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STATELESSNESS AND LAWYERS FOR HUMAN RIGHTS

1. Background

Statelessness, is a legal concept describing the lack of any nationality, and the absence of a recognized link between an individual and any state. A *de jure* (legally defined) stateless person is someone who is not considered as a national by any state under the operation of its law.

A *de facto* stateless person is someone who is outside the country of his or her nationality and is unable or, for valid reasons, unwilling to avail him- or herself of the protection of that country. This can be a result of persecution, in which case there is an overlap with the definition of a refugee, but it can also be a consequence of lack of diplomatic relations between the state of nationality and the state of residence.

Some *de jure* stateless persons are also refugees although not all refugees are *de jure* stateless, and not all *de jure* stateless persons are refugees. Many stateless persons have never crossed an international border.¹

The causes of statelessness around the world are numerous. In most cases, there is an underlying issue of discrimination; usually on the basis of race or ethnicity, religion, or sex. In many cases, statelessness affects entire minority populations that have never been recognized as nationals of the state where they are habitually resident. Statelessness caused in part or whole by ethnic discrimination is often handed down from one generation to the next.²

Conflict of nationality laws can be another cause of statelessness. Nationality is usually acquired through one of two modes: *jus soli* or *jus sanguinis*. *Jus soli* denotes a regime by which nationality is acquired through birth on the territory of the state. This is common in the Americas. *Jus sanguinis* on the other hand is a regime by which nationality is acquired from birth through descent – usually through a parent who is a national. Today, many states, including South Africa, apply a combination of the two systems.³

Although many states allow for acquisition of nationality through parental descent irrespective of where the child is born, many still do not allow their female citizens to confer nationality to their children. This may result in statelessness where the father is stateless, unknown, or otherwise unable to confer nationality. There have however been recent changes in favour of gender neutrality in nationality laws in some parts of the world. Moreover, the Convention on the Elimination of all Forms of Discrimination against Women prohibits sex discrimination in conferral of nationality.⁴

An important measure to avoid statelessness at birth is to provide nationality to children born on the territory who would otherwise be stateless. This norm is stipulated in the 1961 Convention on the Reduction of Statelessness (to which South Africa is not a signatory).⁵ It also appears in several regional human rights treaties, including the American Convention on Human Rights, the European Convention on Nationality, and the African Charter on the Rights and Welfare of the Child (which South Africa has signed and ratified). UN Convention on the Rights of the Child are

¹ The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation

² United Nations High Commissioner for Refugees (2010)

³ DHA 92012)

⁴ Otero (2011)

⁵ The 1961 Convention on the reduction of Statelessness



obligated to ensure that every child acquires a nationality. The Convention requires states to implement this provision in particular where the child would otherwise be stateless, and in a manner that is in the best interests of the child.⁶

In some cases, statelessness is a consequence of state succession. Recent history has shown that some people have become stateless when their state of nationality ceased to exist, or when the territory on which they live came under the control of another state. This was the case when the Soviet Union disintegrated, and also in the cases of Yugoslavia and Ethiopia.⁷

A final cause of statelessness is non-state territories. As per the definition of a stateless person, only states can have nationals. As a result, people who are “citizens” of non-state territories are stateless. This includes, for instance, occupied territories where statehood has ceased to exist or never emerged in the first place. The Palestinian Territories is one example, but also Western Sahara and Northern Cyprus may be considered as such, depending on the interpretation of statehood and sovereignty.⁸

Not holding proof of nationality or being “undocumented” is not the same as being stateless. However, lack of key identity documents such as a birth certificate can lead to a risk of statelessness. Many millions of people live their entire lives without documents, without their nationality ever being questioned. Two factors are of particular importance: a. is the nationality in question acquired automatically or through some form of registration; and, b. has the person ever been denied documents on the basis that he or she is not a national. If nationality is acquired automatically, then the person is a national regardless of documentation status (although in practice the person may face problems accessing certain rights and services – not because he or she is stateless but because he or she is undocumented). If registration is required, like in South Africa, then the person is not a national until that has been completed. As a practical matter, the longer a person is undocumented, the greater the likelihood that he or she will end up in a situation where no state recognizes him or her as a national.

Although South Africa is not signatory to the convention of the prevention of statelessness, the country's responsibilities in terms of Universal and African Charters on Human Rights as well as the convention on the Rights of the Child and the Refugees Act, all directly imply the need to prevent situation leading towards statelessness. In this regard the UNHC has a Publication targeted at Parliamentarians as to how they can help with such issues. The guide states inter alia:

“Parliamentarians are in a unique position to help to reduce the incidence of statelessness and to ensure that stateless individuals are accorded the rights and fulfill the obligations stipulated under international law. They can do so in several ways: by reviewing nationality legislation and making sure that it conforms to international standards, by supporting accession to the 1954 and 1961 Conventions on statelessness, and by advocating for the reduction or elimination of statelessness and for the resolution of cases involving stateless persons.

What should parliamentarians look for as they review national legislation concerning statelessness?

- Review relevant international or regional treaties to which the State is Party. Review treaties, conventions, and declarations to which the State makes reference in national legislation; that will assist in the interpretation of the national legal framework.

⁶ Manby (2009)

⁷ International Observatory on Statelessness (2012)

⁸ Ibid (2012)



- Since many States incorporate provisions relating to nationality in several different legal instruments, review the Constitution, citizenship acts, decrees, and all sources of national law that might shed light on a State's law and on its interpretation of the law.
- Review bilateral and multilateral agreements adopted in cases of State succession."⁹

Due to a conflict of citizenship laws between various African nations, and intentionally discriminatory laws and practice, many Africans find themselves *de jure* stateless – they do not qualify for citizenship under any nation's legal system. In addition, due to a range of factors including low birth registration rates and lack of documentation; migration; and difficulty accessing government services, many would-be citizens are *de facto* stateless – effectively stateless due to an inability to prove or access their nationality.

Lawyers for Human Rights (LHR) is a legal assistance Non Governmental Organization and in March 2011 it launched a new project focusing on the issue of statelessness which forms part of its Refugee and Migrant Rights Programme. The objectives of the Statelessness Project are to: provide direct legal services to individuals; identify and raise awareness of causes of statelessness and populations of concern; recommend and advocate for legislation, policies and procedures to address and prevent statelessness; and advocate for ratification of the two statelessness treaties.¹⁰

LHR indicates that access to nationality is an issue both for individuals born in South Africa as well as immigrants. The problem of statelessness and denial of citizenship is serious in that recognition of nationality serves as a key to a host of other rights. As a result, stateless individuals are often unable to access basic human rights such as education, health care, employment, equality, liberty and security of person. In addition, denial of citizenship frustrates peace and has resulted in violence and armed conflict in several African nations. However, the problem of statelessness has remained largely invisible. Currently there exist limited mechanisms under South African law and policy to assess, prevent and reduce statelessness. At the same time, there is a dearth of information or statistics about the magnitude of the problem.

The most recent amendment to the Citizenship Act (No 17 of 2012) makes provision in section 4(3) for preventing the statelessness of children born to permanent residents by allowing them citizenship once they are adults. The following clause suggested by the LHR, however was not included:

A child born outside of the Republic to parents who are not South African citizens or who have not been admitted into the Republic for permanent residence is eligible to apply for South African citizenship:

-if he or she became orphaned or abandoned within the Republic, provided he or she does not have the citizenship or the right to claim the citizenship of another state;

-if the child is unaccompanied and does not have the protection or the right to claim the protection of another state;

The child will be entitled to remain legally in the country even after the age of majority if an application for citizenship has been lodged until the application for citizenship has been finalized.¹¹

LHR is likely to raise concerns around the potential for the lack of such a clause to create a category of stateless and particularly vulnerable children. The LHR is also concerned with individuals, particularly in prolonged detention before deportation, who are undocumented and cannot or will not provide information on their citizenship.

⁹ UNHCR (2005)

¹⁰ LHR (2011)

¹¹ LHR (2010)



Questions to LHR

1. Until such time as legal amendments are made, what can be done to distinguish between detained persons who are legitimately stateless and those who are concealing their identities/nationalities to conceal international criminal records or to deliberately obstruct their legal deportation?
2. Has the LHR or its sister organizations come across any cases of foreign unaccompanied and undocumented children that are classifiable as stateless and if so how is this currently being dealt with?
3. One of the concerns likely to be raised if South Africa considers acceding to the Convention on the Reduction of Statelessness is how to prevent this category of persons becoming an even larger legal loophole than is already the case for the refugee legislation. What is the LHR response to this concern?
4. What is the extent of the problem of statelessness? In the considerations on amendments to the Citizenship Act

Questions to DHA

1. Has the DHA encountered any cases of unaccompanied undocumented children born outside of the country, and if so what procedures and legal provisions are used to ensure that they have some legal status in the South Africa?

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