations that are provided in article 6 even though the Kenyan Constitution had been reformed. The reason for this was because Kenya did not sufficiently prevent statelessness as it does not guarantee nationality at birth to children that are born to stateless parents or children who would otherwise be stateless. The Committee emphasised the undesirable impact that statelessness had on children. It further held that children should, in most circumstances, be granted nationality from birth.¹³

The UN Human Rights Committee has supported the act of bestowing nationality upon every child. The Committee has noted that in order to ensure that every child is granted nationality at the time of birth, it is essential for states to adopt applicable measures that allow for every child to have a nationality. This should be done with states working together and also internally. The granting of nationality under the state's laws should be exercised without any form of

[012%20elaborate%20that%20deciding.not%20consider%20such%20an%20individual%20as%20a%20national%20%E2%80%9D](#). (Accessed 6-11-2023). See also the case of *Anudo Ochieng Anudo v United Republic of Tanzania*, App. No. 012/2015 African Court of Human and Peoples' Rights (*Anudo Ochieng Anudo*).

¹² Ibid, the draft protocol to the African Charter on the right to a nationality and the reduction of statelessness is still awaiting the input of states.

¹³ *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Kenya*, African Committee of Experts on the Rights and Welfare of the Child (*The Kenyan Nubian Minors* decision) paragraph 42. See also Manby B EAC <https://data2.unhcr.org/en/documents/download/6680775> (Accessed 06-04-2020).

discrimination between legitimate children and children who are born out of wedlock or children that are born of parents who are stateless or relying on the nationality status of one parent.¹⁴

The International Court of Justice in the *Liechtenstein v Guatemala* ICJ Reports 1955 (*Nottebohm*) case explained that the general norm of states, judicial decisions and scholarly opinions is that nationality is a bond that has a genuine connection with societal foundation. The connection includes the presence of rights and duties that are reciprocal.¹⁵ The rights that are granted by a state to its citizens differ from state to state, however, rights such as that of permanent residence in a state, freedom of movement, political rights, diplomatic protection rights and access to public services are commonly restricted. Some rights that are guaranteed to both non-citizens and citizens through international human rights law.¹⁶ Further, in terms of administrative law, stateless persons can lead a normal life in a state with good nationality laws while this is not guaranteed in a country with bad nationality laws, leading to statelessness.¹⁷

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

¹⁴ UN Human Rights Committee (HRC) “CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989” <https://www.refworld.org/docid/45139b464.html> paragraph 8 (Accessed 7-06-2020).

¹⁵ *Liechtenstein v Guatemala* ICJ Reports 1955 (*Nottebohm*) at 23. See also Batchelor A “Statelessness and the Problem of Resolving Nationality Status,” *International Journal of Refugee Law* 156-183.

¹⁶ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> ix (Accessed 31-03-2020).

¹⁷ *Ibid* 1.

African regional legal framework

Colonial history has contributed highly to the reasons why there are high numbers of people at risk of being stateless in the region.¹⁸ This can be seen from the manner in which borders were created, causing ethnic groups to be divided between various countries and in addition, forced displacements and conflicts have been factors too.¹⁹ Simply put, ‘many ethnic and other communities whose cultural, linguistic, religious or other ties, including pre-colonial political histories, lie on both sides of a contemporary border. African states’ nationality laws, policies and administration are often ill-adapted to take account of these realities’.²⁰ It is posited that, this does not only create identity divisions but also causes people who were affected by the division to struggle to prove or be accepted as nationals of the country they are in after border creations. On this basis, it is submitted that there is a need for laws that regulate and address nationality in this context.²¹

The most important link between a state and an individual is that of a state legally recognising the nationality or citizenship of that individual. In Africa during the colonial rule, having nationality in itself did not grant a person full rights in the state as it is now. Some people, like women, had limited rights as compared to men while being recognised as citizens. In other words, ‘. . . women in particular were . . . excluded from full citizenship in the countries of which they were nationals. . .’.²² This was because a limited number of people took part fully in ruling governments in the region. When it came to exercising both political and civil rights that were attached to citizenship,

¹⁸ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 2 (Accessed 31-03-2020) and the article in general.

¹⁹ See African Union--Peace and Security “African Union Border Programme (AUBP) - Uniting and integrating Africa through peaceful, open and prosperous borders” <http://www.peaceau.org/en/page/27-au-border-programme-aubp> (Accessed 01-06-2021), Frey A “Swaziland claims parts of Mozambique and South Africa territory” <https://clubofmozambique.com/news/swaziland-claims-parts-of-mozambique-and-south-africa-territory/> (Accessed 01-06-2021) and Aernl-Flessner J “Who gets to define borders?” <https://africasacountry.com/2018/06/who-gets-to-define-borders> (Accessed 01-06-2021). All these articles speak about the creation of borders, divisions between countries and displacements which is becoming an issues during land claim discussions in South Africa and nationality issues.

²⁰ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 2 (Accessed 31-03-2020).

²¹ See discussion below on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa.

²² Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 21 (Accessed 31-03-2020).

women were excluded in fully exercising these rights until the beginning of the 20th century and this was caused by the distinction between nationality and citizenship. This disadvantage also applied to people in colonial states who were not of European descent. Democracy resulted in individuals being able to claim and exercise their political rights, self-determination and decolonisation and everyone had the right to participate in the government. This made the difference between citizenship and nationality intolerable. As globalisation increased, so did migration. This has made issues of nationality to take priority internationally, especially on the issue of recognition of nationals and the granting of full rights. This has led to the regulation of basic principles on the subject of nationality, considering that it is underdeveloped compared to other areas of law.²³

Considering all the international instruments that have dealt with statelessness, it is high time that regional instruments dealing with statelessness, should be adopted. This will increase better treatment and norms relating to the reduction of statelessness and protection of stateless persons and further increase comparative studies on the subject as it is not vastly explored. In this regard, statelessness can be addressed by taking inspiration from the African Union's past initiatives to create instruments to address African concerns. For instance, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). The African Union (AU) may incorporate best practices from other instruments that address statelessness-related concerns, such as the Kampala Convention, when adopting an instrument on statelessness. Such practices may include but are not limited to those provided for in relevant parts of article IX of the Kampala Convention, which obligates State Parties to '[t]ake necessary measures, including the establishment of specialized mechanisms, to trace and reunify families separated during displacement. . .', and to '. . . consult internally displaced persons [IDPs] to allow them to participate in decision making relating to their protection and assistance'. On the other hand, article XIII obligates State Parties to facilitate the issuance of new documents and replacement, if lost for IDPs. Among other obligations, '. . . separated and unaccompanied children shall have equal rights to obtain such necessary identity documents and shall have the right to have such documentation issued in their own names'. Further, article XIV contains reporting obligations

²³ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 21 (Accessed 31-03-2020).

to ensure compliance by State Parties, and article XXI prohibits reservations to the ‘... Convention that are incompatible with the object and purpose of [the] Convention’.

While it is accepted that there is lack of comparative studies on the topic, this should be taken as an opportunity to engage in discussions that bring about solutions and considering other researches that have developed better implementation or status determination procedures.²⁴ As much as progress can be seen, statelessness remains a human rights issue.²⁵ This is based on the fact that even though many countries have become party to treaties that deal with statelessness, much progress is yet to be seen in attempts to curb statelessness. The lack of domestic procedures that determine statelessness, lead to the nationality laws violating the principle of non-discrimination.²⁶ This is the problem that South Africa faces as it has no procedures in place to determine stateless individuals let alone any kind of statistics to know the numbers of those faced with the crisis.²⁷ It is submitted that lack of determination procedures and statistics makes it easier for people who are stateless to fall in the cracks and remain in the margins where they are viewed as non-existing and will never belong if procedures are not put in place. In the case that nothing is done to resolve this crisis, stateless persons will remain without any form of rights, although they are provided for in the South African Bill of Rights.

In addition, the African National Congress (ANC), South Africa’s ruling party, proposed in July 2022 at a policy conference that South Africa should withdraw from the 1951 Refugee Convention, the 1967 Protocol Relating to the Status of Refugees, and the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, and then accede afresh with reservations and exceptions. The only nation in Southern Africa lacking reservations to the 1951 UN Convention is South Africa.²⁸ Stricter immigration regulations and

²⁴ Bianchini K *The implementation of the Convention relating to the status of stateless persons: procedures and practice in selected EU states* (PhD Thesis University of York Law 2015).

²⁵ Foster M and Lambert H International “Statelessness as a Human Rights issue: A Concept whose time has come” 2016 *International Journal of Refugee Law* 564–584.

²⁶ Foster and Lambert 2016 IJRL 584, see also Lawyers for Human Rights “Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner’s Guide” http://citizenshiprightsafrica.org/wp-content/uploads/2016/05/LHR_PractitionersGuide-Statelessness_2014.pdf 30-1 (Accessed 16-10-2019).

²⁷ Ibid, see also Scalabrini Centre of Cape Town and Legal Resources Centre submission to the special rapporteur at the Office of the UN High Commissioner for Human Rights <https://scalabrini.org.za/wp-content/uploads/2019/05/Scalabrini-Centre-of-Cape-Town-submission-OCHR-Statelessness-Minority-Issues-23-May-2018.pdf> (Accessed 16-10-2019).

²⁸ Du Plessis C “ANC wants tighter citizenship laws to keep out ‘undeserving’ foreigners” <https://www.businesslive.co.za/fm/fm-fox/2022-07-29-anc-wants-tighter-citizenship-laws-to-keep-out->

the establishment of a coherent and trustworthy immigration policy framework are the goals of the new migration policy framework. However, it is posited that creating such a policy could help departments and stakeholders coordinate more effectively, but it might also lay the groundwork for future immigration laws that restrict the rights of refugees, including stateless people.

The ACRWC provides for the rights of all children to have a nationality, have their births registered and also have a name. The ACRWC exceeds what is provided for in the Convention on the Rights of a Child (CRC) by integrating the provision of children who may be at risk of being stateless which is stipulated in the 1961 Statelessness Convention. The ACRWC further allows the acquiring by a child of the nationality of the state in which they were born at the time of birth in the case that they are not granted the nationality of any other state according to its laws. Though the African Charter on Human and Peoples' Rights (the African Charter) does not specifically refer to the right to nationality, it provides for an individual's legal status to be recognised in terms of article 5. This section has been interpreted by the African Commission to protect nationality rights. In 2015 a draft protocol on the nationality right was drafted in Africa on the basis that this right was implied in article 5 and the protocol was placed for consideration by AU structures.²⁹ It is positive that the African Commission has an existing Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa. The African Commission seeks to ensure that the proposed Convention takes into account the unique characteristics of the continent. The Preamble of the Draft Protocol acknowledges that questions of nationality and statelessness emerged as a result of the African continent's history and the original border-drawing by colonial powers, and that existing African and international treaties do not address these issues specifically. The Draft Protocol is consistent

[undeserving-foreigners/](#) (Accessed 07-11-2023), See also Daily Maverick “Wholesale review of immigration regimen may see SA (temporarily) exit UN convention on refugees” <https://www.dailymaverick.co.za/article/2023-08-20-wholesale-review-of-immigration-regimen-may-see-sa-temporarily-exit-un-convention-on-refugees/> (Accessed 09-09-2023).

²⁹ See Meeting on the African Union Protocol on the Right to a Nationality and the Eradication of Statelessness October 29, 2018 - November 3, 2018 <https://www.unhcr.org/ibelong/event/meeting-on-the-african-union-protocol-on-the-right-to-a-nationality-and-the-eradication-of-statelessness/> (Accessed 18-09-2020). See also Manby B EAC <https://data2.unhcr.org/en/documents/download/668075> (Accessed 06-04-2020), and note that the draft protocol to the African Charter on the right to a nationality and the reduction of statelessness is still awaiting the input of states.

with the African Union Agenda 2063 Framework, which calls for the granting of dual citizenship to African diaspora citizens and the establishment of an African citizenship by 2030.³⁰

The African Charter provides for equal protection of the law for every individual in article 3 and that everyone is equal, this is inclusive of those that are stateless. According to the Preamble of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, all issues pertaining to the African continent are to be resolved in accordance with the African Charter and within the African context. Consequently, this also addresses the issue of statelessness. The enjoyment of rights should be available to all with no distinction such as birth for instance and this is provided for in article 2 of the African Charter. In addition to the African Charter, the ACRWC provides that every child has a right to have their birth registered in article 6. This helps to curb statelessness as birth registration makes it easier for the children to be legally recognised, and identified, and it also provides proof of which country they were born.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) makes provisions for rules that are generally non-discriminatory.³¹ However, its provisions on nationality are weak as it fails to provide women with equal nationality rights as men in accordance with the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).³² The Women's Protocol does not guarantee equal nationality rights for both men and women. CEDAW in article 6 makes provision for women to retain their nationality or acquire their husband's nationality, grants women and men equal rights in terms of their children's nationality unless a contrary provision exists in the national legislation or there are considerations of national security. An argument can be made on the basis that the

³⁰ Draft Protocol to the African Charter On Human and Peoples' Rights on the Specific Aspects of the right to a Nationality And The Eradication of Statelessness in Africa: Explanatory Memorandum (DRAFT: revised June 2018) https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_originalexplanatory_memorandum.pdf (Accessed 06-11-2023).

³¹ See Meeting on the African Union Protocol on the Right to a Nationality and the Eradication of Statelessness October 29, 2018 - November 3, 2018 <https://www.unhcr.org/ibelong/event/meeting-on-the-african-union-protocol-on-the-right-to-a-nationality-and-the-eradication-of-statelessness/> (Accessed 18-09-2020). See also Manby B EAC <https://data2.unhcr.org/en/documents/download/668075> (Accessed 06-04-2020).

³² See Banda F in "Protocol to the African Charter on the Rights of Women in Africa," in Evans M and Murray R (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press 2008) 441-474.

Women's Protocol violates the African Charter's non-discriminatory provisions.³³ The African committee adopted a General Comment on article 6 of the ACRWC in May 2014, which was a reminder to the states that their sovereignty when it comes to granting nationality should be in the ambit of their international obligations. Further, the comment also denounces any form of discrimination in regulations that are related to nationality. 'Double *jus soli*' is a rule that the committee also validated and this rule requires for a child to be granted nationality in the case where either parents were born in that state and if the parents are foreigners, the child should be granted nationality after a period of residence which does not require reaching majority for citizenship to be confirmed.³⁴ This has been emphasised in the case of the Nubian children in Kenya, as discussed earlier. In this case the Committee emphasised the importance of children being granted nationality and the undesirable impact that statelessness had on children.³⁵

The African Commission has had the privilege of handling cases about individuals involved in politics whose nationalities have been stripped off or have been deported by their governments with the aim of silencing them.³⁶ This is a violation of their rights on the basis of purported legal status related to nationality or immigration. The African Commission has linked the provisions of article 5 of the African Charter that stipulates that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. . . .' to be applicable in cases where individuals end up being stateless due to states denationalising or attempting to denationalise them.³⁷ A decision concerning the Nubian people of Kenya which was handed down in 2015 by the Commission emphasised that nationality is an intricate link between

³³ Manby B "Citizenship Law in Africa: A Comparative Study" <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 26 (Accessed 31-03-2020).

³⁴ Ibid 27.

³⁵ *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Kenya, African Committee of Experts on the Rights and Welfare of the Child.*

³⁶ *Modise v Botswana* (Communication NO. 97/93) [2000] ACHPR 25 paragraph 91, *Amnesty International v Zambia* (Communication No. 212/98) [(2000) ACHPR, *Legal Resources Foundation v Zambia* (Communication No. 211/98) [2001] ACHPR, in this regard see also similar cases in Swaziland, *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88 119 and *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR 123 (HC) wherein a government sought to deport a citizen from his native country after defeating a political candidate, see also the discussion of these cases in Dube A and Nhlabatsi S "The King can do no wrong: The impact of The Law Society of Swaziland v Simelane NO and Others on constitutionalism" 2016 *African Human Rights Law Journal* 265-282 267.

³⁷ *Modise v Botswana* (Communication NO. 97/93) [2000] ACHPR 25 paragraph 91, see also *Amnesty International v Zambia* (Communication No. 212/98) [(2000) ACHPR, *Legal Resources Foundation v Zambia* (Communication No. 211/98) [2001] ACHPR.

an individual and their juridical personality. Therefore refusing an individual access to identification documents which grant them rights linked with citizenship is a violation of their right to be recognised. The Commission contemplated on the fact that article 5 of the African Charter protects a legal status in relation to claims of citizenship or nationality.³⁸

With regard to article 7(1) of the African Charter, the Commission held that the provision of ‘the right to an appeal to competent national organs’ comprises the right for a case to be brought to court and the right to appeal cases from the *court a quo* to higher tribunals. In matters that involve the loss of nationality and deportations, the Commission is of the view that due to the fact that an individual is not recognised as a citizen, that does not substantiate their deportation; the individual should be granted a right to contest expulsion.³⁹ The Commission has relied on articles 2, 7 and 12 of the African Charter to rule against countries like Zambia, Angola and Guinea on deportation matters or mass expulsions that are related to ethnicity and further, the Commission observed that the expulsions are a human rights violation.⁴⁰

The African Charter has a number of articles that have been used in cases that deal with the right to nationality, viz: (i) non-discrimination in article 2, (ii) the right to equality in article 3, (iii) the right to a fair trial and due process in article 7, (iv) the right to dignity and legal status found in article 5, and (v) the right to freedom of movement in article 12. Several cases have been brought before the African Commission in which the Commission found that the provision on the right to dignity and legal status as stipulated in article 5 of the African Charter applies in cases where states attempt to withdraw the nationalities of people rendering them stateless. Like the case of John Modise, who had spent a number of years in the homeland of South Africa called Bophuthatswana or the land between South Africa and Botswana (no-man’s land). This was due to Botswana’s Government refusing to recognise Mr Modise as a citizen. The Commission found that the Botswana Government had violated, amongst other rights, his right to dignity in terms of article 5 of the Charter and had caused him to suffer.⁴¹

³⁸ *The Nubian Community v Kenya* (Communication No. 317/06) [2015] ACHPR. See also Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 74 (Accessed 06-04-2020).

³⁹ *Amnesty International v Zambia* (Communication No. 212/98) [(2000) ACHPR paragraph 33.

⁴⁰ See *Institute for Human Rights and Development in Africa v Angola* (Communication No. 292/2004) [2008] ACHPR; *African Institute For Human Rights and Development v Guinea* (Communication NO. 249/2002) [2004] ACHPR 59.

⁴¹ *Modise v Botswana* (Communication NO. 97/93) [2000] ACHPR 25 paragraph 91.

In another case of *Amnesty International v Zambia*, the Commission had to deal with a case related to the deportation of two individuals from Zambia to Malawi. The Commission found that the Zambian Government violated the dignity of these men in terms of article 5 as it had deprived the men of their family and deprived their families the support they deserved from the men. This, it had done by compelling the men to live under degrading circumstances and as stateless persons.⁴² Further, when the state expels non-nationals, they are obligated to respect the people's right to family life together with other rights provided for in the African Charter.⁴³

The African Court on Human and Peoples' Rights, in March 2018, further delivered a judgment against the state of Tanzania in *Anudo Ochieng Anudo v Tanzania*.⁴⁴ The court held that Tanzania violated various human rights obligations particularly the ones that are related to applying due process of law. It was found that Anudo had been unlawfully made stateless. It further held that Tanzania carried the burden of proving that the applicant was not of Tanzanian nationality as it was the one that was alleging that fact.⁴⁵ In terms of the Tanzanian Citizenship Act, which does not provide for court review, the court held that by denying the applicant of the right to Tanzanian nationality that he had exercised prior to the case, without an opportunity to appeal in a national court is a violation of his right to have his case be heard in a court as stipulated in article 7(1)(a)-(c) of the African Charter.⁴⁶ The court then noted that the Tanzanian Citizenship Act had breaches because it did not provide citizens with the right to exercise judicial remedies in circumstances where their nationality was tested as international law requires. The court was of the view that the state of Tanzania had to fill the gaps that existed in its laws.⁴⁷ The court found that the Immigration Act also had the same misfortunes and accordingly ordered that Tanzania amend its legislation to guarantee judicial remedies for individuals whenever there were disputes in relation to citizenship.⁴⁸

⁴² *Amnesty International v Zambia* (Communication No. 212/98) [(2000) ACHPR paragraph 50.

⁴³ Manby B "Citizenship Law in Africa: A Comparative Study" <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 34 (Accessed 31-03-2020).

⁴⁴ *Anudo Ochieng Anudo*.

⁴⁵ *Anudo Ochieng Anudo* paragraph 80.

⁴⁶ The judgment makes reference to the International Covenant on Civil and Political Rights which is not the intention if we look at the article referred to in the text.

⁴⁷ *Anudo Ochieng Anudo* paragraphs 115-116.

⁴⁸ *Ibid* para 132(viii).

A common law in West Africa, derived from French law, provides that a person born in the state, or when one of their parents is born there, automatically becomes a citizen at birth. The East African Community (EAC) countries do not have this provision in their laws. Adopting this rule and putting rules and regulations in place in order to form rules of evidence for the implementation of the rule is a means to reduce statelessness. Further, West African countries derived from French law the concept that if an individual has always been treated as a citizen of a state and exercised the rights that accompany that status, one can apply before the court for an order confirming such status with the support of some rules of evidence. When the rates of birth registration and documentation are very low, it creates a high number of people who lack evidence of their nationality.⁴⁹

The provision for nationality as a right and preventing statelessness

In Africa, the right to nationality is provided for in the constitutions of seven countries,⁵⁰ either in general terms or to every child as they have a right to nationality and a name. In a country like South Africa, citizenship is based on *ius soli* for any child with no citizenship of another country or right of citizenship, including a general right to apply for citizenship upon attaining the age of majority for children born to parents who are not nationals, however, the right is only granted if the child's birth was registered.⁵¹ Angola and Guinea-Bissau make nationality provisions for children belonging to stateless persons or where the nationality of the parents is unknown or children are at risk of being stateless as well as foundlings.⁵² Countries that are regarded as having the strongest protections against statelessness for children born within their territory are those that follow the *ius soli* rule which means that they grant nationality automatically to any child born on their soil.⁵³ The *ius soli* rule will assist in formulating resilient regulations that protect and prevent statelessness for children born within the territory of these countries.⁵⁴

⁴⁹ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 81 (Accessed 06-04-2020).

⁵⁰ Angola, Ethiopia, Guinea-Bissau, Kenya, Malawi, Rwanda and South Africa.

⁵¹ South Africa Citizenship Act (No. 88 of 1995, as amended to 2010) (SACA), sections 2(2)(a) and 4(3).

⁵² As discussed in Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 45 (Accessed 31-03-2020).

⁵³ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 9 (Accessed 06-04-2020).

⁵⁴ As discussed in Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 60 (Accessed 31-03-2020).

The nationality laws in other countries have been detailed in their constitutions with provisions on how nationality should be recognised and managed. The issue is that the provisions in constitutions are there to serve as an empowerment to the legislature to implement legislation or offer guidance on values that include children's rights and non-discrimination with the final outcome being in the statute. Many countries have an exclusive citizenship Act or code dealing with nationality but some countries such as Mali and Burkina Faso have their nationality law in legislation related to family law. Then there are a few countries that explicitly provide for the nationality right for all or that all children have the right to nationality and a name in their constitutions. Some of these countries are Kenya, Malawi and South Africa.⁵⁵

In other countries the right to nationality is incorporated in other laws such as laws related to children for instance. Despite these attempts the nationality laws do not *per se* guarantee the fulfilment of these provisions. In other countries, such as Ethiopia, the nationality laws are not in compliance with what the Constitutions stipulate, as they are failing to guarantee nationality to children born in the state who would otherwise be stateless. The provisions stipulated in article 1 of the 1961 Convention on Statelessness and article 6(4) of the ACRWC that children born in a state and would otherwise be stateless should be granted nationality is specifically provided for in the nationality legislation of 13 African countries.⁵⁶ Further, six African countries provide for nationality to children born of stateless parents,⁵⁷ however, this does not protect children that are born to parents with nationality that they cannot transfer to their children.⁵⁸

Many nationality laws in Africa discriminated on the basis of gender from the period they attained independence until recently. This meant that women were not able to pass nationality to their children in circumstances where the father was not a citizen or to foreign spouses. This position changed in the beginning of the 1990s when organisations that fight for women's rights fought

⁵⁵ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 46 (Accessed 31-03-2020).

⁵⁶ These countries are Angola, Burkina Faso, Cameroon, Cape Verde, Chad, Guinea-Bissau, Lesotho, Malawi, Namibia, São Tomé and Príncipe, South Africa and Togo as discussed *ibid* 49.

⁵⁷ These countries are Benin, DRC, Gabon, Mozambique, Rwanda and Tunisia as discussed *ibid* 49.

⁵⁸ See Chapter 4 of the Constitution of the Kingdom of Swaziland Act 2005 with specific reference to sections 43 and 46 that stipulate nationality for children flowing only from the father, see also as discussed in Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 46 (Accessed 31-03-2020).

against this discrimination and for the laws to be reformed and comply with international human rights. The case of *Unity Dow v Attorney-General (Unity Dow)*⁵⁹ in 1992 was very significant as the appeal court upheld the right of a woman to pass her Botswana nationality to her children. A court in Benin, in September 2014, held that four articles in the nationality code were unconstitutional as they discriminated against women when it came to their rights to pass their nationality to their children or spouses.⁶⁰ The change in laws during the 1990s had some laws only reformed in such a way that much access to nationality was granted to children of national mothers which meant that there was no total equality. In a case from Sudan, a child belonging to a national mother was granted the right to claim nationality instead of being granted automatic nationality. In Sierra Leone the reforms made in 2006 still discriminated against children born in other countries.⁶¹ With gender neutrality being practised in many countries gender discrimination is decreasing. From the mid-1980s over 20 countries have endorsed laws that support gender equality.⁶²

Acquiring nationality

Children's nationality

In some countries only fathers have the undisputed right of transmitting their nationality to their children and in countries that do not provide for discrimination between parents in cases of children born in the country, fathers are the only ones to pass nationality to the child if born in another territory.⁶³ In most cases if a country discriminates based on gender, it also discriminates on the basis of whether the child was born in or out of wedlock. If a child is born to a national mother and foreign father, they have a right to claim nationality but not an automatic right to nationality.

⁵⁹ *Unity Dow v Attorney-General* 1991 BLR 233 (HC).

⁶⁰ See as discussed in Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 63 (Accessed 31-03-2020), see also Chapter 4 of the Constitution of the Kingdom of Swaziland Act 2005 with specific reference to section 43(4) which deprives women the right to pass nationality to children unless the father denounces the child.

⁶¹ The Sudanese Nationality Act 1994 and Sudanese Nationality Act (Amendment) 2011 and 2018 [Sudan], 30 December 2018, available at: <https://www.refworld.org/docid/503492892.html> (Accessed 1-07-2020); Sierra Leone Citizenship Amendment Act No.11 of 2006 <https://citizenshiprightsafrika.org/sierra-leone-citizenship-amendment-act-2006/> (Accessed 1-07-2020).

⁶² Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 6 (Accessed 31-03-2020).

⁶³ Chapter 4 of the Constitution of the Kingdom of Swaziland Act 2005 with specific reference to section 43(4) which deprives women the right to pass nationality to children unless the father denounces the child.

This is proof of how the laws discriminate in individual provisions related to nationality yet the total effect of the provisions as a whole allows both genders to transmit nationality to their children, though the right, if not claimed, will lapse. In a country like Benin, provisions legally discriminate as they allow a child born to a national mother to repudiate their nationality upon reaching majority and if they do not, the child is attributed nationality under the law.⁶⁴

Acquiring nationality on the basis of marriage

Marriage is one of the grounds through which one can acquire nationality as an adult. This is because most countries provide for the acquiring of nationality automatically or through lenient terms of registration in common law countries or declaration in civil countries when one marries a national. The automatic acquisition of nationality upon marriage was the custom earlier and women would assume the nationality of their husbands or father. However, this custom is decreasing and remains in only eight countries in Africa.⁶⁵ A considerable number of countries still deny women to transmit nationality to their spouses, or have discriminatory residence qualifications in place for the foreign spouses married to national women who need to acquire nationality.⁶⁶ The period in which naturalisation is acquired is in some cases reduced but all other requirements have to be satisfied. Other countries, in particular, ones that have laws based on the French civil code usually object to an application to acquire nationality through marriage within the first year the application is made.⁶⁷

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

A considerable number of African countries currently grant nationality to children born within their border if either parent is a citizen despite the gender and whether the child is born out of wedlock or not. This law is also extended to children born outside the country too. In some

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

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

⁶⁶ Benin, Burundi, Cameroon, Central African Republic, Comoros, Republic of Congo, Egypt, Equatorial Guinea, Guinea, Lesotho, Libya, Madagascar, Malawi, Mauritania, Morocco, Niger, Nigeria, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Togo and Tunisia, see as discussed in Manby above.

⁶⁷ Article 4(3)(b) of the Constitution of Namibia 1990.

countries⁶⁸ the right is also granted in cases where one of the grandparents is a national of the country. Deviations do exist in this case depending on which territory the person was born.

Other countries provide for only one generation to pass nationality if they reside outside the country, meaning that someone who is a national and born in the country can pass that nationality to a child born in another country but that child is not allowed to pass on their nationality further. These provisions are derived from British laws and are enforced by countries such as Lesotho, Malawi and Tanzania etc. In the Kenyan Constitution these provisions are allowed to be established by legislation, however, are not implemented in practice.⁶⁹ In other cases, when children are born in other territories, nationality maybe be passed, however, further requirements need to be complied with such as claiming the nationality right or informing the authorities of the birth. This may lead to the statelessness of some children even though the principle is accepted because if the limited time to claim the right lapses, the right is lost. In cases where there is a lack of diplomatic representation of the country where the parents have nationality in the country they reside, it becomes challenging to satisfy the requirements in practice.⁷⁰

Acquiring nationality on the basis of adoption

When it comes to adopted children in Africa born in other countries, their acquisition of nationality is provided for in many African countries through registration procedures that are automatic or non-discretionary. In other countries provision is made for discretionary naturalisation procedures and other countries do not provide for adopted children at all. Countries like Sierra Leone and Sudan have gone further and revised their laws to disregard adopted children or parents on definitions of ‘child’ or ‘parent’. When a father legitimises a child through adoption in Central

⁶⁸ Cape Verde, Ghana, Nigeria, Uganda and Zimbabwe.

⁶⁹ Article 14(3) of the Kenyan Constitution 2010; Section 7 of the Citizenship and Immigration Act 2011 of Kenya, as amended by the Security Laws Amendment Act, 2014. There was gender discrimination in the 1971 citizenship order of Lesotho before it was repealed by the 1993 Constitution as it provided that children born in foreign states could only acquire the Lesotho nationality through their fathers.

⁷⁰ Manby B “Citizenship Law in Africa: A Comparative Study” “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 53 (Accessed on 31-03-2020).

African Republic, that child becomes a national as of right, however, in the case of adoptions by non-biological parents, the effect is different.⁷¹

Acquiring nationality on the basis of naturalisation

In South Africa the naturalisation process comes in two steps. Permanent residence is required first and it takes a minimum of half a decade and another half decade after acquiring permanent residence is needed to become a citizen.⁷² The requirements for proving legal residence disregard those that migrate from free movement zones like West Africa and those that work in informal sectors. The processes involved in naturalisation are challenging and in some countries they involve investigations, interviews and police inquiries. Other countries even request proof of good health and such is a basis of exclusion for a lot of people such as those who are disabled from obtaining nationality.⁷³ In some countries one has to obtain a decree from the President for naturalisation to be granted, which is an administrative procedure requirement. In other countries if all requirements are met, the discretion is within the executive branch or the head of state. Long term refugees or former refugees suffer from the deficiencies that exist in laws related to naturalisation. In South Africa, the process is that one becomes a permanent resident from being a refugee and then later becomes a naturalised citizen, however, in practice, this process has been reported as one with complications.⁷⁴ The complications include, but are not limited to persons who are undocumented for various reasons, such as internal conflicts in their country of origin, being afraid to present themselves before national authorities without guarantees of a legal stay in the country while their status is being resolved. In some states, like Swaziland, they use customary law as a means of regulating citizenship acquisition.⁷⁵

Acquiring nationality on the basis of dual citizenship

Upon attaining independence, many countries in Africa decided that dual nationality should be prohibited; they took the stance that if an individual had nationality in another country, they had to choose where their loyalty would be based. In the case that one did not take the nationality of

⁷¹ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 57 (Accessed on 31-03-2020).

⁷² Ibid 7.

⁷³ Ibid 7-8.

⁷⁴ Ibid 8.

⁷⁵ Sections 4(2), 5(1) and 7(4) of the Swaziland Citizenship Act No.14 of 1992.

the new country, they would be considered with distrust, as a possibility of working for the former colonisers or other interests. Obtaining the nationality of another country meant the automatic loss of one's birth nationality and one had to renounce the nationality of another country for naturalisation to take place.⁷⁶

Currently dual nationality seems to be provided for in a limited number of countries, statistics show that many countries in Africa are now against the ban of dual citizenship.⁷⁷ In other countries,⁷⁸ the authorities have to give authorisation for dual nationality to take place. Other countries do not allow dual citizenship in certain situations such as in cases where an individual is in the process of becoming a citizen by naturalisation⁷⁹ or when the case involves people who are citizens from birth and willingly obtain the citizenship of another country.⁸⁰ In the countries that do not commonly make provisions for dual nationality, women who obtain the nationality of their spouses when they get married are allowed to keep their birth citizenship.⁸¹ Dual nationality in many countries has consequences, such as the inability to hold positions of high stature in the public office based on their allegiance for both nationalities.⁸² In Swaziland, the Swaziland Government sought to deport a citizen from his native country (Swaziland) after defeating a

⁷⁶ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 73 (Accessed on 31-03-2020).

⁷⁷ Some of these countries include Chad in article 6 and 7 of Decree No. 211 / PG.-INT. of 6 November 1963 implementing the Chadian nationality code, 1 December 1963, <https://www.refworld.org/docid/3ae6b4da33.html> (Accessed 8-06-2021), see the Burundian Nationality Code of 2000 article 21 as discussed in Canada: Immigration and Refugee Board of Canada, Burundi: Citizenship legislation; procedures for obtaining citizenship; whether dual citizenship is possible and, if so, how to obtain it; procedures for renouncing citizenship and the necessary documents; grounds for revoking citizenship, 22 January 2007, BDI102295.FE <https://www.refworld.org/docid/485ba8577.html> (Accessed 8-06-2021), article 8 of the Constitution of Ghana and see the 2010 Kenyan Constitution in articles 15(2) and 16.

⁷⁸ Countries such as South Africa, Libya and Mauritania for example.

⁷⁹ These countries include Namibia, Zimbabwe and Mauritius for example.

⁸⁰ Benin, CAR, Côte d'Ivoire, Guinea and Madagascar.

⁸¹ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 73 (Accessed on 31-03-2020).

⁸² Ibid 73 and 77-79, some of these countries are Kenya where this provision is provided for in article 137(2)(a) of the Kenyan Constitution which provides that ‘ a person is not qualified for nomination as a presidential candidate if the person owes allegiance to a foreign state.’, article 147(2)(a) of the Constitution of Mozambique which stipulates that ‘All Mozambican citizens maybe candidates for the office of the President of the Republic, provided that they. . . possess nationality by origin and do not possess any other nationality.’ And article 94(2)(a) of the Constitution of Ghana stipulates that ‘A person shall not be qualified to be a member of Parliament if he— (a) owes allegiance to a country other than Ghana.’

political candidate. The Government, in attempting to achieve its malicious acts, amended the Immigration Act, however, on appeal Mr Ngwenya was successful.⁸³

Lesotho's appeals court, in a case that involved dual citizenship, decided that in the case that an individual obtained nationality of another country, they would lose their birth citizenship. However, the court also in the same judgment commented, that legislation should be passed wherein dual nationality is not prohibited, especially if the other nationality is South African. In doing so, the court noted with special concern on the number of Basotho people who migrate to South Africa due to the economic and cultural inter-dependency of the two countries.⁸⁴

Deprivation or loss of nationality including state arbitrarily not recognising citizens

Issues related to acquiring citizenship have gone unnoticed in most countries as they only become apparent when an individual is exposed to expulsion and during the application of a passport. The fact that most countries in Africa are introducing the use of identification cards, people who thought they were citizens of a state or believed to be entitled to citizenship under the law will realise that they are not considered as such with the possibility of not being nationals of any other state.⁸⁵

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

⁸³ See also the cases of *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88 119 and *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR 123 (HC) as discussed in Dube A and Nhlabatsi S "The King can do no wrong: The impact of The Law Society of Swaziland v Simelane NO and Others on constitutionalism" 2016 *African Human Rights Law Journal* 267, 265-282 and Maseko T "The drafting of the Constitution of Swaziland,2005" 2008 *African Human Rights Law Journal* 312-336 320-1.

⁸⁴ *Director of Immigration and Others v Lekhoaba and Another* (C of A (CIV) No.22/07) [2008] LSCA 4 (11 April 2008) <https://lesotholii.org/ls/judgment/court-appeal/2008/4/> (Accessed 07-07-2020).

⁸⁵ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 79 (Accessed 06-04-2020).

In most circumstances, states are likely to deprive an individual the recognition of nationality compared to allowing the automatic loss of nationality or nationality denied on the basis of an administrative action by the authorities.⁸⁶ Ethiopia and South Africa have constitutions that prohibit states from depriving people of nationality or ban the loss of nationality. Article 33 of the Ethiopian Constitution provides all who are Ethiopians with nationality and that the status cannot be withdrawn without their consent. In the case that a citizen obtains the nationality of another state, they will automatically lose their Ethiopian citizenship.⁸⁷ When it comes to South Africa, there is a contradiction with what is provided for in the Constitution and the provisions in the South African Citizenship Act 88 of 1995 (SACA).

Section 20 of the South African Constitution stipulates that citizens may not be denied of citizenship,⁸⁸ while the SACA makes provision of loss of citizenship automatically and the deprivation of nationality on a discretionary basis including citizenship from birth. The present Constitution of South Africa came into effect after the adoption of the SACA which originally stipulated that a citizen by acquisition or from birth was capable of losing such citizenship (i) if they acquired the nationality of another country without being granted permission, (ii) in the case where they are citizens of another state. In this regard, some developments in law have occurred in the case of *Democratic Alliance v Minister of Home Affairs and Another* [2023] ZASCA 97 where the South African Supreme Court of Appeal held that South Africa citizens who lost their citizenship on the basis of being citizens of another country in accordance to section 6(1)(a) of the SACA were deemed not to have lost their citizenship as the court declared the section to be inconsistent with the Constitution and is invalid from its promulgation on 6 October 1995. And (iii) when the army of such state is in war with South Africa.⁸⁹ Provisions existed in the SACA in which individuals were prohibited from obtaining citizenship through naturalisation if there was

⁸⁶ Manby B *Citizenship Law in Africa* (African Minds 2016) 103, see also Manby B “You can’t lose what you haven’t got: Citizenship acquisition and loss in Africa”, in Macklin A and Bauböck R *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, RSCAS 2015/14 https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf 17 (Accessed 07-07-2020).

⁸⁷ Article 33 of the 1994 Constitution of the Federal Democratic Republic of Ethiopia and article 17 of the Proclamation on Ethiopian Nationality 378 of 2003.

⁸⁸ Section 20 of the Constitution of the Republic of South Africa 1996.

⁸⁹ Section 6 of the SACA which was amended in 2004 by the amendment Act 17 of 2004 which eliminated the stipulation that a person would be denied nationality if they were using a passport of another country which was provided for in the 1995 Act.

fraud involved, previous convictions, or in the case where it was deemed to be in the public interest. If citizenship was denied on the basis of fraud, one was not protected from becoming stateless.⁹⁰ The provisions are still in effect and an amendment was introduced in 2010 stipulating that naturalised citizens would further lose their nationality if they join the army forces of another country in a war not supported by South Africa.⁹¹

The 1961 Convention on Statelessness in article 7 allows for a naturalised person to be deprived of their nationality if they are abroad for a period over seven years without showing the authorities any intent of retaining their citizenship. Therefore, some countries have provisions in their laws aligning with article 7. When it comes to full protection against people being stateless in circumstances of deprivation, only a handful of countries⁹² have this provision in their laws when the government withdraws nationality. In some countries such as South Africa, Rwanda and Senegal, for instance, partial protection is available, which means statelessness would exist in some situations and in others there is uncertainty on whether protection is available or not.⁹³

Renunciation and reacquisition of nationality

On the African continent, not all states permit people to relinquish their nationality. The reason for the existence of provisions such as those that do not allow renunciation is to protect citizens from being stateless, however, this can also be taken as denying people their right to free movement and expression.⁹⁴ Article 15 of the UDHR stipulates that an individual is permitted to acquire the nationality of another country in which they reside based on different situations. However, in the case that dual nationality is prohibited, such would hinder the possibility of acquiring a new

⁹⁰ Section 8 of SACA.

⁹¹ Subsection 6(3) of the South African Citizenship Amendment Act 17 of 2010 included. See Submission on the South African Citizenship Amendment Bill, B 17 – 2010 (Citizenship Rights in Africa Initiative, 6 August 2010) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100817pchomecra.pdf> (Accessed 11-07-2020) where it was submitted that the amendment was contrary to the provisions of the Constitution.

⁹² Lesotho, Mauritius and Zimbabwe from 2013, however, the Zimbabwean nationality laws are contrary to what the Constitution provides for as they allow for the Minister to withdraw nationality attained by naturalisation if he is of the view that it is in accordance to public policy which can cause statelessness, see article 39(3) of the Constitution of Zimbabwe 2013 and Citizenship of Zimbabwe Act Chapter 4:01.

⁹³ Article 42 of the Constitution of Lesotho 1993 as amended in 2001, the provision is contradicted by article 23 of the Citizenship Order 1971; article 11(3)(b) of the Mauritius Citizenship Act 1968 as amended in 1995; article 9(4) of the Namibia Constitution 1990 as amended in 2010; article 19 of the Rwanda Nationality Law 2003; article 21 of the Senegal Nationality Code 1961 as amended in 2013; article 8 of the South African Citizenship Act 1996 as amended in 2013 and section 49(5) of the Swaziland Constitution 2005.

⁹⁴ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 112 (Accessed on 31-03-2020).

nationality. The other dilemma brought by renunciation stipulations is when there is no regard to preventing or protecting against people from becoming stateless. There should be reassurance that an individual involved will definitely acquire the new nationality or is in the position of being able to reacquire their original nationality if the process is not successful. Provisions allowing for such may exist but are, in most circumstances, not followed through in practice.⁹⁵

Proving nationality

The guidelines used to prove the facts related to the claim of nationality and the issuance of documentation proving the recognition of a person as a citizen have the same significance in practice as the regulations on the circumstances that must be recognised. In cases where the requirements and costs for one to prove their nationality are arduous, it means that people will rarely be able to satisfy the requirements imposed by the law. Further, in situations where the recognition of nationality procedures are not available or are based on discriminatory measures, a vast number of people become undocumented with a high chance of being stateless. Birth registration is important because in cases where a person's nationality is questioned, such can be utilised as conclusive evidence. The issuance of identification documents such as a passport is crucial even though they may not be considered formal evidence of citizenship but will assist in the exercise of the right to nationality.⁹⁶

A certificate of birth is not always regarded as proof that a person is a citizen, however, there are exceptions such as registration of births for the sake of nationality acquisition as a right provided for in some UN conventions.⁹⁷ It was held in the *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Kenya, African Committee of Experts on the Rights and Welfare of the Child (Nubian children's judgment)* that birth registration and nationality are connected.⁹⁸ Legal registration of birth makes it easier to prove the place of birth of both the individual involved and of their parents and their

⁹⁵ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 11 (Accessed on 31-03-2020).

⁹⁶ Ibid 116.

⁹⁷ Article 7 of the Convention on the Rights of the Child (CRC) and article 6 of the ACRWC.

⁹⁸ The *Kenyan Nubian Minors* decision paragraph 42.

nationality. Without a birth registration process or an efficient birth registration system, many children will be at risk of becoming stateless.⁹⁹

Birth registration is not a requirement for some countries and in others it only recently became a requirement. In countries such as Zimbabwe, South Africa and Mauritius for instance, registering of births was a requirement, however, it was not required in Tanzania, Botswana or Malawi.¹⁰⁰ There is a need for initiatives that would assist in the creation of efficient birth registration systems in African countries. The systems must be inclusive of all countries and the minority groups as they are the ones that are more at risk of becoming stateless.¹⁰¹

EAC member countries do not have an effective system in their national laws for registering births as they fail to acknowledge how crucial it is related to nationality law. Providing for the registration of births in laws should be linked with providing such right explicitly in the countries' constitutions in order to show the importance thereof.¹⁰² Other countries like Kenya make provisions for every child to have a right to a birth certificate in their Immigration Act but only to children who are citizens. It is necessary to note that the Births and Deaths Registration Act allows for compulsory registration of births but does not provide for it as a right.¹⁰³ In countries like Kenya, the legal framework that deals with nationality related issues such as registrations is still based on laws from the past, however, they constantly modify them. These laws from the past did not apply to all people in Kenya and only became inclusive of everyone when the countries gained independence. In Uganda the laws that did not include everyone when it came to registration are no longer operating.¹⁰⁴

EAC member states have low numbers in terms of birth registrations. This has caused the UN Committee on the Rights of the Child to be concerned based on the reviews made by treaty

⁹⁹ Manby B “Citizenship Law in Africa: A Comparative Study” 117 <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> (Accessed on 31-03-2020).

¹⁰⁰ Ibid.

¹⁰¹ Civil Registration and Vital Statistics “Third Conference of African Ministers Responsible for Civil Registration: Yamoussoukro Declaration 13 February 2015” <https://www.uneca.org/crmc3> (Accessed 13-07-2020).

¹⁰² Section 11 of the Child Act 10 of 2008 [Southern Sudan].

¹⁰³ Section 22(1)(g) of the KCIA 2011 and Section 9 of the Births and Deaths Registration Act 2 of 1928 as amended (Cap. 149 Laws of Kenya 2012).

¹⁰⁴ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 25-26 (Accessed 06-04-2020).

bodies.¹⁰⁵ The most numbers of unregistered births in African countries are found in the rural areas as the systems are not accessible or inclusive.¹⁰⁶ EAC member states struggle with births that are registered late. States such as Kenya, Ethiopia, and Somalia feature seasonal or entirely nomadic communities due to climate and weather changes, which may also be a factor in statelessness. It is possible that these populations feel a tenuous connection to any one state.

Furthermore, some countries like Kenya allow late registration only on condition that the Principal Registrar has granted such in writing.¹⁰⁷ It is encouraged that registration of births be done immediately in order to avoid complications that come with the many requirements that follow when late registration occurs, which in most cases are difficult to comply with. Even though birth registration has improved in countries like Kenya, the systems cannot yet be said to be fully problem free. The struggle for registration is also faced by children belonging to parents who are not recognised as Kenyan or orphans whose parents' nationality is questioned by the state. This situation improved on the basis of directives that were given by the Department of Civil Registration in 2008, which looked into assisting vulnerable children with easy access to late birth registration.¹⁰⁸

The other category that makes it challenging in terms of birth registration is the children who are born to parents who are not married. This has led the high court in Kenya to hold that the names of fathers should be on the birth certificate of the child, even in cases where the parents are not married.¹⁰⁹ However, an argument can be made on the notion that what happens when the father is unknown or his whereabouts are not known to the mother, this will then further delay the

¹⁰⁵ UN Committee on the Rights of the Child, Concluding observations: Burundi, 19 October 2010 (CRC/C/BDI/CO/2) <https://digitallibrary.un.org/record/692497?ln=en> (Accessed 17-07-2020); UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third to fifth periodic reports of Kenya*, 21 March 2016, CRC/C/KEN/CO/3-5 <https://www.refworld.org/docid/57aueb8b4.html> (Accessed 17-07-2020); Rwanda, 14 June 2013 (CRC/C/RWA/CO/3-4) https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/RWA/INT_CRC_COC_RWA_13833_E.pdf; Tanzania, 3 March 2015 (CRC/C/TZA/CO/3-5) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhssLtNjBZiFQ5NZyh2VH3hcSW0Z6IRACJZafst2Vo8RTDFbd1J72ege4JeN4X1ReUaRCKfSv3SiQ8VAGWW598FfrscO8NxuOkmFJbrLEd32b>, and Uganda, 23 November 2005 (CRC/C/UGA/CO/2) <https://www.refworld.org/docid/45377eb70.html> (Accessed 17-07-2020).

¹⁰⁶ See UN Committee on the Rights of the Child “Concluding observations: Kenya, CRC/C/KEN/CO/3-5, 21 March 2016” paragraph 2930. See also Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 27 (Accessed 06-04-2020).

¹⁰⁷ Section 8 of Births and Deaths Registration Act.

¹⁰⁸ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 28 (Accessed 06-04-2020).

¹⁰⁹ Ibid.

registration of the child's birth with the possibility of not even registering at all. Refugees have challenges in registering the births of their children, however, the UNHCR attempts to assist states with such cases. In addition, there is also more difficulties in the birth registration of children that have been displaced as there is limited support for this category from international organisations.¹¹⁰

An identification document is, in some countries, *prima facie* evidence of nationality as the nationality of a person is on the document. The access to rights that are provided for is through possession of an identification card, this includes the right to education, healthcare services and even voting, for instance. Further, an identity document is a required document for the application of a passport.¹¹¹ In order for people to enjoy the rights that are provided for, there should be an effective administration for registration of identity documents in place¹¹² which is accessible to all people within a state as the practice experienced is said to be challenging. The determination of a person's nationality is usually in the hands of people who are less qualified or lack experience in practice. This is because when the process begins, it is usually civil servants in the low ranks who handle the applications and experience lack of knowledge of nationality laws in most circumstances. The procedures to be followed when identification applications are rejected unlawfully may exist in theory, however, they are not easily accessible to everyone. Reviewing such decisions using judicial procedures is almost always an expensive procedure that is not afforded by the majority of people who are actually in need of such service and exclusionary.¹¹³

Nationality certificates are considered to be conclusive proof of nationality in civil law countries, and they are issued by a tribunal. This process of an individual being recognised as a national through judicial procedures protects people from undue processes and from decisions that are made illogically by those in power. This opens up the argument about the link between administrative procedures and nationality laws. In cases where a person's nationality is in question, the case can be taken to the tribunal where the matter will be decided and their status will be determined. With the availability of a nationality certificate means conclusive proof of nationality which need not

¹¹⁰ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 28-30 (Accessed 06-04-2020).

¹¹¹ For southern Africa, see Klaaren J and Rutinwa B *Towards the Harmonisation of Immigration and Refugee Law* Chapter 2 "Population Registration and Identification" 26–38 as discussed in Manby B "Citizenship Law in Africa: A Comparative Study" <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 119 (Accessed on 31-03-2020).

¹¹² See Manby B *Struggles for Citizenship in Africa* (Zed Books Ltd 2013) 115–126 as discussed in Manby B *ibid* 119.

¹¹³ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 29 (Accessed 06-04-2020).

be tested. The procedure maybe difficult for people to satisfy, though it is there to provide them with protection against arbitrary processes. This procedure is provided for in theory in Commonwealth countries when the nationality of a person is questioned, however, it is provided for by the executive though in practice it is not known.¹¹⁴ Different circumstances in practice require different kind of proof to determine the nationality of an individual, with the passport regarded as the most effective proof. This is disturbing because not everyone is privileged to possess a passport or travel internationally.¹¹⁵

Travelling documents such as passports are only of use to the citizens who wish to travel abroad. The nature of reasons why one would want to access a passport is often related to opportunity, access and privilege, however, the majority of people in African countries or poor countries in other regions such as Myanmar are not able to access these documents, and to them it is luxury. International travel within the EAC community usually did not require an international passport, however, a decision to allow travelling with the use of national identity cards has been introduced. The 2010 Kenyan Constitution stipulates that everyone is eligible to obtain a passport and any form of document that identifies such a person as Kenyan. Further, the Kenyan Citizenship and Immigration Act also aligns with these provisions of the Constitution.¹¹⁶ This process was previously set on discretion.¹¹⁷ The implementation of the right to a passport took place in Uganda in 1999¹¹⁸ and other countries in that region which include Tanzania and Burundi for instance, also adopted the provision.¹¹⁹

¹¹⁴ See Section 20 of the Ghana Citizenship Act 2000 which gives the Minister power to grant nationality to an individual. This is also provided for in section 14 of the Gambia Nationality and Citizenship Act 1965 and section 24 of the Sierra Leone Citizenship Act 1973, however, such provision is not provided for in Nigeria. In the case of southern Africa countries that have the same provisions are Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe, however, the provision is not provided for in Kenya and Uganda.

¹¹⁵ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 120 (Accessed on 31-03-2020).

¹¹⁶ Article 12(1)(b) of the Constitution of Kenya 2010 and Section 22(1)(g) of the Citizenship and Immigration Act 2011.

¹¹⁷ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 121 (Accessed on 31-03-2020).

¹¹⁸ Section 39 of Citizenship and Immigration Control Act 1999: ‘Every Ugandan shall have the right to a passport or other travel documents.’

¹¹⁹ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 122 (Accessed on 31-03-2020).

Acquiring a passport is challenging compared to acquiring a state's identification card. Accordingly, the process of applying for a passport is stricter and requires the personnel to inspect the whole procedure thoroughly. In some circumstances, people in possession of nationality identity documents find their citizenship in doubt when they apply for a passport. In cases where a person's nationality is doubted, there are further procedures and document requirements that they may go through in order to eliminate the doubt. Such documents may include birth certificates.¹²⁰

Asian region legal framework

Most Asian countries regained independence around 1945 towards 1949.¹²¹ Asia is largely a region with inherent differences in terms of religion, languages and ethnic groups.¹²² There has been a lack of research on Asia's position, which may have been based partly on the poor participation of Asian states in treaties that are related to nationality laws as compared to other states. Further, the region lacks judicial decisions related to citizenship matters.¹²³ The situation is improving as evidenced by the growing number of writings from comparative analysis angle.¹²⁴ It has been noted that because most countries in Asia either became free from colonialism or asserted their state-determination in the 20th century, this explains the reason why their citizenship laws are stringently safeguarded.

There is a lack of regional judicial decisions in Asia when compared to what the other regions have done in matters related to nationality within their regional courts and committees. The writers in the region have acknowledged the underdevelopment of the region's performance in the international arena in nationality issues, with the majority of studies linked to Europe.¹²⁵

Upon regaining independence from the Soviet Union, Central Asian countries (CAC) undertook to make improvements to policies related to citizenship issues. However, this is not the position

¹²⁰ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 34-35 (Accessed 06-04-2020).

¹²¹ Isharyanto "Post-Colonial Citizenship Law (Comparative Study of Asian Countries)" 2019 *Jurnal Dinamika Hukum* 448-467 449. For instance, these countries include Pakistan, the Philippines and Burma (now Myanmar).

¹²² Suryadinata L The making of Southeast Asian nations. State, ethnicity, indigenism and citizenship (WSPC 2014).

¹²³ Isharyanto 2019 *Jurnal Dinamika Hukum* 449.

¹²⁴ See Manby B Citizenship and statelessness in Africa: the law and politics of belonging (Wolf Legal Publishers 2015) and Vonk O Dual "Nationality" in the *European Union: A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (Martinus Nijhof 2014) as discusses *ibid*.

¹²⁵ Choen H "National Identity and Citizenship in the People's Republic of China and the Republic of Korea" *Journal of Historical Sociology* 84-118.

with other states in the region that were under the Soviet Union rule pre-independence, as they have no regard about demographical issues related to immigration and ethnicity.¹²⁶ When CAC attained their independence, they resorted to granting citizenship status to anyone residing within the territory despite heredity being the determining factor for the status.¹²⁷

Gaining independence means that a country has to adjust its nationality policies and a rise in migration also needs to be addressed during this era. Initially, there were few concerns in relation to migration in the Asian region as it occurred domestically. The position changed during the 20th century when international migration emerged due to new states being created on the basis of independence.¹²⁸

Colonialism in the Asian region, like other regions, caused displacement which still has an impact between countries in the region. However, countries such as Myanmar and India were under British colonial rule and that meant that the laws in the two countries were applied similarly.¹²⁹ In Myanmar, a lot of people have experienced challenges with regard to their citizenship status, which has led to a lot of people, mostly the Rohingya, being refugees in other countries and stateless. This is not the case for all minority groups in Myanmar as the nationality challenges of the other minority groups, such as the Tamils and the Urdu people, have developed.¹³⁰ It is posited that participation in the community is a crucial protective concept. The Rohingya's ability to contribute to the end of their statelessness makes it crucial for them to be involved in problems that concern them and for their security. Furthermore, considering persecutory policies which lead to statelessness and challenges in returning stateless persons like the Rohingya to Myanmar in light of the non-refoulement principle, stronger measures that encourage resettlement in other countries should be developed.

¹²⁶ Isharyanto 2019 *Jurnal Dinamika Hukum* 449.

¹²⁷ Ibid 450.

¹²⁸ Amrith S S *Migration and Diaspora in Modern Asia* (Cambridge University Press 2011).

¹²⁹ Vonk O “Comparative Report: Citizenship in Asia” https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 4 (Accessed 24-08-2020) and Arraiza J M and Vonk O “Report on Citizenship Law: Myanmar” https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 3 (Accessed 24-08-2020).

¹³⁰ Vonk O “Comparative Report: Citizenship in Asia” https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 4 (Accessed 24-08-2020).

Despite the region being notorious for having the highest rate of stateless people because of countries like Myanmar, other countries can be applauded for their efforts in eradicating statelessness. Kyrgyzstan has become the first country in history to end statelessness within its territory.¹³¹ The Kyrgyzstan managed to grant nationality to over 13 000 individuals within a period of five years. This initiative was influenced by the UNHCR campaign called ‘I Belong campaign’. The Kyrgyzstan government showed political will and identified the number of people who were stateless and within five years it had granted them with citizenship status. Other countries globally, especially in Africa and Asia, can emulate the procedures and measures that the Kyrgyzstan Government used to show political will in ending the crisis.¹³²

Acquiring nationality in Asia

In terms of the manner in which citizenship was acquired, most countries followed *ius sanguinis* through the paternal lineage, with maternal lineage only followed as an exception. This was commonly in cases where a child was born to unmarried parents and the father rejected the child.¹³³ Due to the loss of nationality of origin by women upon marriage, leading them to acquire their husband’s nationality, the majority of the children share the same nationality with their parents. This discrimination based on gender came to an end around the 20th century and women were now allowed to possess their own nationality. Gender equality is now being practised in some countries in Asia such as Japan, Sri Lanka and Pakistan for instance.¹³⁴

Currently most Asian countries practice both the *ius sanguinis* and *ius soli*. Conventionally, *ius soli* provides for a diversion from the normal practice of using *ius sanguinis* in cases where the children were born abroad, and an application is being made for acquiring citizenship. The transfer of citizenship through this provision is extended up to the second generation. In Asia citizenship

¹³¹ UNHCR “The UN Refugee Agency “Kyrgyzstan ends statelessness in historic first”
<https://www.unhcr.org/news/press/2019/7/5d1da90d4/kyrgyzstan-ends-statelessness-historic-first.html>.
(Accessed 24-08-2020).

¹³² Ibid.

¹³³ Isharyanto 2019 *Jurnal Dinamika Hukum* 457-458, see also, in the case of Swaziland, see Chapter 4 of the .Constitution of the Kingdom of Swaziland Act 2005 with specific reference to section 43(4).

¹³⁴ Isharyanto 2019 *Jurnal Dinamika Hukum* 457-458.

by birth is commonly acquired through *ius sanguinis*, which is a practice imitating European as opposed to American practices.¹³⁵

Operation of law makes it difficult to unify the manner in which people gain nationality globally where there is no uniformity; and each state has their own rules and regulations.¹³⁶ In Myanmar for one to acquire citizenship it is required that one of the parents must be a citizen by birth and the other parent must be, in accordance with Myanmar laws, an associate or naturalised citizen.¹³⁷ Further, birth registration is an integral process related to nationality issues and the acquiring of documentation that proves one's nationality. In Asia, the countries that have challenges with the registration process are Cambodia and Myanmar.¹³⁸

Acquiring nationality on the basis of dual nationality

Asian countries are against the idea of children born in foreign countries to possess dual nationality, and in order for the children to be granted the nationalities of their parents, further conditions must be fulfilled.¹³⁹ It is at this point that even though the Asian region mirrors European practices, the difference is seen through further rigid provisions provided for in these circumstances. Other countries in Asia such as Malaysia and Nepal, still practice gender discrimination when granting children nationality.¹⁴⁰ Many countries world-wide are seeking to purge the *ius soli* principle or, in its stead, create a principle with better conditions in comparison with the *ius soli* principle.¹⁴¹

Due to the prohibition of dual nationality in Asia as a region, in most countries, when a person acquires the nationality of another country by choice, it warrants the loss of their birth nationality.

¹³⁵ Vonk O “Comparative Report: Citizenship in Asia” https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y (Accessed 24-08-2020).

¹³⁶ Ibid.

¹³⁷ Ibid 10, associate and naturalised citizens are people who were granted nationality on the basis of the 1948 Union Citizenship Law of Burma and persons who have resided in Burma before 4 January 1948 and processed their nationality applications after 1982 respectively.

¹³⁸ Arraiza J M and Vonk O “Report on Citizenship Law: Myanmar” https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 (Accessed 24-08-2020) and Sperfeldt C “Report on citizenship: Cambodia” https://cadmus.eui.eu/bitstream/handle/1814/45084/GLOBALCIT_2017_02_Cambodia.pdf 15-16 (Accessed 25-08-2020).

¹³⁹ See generally Isharyanto 2019 *Jurnal Dinamika Hukum* 457-458.

¹⁴⁰ Isharyanto 2019 *Jurnal Dinamika Hukum* 457-458.

¹⁴¹ Ibid 458.

The countries that allow people of origin to renounce their nationality voluntarily and acquire the nationality of another state are Pakistan and Bangladesh. Loss of nationality upon acquiring the nationality of another state is applicable in South Korea except in cases where one acquires the other nationality by marriage or other specified circumstances. However, in Sri Lanka, persons who acquired nationality by registration or birth are the ones to which the rule on the loss of nationality by acquiring another nationality applies. The same rule that applies in other regions that fraudulent practice in acquiring nationality leads to the loss of nationality applies in Asia.¹⁴²

Acquiring nationality on the basis of being an abandoned child

In cases of abandoned children, only a few countries in Asia make provision for these children to automatically acquire citizenship, supposedly with many countries in the region considering the children as nationals. Age limitation is a common provision used by the countries that recognise abandoned children as citizens. The countries specify up to what age a child should be considered a citizen when found.¹⁴³

Acquiring nationality on the basis of naturalisation

Naturalisation is considered as another form of acquiring nationality in terms of laws of other countries as already established above. Therefore naturalisation is also applied in other Asian countries such as Bangladesh where the process also considers family links.¹⁴⁴ Other countries such as Japan have a low rate of naturalisation and this also includes countries that form part of the Organization for Economic Cooperation and Development. Countries that are part of this organisation are also against the notion of dual nationality.¹⁴⁵

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

¹⁴² Vonk O Dual Nationality in the European Union. A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States (Martinus Nijhof 2014).

¹⁴³ Isharyanto 2019 *Jurnal Dinamika Hukum* 459.

¹⁴⁴ Ibid.

¹⁴⁵ Isharyanto 2019 *Jurnal Dinamika Hukum* 459-460.

naturalisation by entitlement. This is offered if the stateless individuals do not have identification papers, they respect the Constitution and laws of Vietnam and also if they have been residing in the country for 20 years. It is not unexpected that there still is a lack of regulations in relation to the facilitated naturalisation of refugees and stateless people in Asia. This is due to the low rates in ratification of international treaties relevant to citizenship and statelessness.¹⁴⁶

Losing nationality in Asia

Citizenship can be lost on the state's accord when it withdraws nationality or when the citizen willingly renounces their nationality.¹⁴⁷ It is generally recognised internationally that fraud is a ground for citizenship to be lost even if statelessness is a consequence thereof.¹⁴⁸ Even in the case that states do not implicitly provide this ground in citizenship laws, general administrative law principles are assumed to be other means which can be applied to withdraw citizenship.¹⁴⁹ On one hand, it can be said that administrative law plays an integral role when countries revoke nationality even though such a provision is not specifically provided for in the laws of many countries but is seen through practice.¹⁵⁰ On the other hand, a question of whether it is necessary to deal with statelessness in some nations by depoliticising policies and implementing a humanitarian/human rights-based approach is critical in order to find solutions.

Loss of nationality for some people in other Asian countries transpired due to their countries being at war and such countries include Myanmar, Sri Lanka and Malaysia for instance.¹⁵¹ Safeguarding methods such as reversing the renunciation of nationality are made available in the states of Vietnam and Mongolia in instances where citizens attempt to acquire nationalities of other states and are rejected. Other regions can use the reverse of renunciation method in an attempt to reduce statelessness as a safeguarding tool. Renouncing one's nationality voluntarily is prohibited in North Korea and Nepal, and in Thailand it is only allowed in cases where a citizen marries someone from another state. Asian citizens residing in other countries are at risk of losing their nationality as this is one of the methods recognised for loss of nationality in the region. The only country that

¹⁴⁶ Vonk O “Comparative Report: Citizenship in Asia” https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 26 (Accessed 24-08-2020).

¹⁴⁷ Ibid 23.

¹⁴⁸ Ibid 25.

¹⁴⁹ Ibid.

¹⁵⁰ Isharyanto 2019 *Jurnal Dinamika Hukum* 461.

¹⁵¹ Ibid 461.

has an exception to this rule is Malaysia as it provides for this rule to only apply to persons who acquired nationality through naturalisation.¹⁵²

Categories of people susceptible to statelessness and the impact thereof

When it comes to citizenship laws and the administration related to it, there is lack of effective provisions to integrate migrants to be nationals. This has increased the population of people who are stateless.¹⁵³ In Africa, the groups that are more susceptible to being stateless are similar. They can be divided into four main categories which are: Historical or contemporary migrants with their descendants; Refugees or former refugees including individuals that were returned to their country of origin where they have few or no current links;¹⁵⁴ border populations, including ‘pastoralist ethnic groups’ who frequently cross borders, nomads including people that have been affected by disputes related to border and territory transfers and children with no parents including children that have been trafficked.¹⁵⁵

The impact of being statelessness

The scope of statelessness as a problem is being addressed by the need to create administrative systems that are reinforced and safeguard the registration of births and access of identity documents widespread. The consequences of not being recognised as a national can be serious. One is prone to be subjected to arbitrary detention and expulsion. In addition, when looking into development areas, it is necessary to deal with statelessness in some nations by depoliticising policies and implementing a humanitarian/human rights-based approach, as mentioned above. One such development could be counterterrorism measures developed by states whereby they are reluctant to give nationality to people due to security fears. For example, the defeat of the Islamic State (IS) in countries such as Iraq, Libya and Syria have left thousands of foreign fighter children detained in camps and prisons. Few governments are willing to repatriate those with nationality and citizenship claims to their jurisdiction. With the IS spreading its operations to contexts such as the Sahel, the developing African framework may consider these challenges.¹⁵⁶

¹⁵² Isharyanto 2019 *Jurnal Dinamika Hukum* 461.

¹⁵³ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 4 (Accessed 06-04-2020).

¹⁵⁴ This group is found in almost all regions including Asia, especially considering the situation of Myanmar.

¹⁵⁵ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 3 (Accessed 06-04-2020).

¹⁵⁶ BBC News “Islamic State group defeated as final territory lost, US-backed forces say” <https://www.bbc.com/news/world-middle-east-47678157> (Accessed 09-11-2023), see also Margolin D “The

Several countries in the EAC have been practicing arbitrary detention and expulsion and it has caused a negative impact not only to individuals who are foreigners but also people who are either nationals or have the entitlement to nationality. Even though detention must be considered to be the last resort, in most circumstances, most countries in the EAC do not seriously consider alternatives to detention.¹⁵⁷ Another concern is that there might be a detrimental effect on the communities themselves since marginalised people might use violence to get what they want.

In countries such as Kenya, Burundi and Rwanda where since independence, individuals are obligated to possess a national identification card one can be excluded from public and private benefits if they do not have an identity card.¹⁵⁸ In countries like Uganda and Tanzania the possession of identity cards was not required and access to services did not require identification until recently which shows a change in the system.¹⁵⁹ In this regard, it is suggested that countries may also make investments in cutting-edge digital technologies that allow citizens to store papers in order to ameliorate the situation. In the event that documents are misplaced, this will shorten the time required to prove nationality.

In the *Nubian children's* judgment, the African Committee of Experts dealing with rights and welfare of children indicated that despite the causes of statelessness, the negative impact thereof cannot be overemphasised. Due to no fault on their part, stateless children endure an uncertain future. This means that they lack any form of exercising constitutionally protected rights granted by the state such as having justice procedures at their disposal or travelling freely within the state or outside. Further, stateless children are unable to realise their socio-economic rights which

Islamic State in 2023: Threat Levels and Repatriation Questions” <https://www.washingtoninstitute.org/policy-analysis/islamic-state-2023-threat-levels-and-repatriation-questions> (Accessed 09-11-2023).

¹⁵⁷ Regional Mixed Migration Secretariat “ Behind bars: the detention of migrants in and from East & Horn of Africa” https://mixedmigration.org/wp-content/uploads/2018/05/011_behind-bars.pdf 11 (Accessed 15-11-2023), in relation to expulsion, see also International Justice Resource Center ‘East African Court: Community must investigate Tanzania’s expulsion of migrants’ <https://ijrcenter.org/2016/05/09/east-african-court-community-must-investigate-tanzanias-expulsion-of-migrants/> (Accessed 15-11-2023).

¹⁵⁸ They include being able to obtain a passport, voting and holding a public office position or getting health services for instance.

¹⁵⁹ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 3 (Accessed 06-04-2020).

include the rights to education and to health care. Statelessness is a position that contrasts what is regarded to be the best interests of children in a nutshell.¹⁶⁰

The COVID-19 pandemic and the stateless community

The stateless community has already been historically marginalised and with the pandemic disrupting the world the community is now exposed to even worse double standards of marginalisation as compared to the rest of the people. An imbalance, to say the least, has been seen in the manner in which the governments, globally, are responding to the pandemic. It is clear that citizens are given priority in receiving states' assistance with the majority of the countries making no efforts to include the stateless community. Further marginalisation as the stateless people are not being granted any form of relief, medical assistance or supplies that citizens are receiving from their governments. When stateless people are in need of all these services, they are unable to approach the relevant authorities for fear of being arrested for being undocumented.¹⁶¹

Despite all the negativity that has been occurring during this pandemic period, India is to be applauded as its judicial system has shown initiative through considering the release of detainees with the aim of curbing the virus. The detainees are undocumented and were declared to be foreigners, however, they are now eligible for release upon meeting the requirements that have been set by the Supreme Court of India. This came after the court considered the state that the pandemic has put the country in and that the court had already ordered the release of other detainees in general, the court saw no issue in doing the same with detainees that were considered to be foreign. The aim of the release was to decrease the amount of infections in detention centres.¹⁶²

¹⁶⁰ The *Kenyan Nubian Minors* decision paragraph 46, see also Fokola E and Chenwi L "Statelessness and rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee" 2013 (6) *African Journal of Legal Studies* 357-373.

¹⁶¹ International Commission of Jurists Advocates for Justice and Human Rights "In Solidarity with the stateless" https://www.icj.org/wp-content/uploads/2020/05/Joint_Statement_in_Solidarity_with_the_Stateless-27.05.20.pdf (Accessed 04-06-2020).

¹⁶² The Hindu "SC orders release of detainees lodged for 2 years in Assam detention centres" <https://www.thehindu.com/news/national/other-states/sc-orders-release-of-detainees-lodged-for-2-years-in-assam-detention-centres/article31333315.ece> (Accessed 28-08-2020).

The enforcement of laws related to nationality and remedies

Statelessness as a subject in the international arena has led the UNHCR to distribute guidelines on the subject¹⁶³ and develop on how the stateless can be protected.¹⁶⁴ The guidelines are based on experts meetings that were convened for issues relating to statelessness which were concluded by finalising on what defined a stateless individual. It was further established whether it is a mixed question of fact and law when a state's operation of law does not regard an individual as its national.¹⁶⁵

The EAC partner states seek to strengthen the measures to address statelessness through coordination amongst them together with other international bodies and agencies such as the UN. The laws that grant and regulate the recognition of nationality of a state are extremely political and tend to be controversial. This is due to high migration levels or instances where states involved lack strengthened or effective regulations on nationality.¹⁶⁶ The existence of an EAC treaty seeks to encourage EAC Partners in committing to follow the principles provided for in the African Charter. Their obligation to respect and protect human rights also means that they are obligated to curb statelessness and respect the right to nationality. If EAC partner states do not grant the right to nationality within their territories, this would lead to the infringement of the right to free movement and lack of respect towards the people's human rights.¹⁶⁷

¹⁶³ UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 1: The definition of 'Stateless Person' in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012, HCR/GS/12/01" <https://www.refworld.org/docid/4f4371b82.html> (Accessed 28-08-2020); UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02" <https://www.refworld.org/docid/4f7dafb52.html> (Accessed 28-08-2020); UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, 17 July 2012, HCR/GS/12/03" <https://www.refworld.org/docid/5005520f2.html> (Accessed 28-08-2020); UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04" <https://www.refworld.org/docid/50d460c72.html> (Accessed 28-08-2020), UN High Commissioner for Refugees (UNHCR) "Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05" <https://www.refworld.org/docid/5ec5640c4.html> (Accessed 28-08-2020).

¹⁶⁴ UN High Commissioner for Refugees (UNHCR) "Handbook on Protection of Stateless Persons, 30 June 2014" <https://www.refworld.org/docid/53b676aa4.html> (Accessed 28-08-14-03-2020).

¹⁶⁵ UN High Commissioner for Refugees (UNHCR) "Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: ("Dakar Conclusions"), September 2011" <https://www.refworld.org/docid/4e8423a72.html> paragraphs 12 and 13 (Accessed 28-08-2020),

¹⁶⁶ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 5 (Accessed 06-04-2020).

¹⁶⁷ Ibid 6.

There is a need for countries that grant nationality based on descent only to have an obligation of surging the access of nationality on the basis of long-residence or other measures. When it comes to persons on the verge of becoming stateless, like children with no possibility of being granted the nationality of their parents, the state should put in place easy and expedited naturalisation procedures or even non-discriminatory ways of registration. In cases where states have available procedures to protect stateless children, in most circumstances it is very challenging to access these procedures and there is a need for other ways in which acquisition can take place. The process of naturalisation is based on the personal discretion of the Minister or President, however, it is supposed to be decided objectively based on processes that are transparent and fair. When an application for naturalisation is denied, reasons for such decision should be made available together with opportunities to review the decision in the case that the individual is said not to meet the requirements stipulated in legislation. The 1951 Refugee Convention in article 34 and the 1954 Convention on Statelessness in article 32 provides for states' obligation to assist with naturalisation. Therefore, states should consider these provisions when making decision of naturalisation. This can be seen in the case of the Makonde people in Kenya where fees related to applications were reduced.¹⁶⁸

The easy way of guaranteeing that children born in a state do not end up stateless is by the application of an outright *ius soli* rule which provides any child born in the state with automatic nationality.¹⁶⁹ This makes the right to nationality a controversial issue which needs radical legal knowledge in order to give answers on who should be considered a citizen. This on its own is but just one of the many challenges faced by a person claiming the right to nationality. In countries like South Africa, Mozambique and Lesotho for instance the laws and Constitutions conflict in some provisions.¹⁷⁰

The UNHCR has considered three possible solutions for refugees and these are: (i) considering integrating them in the first country they seek asylum, (ii) resettling them in another country and (iii) repatriating them voluntarily. Repatriating refugees is considered a better resolution, however,

¹⁶⁸ Manby B EAC <https://data2.unhcr.org/en/documents/download/66807> 81-82 (Accessed 06-04-2020).

¹⁶⁹ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 4 (Accessed 31-03-2020).

¹⁷⁰ Ibid 46.

there is no certainty on the safety of the refugees when repatriated. A small figure can be resettled so this is not a more viable solution as the number of refugees has increased over the years. The large number of refugees that have settled in other countries on the basis of asylum has seen a need for a solution that can allow for refugees to be reintegrated into the local communities. Article 34 of the 1951 Refugee Convention stipulates that countries should enable the adjustments of refugees through naturalising them. States should do this by making sure that the process is accelerated, affordable and accessible to all.¹⁷¹

African countries have seen a protracted and large number of refugees settling in different regions whether the reason is for exile or fear of persecution but there has been a need for solutions to be put into operation.¹⁷² The 1951 Refugee Convention provides for what is known as the ‘cessation clauses’ which are related to ending the status of being refugees in a manner that is regulated.¹⁷³ This process allows for the UNHCR to enter into agreements with the nationality countries of the refugees so that they may be repatriated or integrated into society. In some cases when an individual is still in need of protection from another country, they will qualify to be exempted from the process.¹⁷⁴

The procedure of naturalising stateless individuals is provided for in broad terms in the laws of a few countries.¹⁷⁵ The interpretation of law providing for the naturalisation of stateless people often is not done in a favourable manner in practice, however, countries such as Lesotho and Malawi

¹⁷¹ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 46 (Accessed 31-03-2020).

¹⁷² UN High Commissioner for Refugees (UNHCR) “Protracted Refugee Situations, 10 June 2004, EC/54/SC/CRP” <https://www.refworld.org/docid/4a54bc00d.html> 14 (Accessed 25-08-2020, see also Manby B ibid 128).

¹⁷³ Manby B ibid 129.

¹⁷⁴ UN High Commissioner for Refugees (UNHCR) “Assistance to refugees, returnees and displaced persons in Africa: Report of the Secretary-General, 29 August 2006, A/61/301” <https://www.refworld.org/docid/4601416e2.html> (Accessed 26-08-2020).

¹⁷⁵ See for instance article 17 of the Nigerian National Commission for Refugee Act of 1989 which stipulates that, ‘[s]ubject to the provisions of relevant laws and regulations relating to naturalisation, the Federal Commissioner shall use his best endeavours to assist a refugee, who has satisfied the criteria relating to the acquisition of Nigerian nationality to acquire the status of naturalisation under such relevant laws and regulations’ and section 14 of the Ghana Refugee Law of 1992 provides that the ‘[s]ubject to the relevant laws and regulations relating to naturalisation, the Board may assist a refugee who has satisfied the conditions applicable to the acquisition of Ghanaian nationality to acquire Ghanaian nationality’.

provide for, in certain situations, stateless persons to be registered.¹⁷⁶ The aim now is for other countries to follow suit in terms of naturalising stateless persons and granting them with a legally recognised status while improving on the shortcomings that are faced by the countries that already have that provision in their laws. There are countries with commendable naturalisation systems that are accessible to refugees and deal with them in the most humane manner. The systems do not have in place requirements that may hinder the access by refugees and are easily accessible and operational. Accommodating naturalisation measures should be made available for refugees that have been integrated in communities or who are in camps.¹⁷⁷

According to the UNHCR the Southeast Asian region should be a priority,¹⁷⁸ in relation to the Global Action Plan 2014-2024 to end statelessness.¹⁷⁹ The reason for this is not only because it is estimated that 40 per cent of the stateless people are found in that region but also because the nationality status of the Rohingya community in Myanmar has not been resolved. Further, there still is a lack of improvement towards respecting the human rights of the Rohingya community.¹⁸⁰

Conclusion

Being granted nationality is an opening to the ability of persons to exercise their rights and being protected by the state which granted them citizenship amongst other things.¹⁸¹ For one to possess citizenship they should be linked to a state and that link should be recognised.¹⁸² In cases where people have not acquired citizenship it means they do not have rights such as socio-economic, political and civil rights for instance. This makes their existence difficult in the sense that they are

¹⁷⁶ Manby B “Citizenship Law in Africa: A Comparative Study” <https://www.opensocietyfoundations.org/uploads/d5d1d086-1a0d-4088-b679-003e09e9c125/citizenship-law-africa-third-edition-20160129.pdf> 130 (Accessed 31-03-2020).

¹⁷⁷ Ibid.

¹⁷⁸ Vonk O “Comparative Report: Citizenship in Asia” https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 27 (Accessed 24-08-2020).

¹⁷⁹ UNHCR The UN Refugee Agency “Global Action Plan to End Statelessness: 2014 – 2024” <https://www.unhcr.org/ibelong/global-action-plan-2014-2024/> (Accessed 26-08-2020).

¹⁸⁰ Vonk O “Comparative Report: Citizenship in Asia” https://cadmus.eui.eu/bitstream/handle/1814/50047/RSCAS_GLOBALCIT_Comp_2017_04.pdf?sequence=1&isAllowed=y 26 (Accessed 24-08-2020).

¹⁸¹ Isharyanto 2019 Jurnal Dinamika Hukum.

¹⁸² Bosniak L “Citizenship Denationalized” 7(2) 2000 *Indiana Journal of Global Legal Studies* 447-509.

unable to do things that may seem easy to those that have the legal citizenship status such as accessing health facilities, getting employed or even accessing education.¹⁸³

The status of being recognised by a state as a citizen is crucial in relation to the link created between a country and the citizens.¹⁸⁴ The authors are of the view that the role of citizens is often taken for granted by states, and even in writings, yet they are the needed basics for a state to be recognised as such and without which it becomes impossible. The predicament further extends because the exercising of rights and obligations are linked to people being recognised as citizens.¹⁸⁵ This leads to the question of what steps should be taken against states that decide to denounce the citizenship status of a group of people based on their ethnicity or discrimination. This is a narrative that should be challenged vigorously as many people's rights are being violated with states getting away without any consequences attached to their actions. The nature of citizenship makes it a very intrinsic and integral topic in terms of policies both within states and outside.¹⁸⁶ The question of who belongs to a state remains in the power of such states to regard and decide upon, however, this power is now subjected to be in line with the principles provided for by international laws related to nationality.¹⁸⁷ Lack of consensus between states on what measures should be regarded on the determination of citizenship is still the challenge. If states could reach a consensus on a method to use, the different challenges faced by citizens related to nationality would decrease.

¹⁸³ Ngai M M "Birthright Citizenship and the Alien Citizen" 75(5) 2007 *Fordham Law Review* 2521-2530.

¹⁸⁴ Parker K M "Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts" 2001 *Utah Law Review* 75-124 75.

¹⁸⁵ Filomeno A "The triumph of instrumental citizenship? Migrations, identities, and the nation- state in Southeast Asia" 23(3) 1999 *Asian Studies Review* 307-336 and Volpp L "The Citizen and the Terrorist" 49(5) 2002 *UCLA Law Review* 1580-1583.

¹⁸⁶ Isharyanto 2019 *Jurnal Dinamika Hukum* 449.

¹⁸⁷ Ibid.

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