



NATIONAL BIRTH REGISTRATION REQUIREMENTS A DOORWAY TO STATELENESS IN ZIMBABWE

BY

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Declaration

I PHUMZILE MPOFU do hereby declare that the work contained in this dissertation is a product of my own original work with the exceptions of quotations and references which had been attributed to their sources. I further declare that this work has never been previously submitted and is submitted in partial fulfilment of the Master of Laws in International law degree at the University of Zimbabwe.

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DEDICATION

This research paper is wholeheartedly dedicated to my loving mother and my sister, my partner, the rest of my family and friends who all gave me the strength when I thought of giving up, I am extremely grateful.

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ABSTRACT

Statelessness has been and is an issue in Zimbabwe and globally. The problem is the large number of people that are stateless or potentially stateless in Zimbabwe. This Research shows that Zimbabwe has stateless persons for many reasons the biggest being failure to acquire birth certificates despite the existing national legal frameworks and regional and international instruments that the country is party to that address the right to nationality. The research investigates whether the several requirements needed to acquire a birth certificate are themselves a set back to the acquisition of a birth certificate in Zimbabwe or whether the implementing institution of those requirements i.e. the Department of the Registrar General (DRG) is also catalyst in this issue. The latter was done through interviews and a critical analysis to the Zimbabwe's birth registration requirements to identify gaps and impediments and a critique of the Zimbabwe's birth registration process and laws with that of some Southern African jurisdictions was done to come to conclusions. The right to nationality is the most paramount fundamental human right that is inherent to a person once they come to mother earth. It is a key that unlocks all other fundamental human rights. The majority affected by statelessness are children which in turn has an adverse effect on their right to nationality and other fundamental rights. It is also evident that there seems to be two sets of birth registration requirements, those in the Act and those from the DRG. Although it has its hindrances, the the Births and Deaths Registration Act requirements cannot be faulted as the main cause of child statelessness or its risk thereof. The research concludes that the birth registration requirements by the DRG which are inconsistent, unclear and unknown coupled with its failure to use its discretionary powers are the major barrier to birth registration.

Keywords: *Statelessness, birth registration requirements, de facto statelessness, de jure statelessness*

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List of Acronyms

CSO	: Civil Society Organisation.
DRG	: Department of the Registrar General.
ICCPR	: International Covenant on Civil and Political Rights.
ISI	: Institute on Statelessness Inclusions.
LFR	: Legal Resources Foundation.
UDHR	: Universal Declaration on Human Rights.
UN	: United Nations.
UNGA	: United Nations General Assembly.
UNHCR	: United Nations High Commissioner for Refugees.
UNICEF	: United Nations International children's Fund.
UPR	: Universal Periodic Review Report.
ZHRC	: Zimbabwe Human Rights Commission.
ZWALA	: Zimbabwe Women Lawyers Association.

CHAPTER 1

INTRODUCTION AND BACKGROUND OF THE RESEARCH

1. INTRODUCTION

This chapter will give a background of the topic the topic chosen by the researcher of whether the Zimbabwe birth registration requirements act as hindrance to birth registration and thus open room for child statelessness in Zimbabwe. This will be done by demonstrating the magnitude of both child statelessness and general statelessness in Zimbabwe through a discussion of several statistics compiled by other scholars. Further the chapter review literature on child statelessness and its causes with general focus being on Zimbabwe. Finally the chapter will list the research questions that ought to be answered in order to effectively attend to the research topic as well as to discuss the scope and limitation of the study.

2. BACKGROUND

Statelessness has been a global issue since time immemorial. Mbiyozo's research notes that millions of people in around the world do not have access to nationality and are effectively Stateless.¹ A study conducted by the United Nations noted that statelessness is as old as when the phenomenon of Nationality came into existence.² In actual fact it is a barrier to the right to Nationality. Statelessness is defined as a person who is not recognised as a national by any State under operation of law.³ When one is Stateless they will be in a condition in which they will have no formal, legal or protective relationship with any recognised State no matter their emotional identification.⁴ In essence a stateless person has no nationality.

The right to nationality is arguably the most important right as it lays a foundation to all other rights. George and Elphick note that many States especially in Africa such as Zimbabwe, Zambia, South Africa and Botswana do not have specific laws that deal with Statelessness but rather their legal frameworks relate to the eradication or reduction of statelessness through the right to nationality.⁵ Chauke posits that the right to Nationality is a key that opens up all other rights, as one needs to first be recognised as a National of a State in order to be protected and be afforded the rights that are

¹ AN Mbiyozo (2019) 'Statelessness an old problem with new threats. P 1.

² United Nations (1949) 'A study of Statelessness' p 5.

³ Article 1 of the 1954 Convention relating to the Status of Stateless Persons.

⁴ D E E Manono (2021) 'Peoples' right to a Nationality and the Eradication of statelessness' in African in Statelessness &Citizenship review p 43.

⁵ P George and R Elphick (2014) 'Promoting Citizenship and Preventing statelessness in South Africa: A Practitioner's guide', p20

afforded to nationals of that particular state.⁶ This therefore means if one is Stateless, the right to nationality and all other rights that depend on being a national to a State will also be infringed. Clearly the consequences of being stateless are devastating this is why the United Nations General Assembly sought to reduce global statelessness through the passing of the 1954 Convention Relating to the Status of Statelessness. Several other international and regional instruments were passed after the 1954 Convention in a bid to reduce and ultimately eradicate global statelessness.

Zimbabwe joined in the bid to reduce statelessness by being a party to several of the international and regional instruments relating to statelessness and undertaking to reduce statelessness in its State. At the heart to achieving and exercising the right to nationality is acquiring a birth certificate. Birth Registration is a step towards achievement of nationality and citizenship.⁷ It is however disturbing to note that a large number of children and some adults in Zimbabwe fail to acquire birth certificates at the Department of the Registrar General's Office despite Zimbabwe's undertaking to make efforts to reduce statelessness. This research will thus investigate whether the several requirements needed for one to acquire a birth certificate in Zimbabwe are themselves a set back to the acquisitions and thus fuelling statelessness.

Several researches have noted that a large number of children and adults in Zimbabwe are stateless or potentially stateless. Despite being a party to several international instruments, Mbiyozo remarks that Zimbabwe has been listed as the top four (4) countries that house the biggest stateless populations in Africa and has been term the main Statelessness Crisis in Southern Africa.⁸ The Zimbabwe Universal Periodic Review Report (UPR) averred that their research showed that approximately three hundred thousand (300 000) people in Zimbabwe are stateless due to several reasons but mostly failure to acquire birth certificates.⁹ Research has shown that fifty percent (50%) of Zimbabwe's orphans do not have birth certificates, ninety five percent (95%) of the children living in institutions do not have birth certificates¹⁰ and that thirty percent (30%) of all children in Zimbabwe do not have birth certificates.¹¹ Ridderbos adds that of the stateless population in Zimbabwe thirty percentage (30%) of them are farm workers who illegally migrated to Zimbabwe from countries such as Malawi and

⁶ T Chauke (2021) 'Statelessness and Nationality in South Africa' in Lawyers for Human Rights, p 2.

⁷ B Mandy (2020) 'Citizenship and statelessness in Member States of Southern Africa' in United Nations High Commissioner for Refugees, p 9

⁸ Note 1 above, p3.

⁹The 2020 40th Zimbabwe Universal Periodic Review for the period January - February 2022.

¹⁰ Reform of birth registration law urged in The New Humanitarian [www.thenewhumanitarian.org/fr/node/215842]

¹¹J Cassim (2021) 'Stateless Zimbabweans endure prejudice without identity: Registrar General Fails to implement new Citizenship law' continues to function under discriminatory 1984 Citizenship Act'. [www.aa.com.tr/en/Africa/stateless-zimbabweans-endure-prejudice-without-identity/2308737].

Mozambique who were mostly not documented and moved to Zimbabwe during the colonial era.¹² Such parent's children pass on their statelessness to their children as they do not have enough requirements to effectively give notice of the births of their children to the department of the Registrar General.

Chauke notes that though authors and institutions have tried to compile statistics on the number of statelessness people, it is very difficult to accurately do so because of the nature of statelessness. Statelessness is a complex phenomenon and the people that are affected by it are usually undocumented and unaccounted for by states and the reality is that the numbers that are published are mere estimations whereas the actual number may be a lot larger than the published statistics.¹³ These numbers are despite the fact that Zimbabwe is a party to several international and regional instruments some through accession without reservation and others through ratification. In line to being a party to the aforementioned instruments, Zimbabwe has domesticated some provisions that promote the reduction of statelessness in its Constitution¹⁴ and other statutes such as the Births and Deaths Registration Act.¹⁵ This backdrop thus begs the question of whether the competent body in charge of conferring and revoking nationality that is the Registrar General's Office is the weak link towards birth registration and acquiring of birth certificates through its requirements of birth registration.

3. STATEMENT OF PROBLEM

The challenge is the large number of people (children included) that are stateless or potentially stateless in Zimbabwe. This is regardless of the international, regional legal framework that Zimbabwe is a part of as well as its national legal frameworks that advocate and promote the right to nationality. One is prompted to question the competent authority charged with conferring and revoking nationality that is the Department of the Registrar General's office, whether its requirements for birth registration are in themselves a hindrance to birth registration and thus working against the reduction of statelessness.

4. OBJECTIVE OF STUDY

The research critically discusses the term statelessness how it results as well as the consequences and effects of statelessness. The researcher also unpacks provisions that deal with statelessness and birth registration in international, regional instruments.

¹² K Ridderbos (2008) 'Stateless Farm workers in Zimbabwe' in International Displacement Center, p1.

¹³ T Chauke (2021) 'Statelessness and Nationality' in South Africa in Lawyers for Human Rights, p4.

¹⁴ Constitution of Zimbabwe Amendment (No. 20) Act 2013

¹⁵ Births and Deaths Registration Act chapter 5.02.

Flowing from the international and regional instruments particularly those that Zimbabwe is a party to, an analysis is done on the current Zimbabwean national legal frameworks in relation to statelessness and whether this legal framework is in line with the International and Regional frameworks. Also, the research does an in-depth discussion on Zimbabwe's national birth registration requirements, identifying loopholes or setbacks. Further, a comparative analysis of Zimbabwe's birth registration requirements and the legal framework to those of other jurisdictions will be done. Finally observations and recommendations on how to circumvent the identified barriers or setbacks with regards to birth registration in Zimbabwe will be proffered.

5. RESEARCH QUESTIONS

- 1) What is statelessness?
- 2) What are the effects of statelessness?
- 3) What are the international and regional legal frameworks on statelessness?
- 4) What are the Zimbabwean legal frameworks in relation to statelessness?
- 5) What influence does the Zimbabwe legal framework have on the national birth registration requirements required by the Department of the Registrar General?
- 6) What are the birth registration requirements provided for in the Zimbabwe's Births and Deaths Registration Act?
- 7) What are the birth registration requirements for other jurisdictions?

6. RESEARCH METHODOLOGY

The research method that was adopted in this study is a combination of the Doctrinal and Non-Doctrinal research. To a greater extent the Doctrinal research was relied on as the researcher analysed the international, regional and national legal frameworks on and in relation to child statelessness and birth registration. Under this research technique, books, journal articles, case law as well as previous studies from other scholars in the legal field were analysed. The research heavily relied on secondary sources of data collection in order to gather relevant data for the present study. The research used secondary sources that were compiled through statutes, books, journal articles and data from previous studies. Non-Doctrinal research method technique was used in collection of primary data through interviews. The Researcher interviewed the Legal Resources foundation on their study and survey of birth registration in Zimbabwe and the Zimbabwe Human Rights Commission on their research document which was dedicated to National Registration in Zimbabwe. The Researcher had also scheduled to

hold an interview with the Department of the Registrar General, but the endeavour was fruitless due to circumstances beyond the researcher's control.

7. LITERATURE REVIEW

A number of scholars have endeavoured to investigate statelessness. At international law, childhood statelessness is frowned upon, this is because of the effects it has on the stateless children. A child is defined as a person below the age of 18.¹⁶ The United Nations High Commissioner of Refugees (UNHCR) noted that child statelessness opens them up to a life of discrimination as they will not be able to access medical care, participate in sports, write national examinations and ultimately it will be difficult for them to get decent employment.¹⁷ That status of being stateless haunts these children during the course of their lives. This is why a number of international instruments have been effected to reduce and guard against statelessness especially among the vulnerable groups such as the persons with disabilities, children and worse more children with disabilities.¹⁸

Manono posits that three quarters of the statelessness population in the world belongs to the minority groups.¹⁹ This is because minority groups are the most vulnerable and face a lot of challenges in trying to enforce their rights including the right to nationality which guards against statelessness. Of all the minority vulnerable groups such as refugees, illegal migrants and segregated ethnic and racial groups, children are a common factor resulting in children being the most affected by statelessness. It is thus important to strive and make serious efforts to eradicate or at the very least reduce child statelessness as this also helps protect future generations from statelessness.²⁰ This is because the stateless children now will grow to become stateless parents and giving birth to children who are at a great risk of also becoming stateless thereby perpetuating the vicious cycle.

Siegelberg avers that the notion of statelessness is explosive and has various political implications and has a very broad meaning, however, after the Second World War it was accepted to mean persons living outside the boundaries of being State nationals and are trying to seek entry.²¹ On this end governments are mandated to make

¹⁶ Article 1 of the Charter on the Rights of Children.

¹⁷ United Nations High Commissioner for Refugees 2015 Report on Statelessness 'Urgent need to end Childhood Statelessness', p4.

¹⁸ Institute on Statelessness and Inclusion (2014) 'World Statelessness', 19.

¹⁹ D E E Manono (2021) 'Peoples' right to a Nationality and the Eradication of statelessness' in African in Statelessness & Citizenship review p 43.

²⁰ I Paolini (2021) 'Statelessness in West Africa is a crucial for Domestic and Regional securities, p4.

²¹ M L Siegelberg (2020) 'Statelessness a Modern History', p2.

determinations of whether to confer citizenship to such persons or to refuse it. It was only after the World War that States under the United Nations (UN) recognised and acknowledged the gravity of statelessness which resulted in the Conventions and other international instruments. Unfortunately international law is difficult to enforce as it is only binding upon agreement by interested member States and in some Conventions nations can agree to be a part of them but with reservations.²² As a result, Mander and Singh, posit that a number of member States despite being parties to statelessness Conventions are not religiously following the provisions stated in the Conventions, thereby perpetuating statelessness²³ Mbiyozo notes that this principle of State Sovereignty weighs is a boulder that weighs heavily on the efforts to reduce and do away with statelessness at international law.²⁴ The principle is at the core of the State's reluctance to effectively deal with statelessness.

Paolini acknowledges that there are a number of reasons that cause statelessness in Africa such as discriminative laws, contradicting laws, colonial legacies, ethnicity and hostile administrative practices.²⁵ The author posits that the factors are interwoven in that they enable each other. While there are varied reasons for childhood statelessness, Gordon astounds that failure to register child births is the largest cause.²⁶ Matimbe propounds that birth registration affords a child proof of their name and nationality and aids in making their legal standing ascertainable and that failing to register a birth may render the child stateless.²⁷ Cassim avers that Zimbabwe's situations with regards to statelessness as a result of the difficulties in birth registration is very high,²⁸ The author attributes these difficulties to unchanging national laws and cumbersome administrative and procedural issues in the Registrar General's office. The administrative issues include the requirements for birth registration. Section 10 of the Births and Death Registration Act outlines the requirements needed for one to register a birth where parents are legally married, not married or deceased.²⁹

Bloom posits that the delay in administrative processing for one to acquire documentation can lead to statelessness.³⁰ For instance when one has renounced his/her nationality of one state and awaiting to be granted citizenship of the other state he/she would have applied for, in that period the one will be awaiting

²² CC Rachels (2015) 'A Spontaneous Order: The Capitalist Case for a Stateless Society', p23.

²³ H Mander & N Singh (2021) 'This Land is Mine, I am not of this Land CAA-NRC and the Manufacture of Statelessness, p96.

²⁴ Note 1 above, p2.

²⁵ Note 15 above, p2.

²⁶ J.A Gordon (2020) 'Statelessness and Contemporary Enslavement', p24.

²⁷ T Matimbe (2021) 'Towards securing children's right to Birth registration in Zimbabwe', p 2.

²⁸ Note 18 above.

²⁹ Note 8 above.

³⁰ T Bloom et al (2017) 'Understanding Statelessness', p102.

documentation, they will be stateless. The Institute on Statelessness notes that this kind of statelessness is usually caused by arbitrary deprivation of citizenships caused by conflict of state laws or state succession.³¹ Additional requirements to birth registration are given on Zimbabwe's government website³² the trend that can be drawn in all the requirements is that all persons coming to register the birth of a child should themselves have national Identity documents, where the parents are deceased in addition to informant's national identification, the parent(s) death certificate(s) is required.

The Zimbabwe UPR Report notes that approximately 30% of the farm workers that worked in farms during the colonial era consisted of mostly undocumented foreigners.³³ These foreigners became long term migrants who have created generations in Zimbabwe and these cascading generations remain undocumented.³⁴ This will therefore mean that the children and grandchildren of these long-term migrants will not be able to register the births of their children and these parents will not have identity documents. This thus leaves these children and their descendants stateless or at the very least potentially stateless.

The Gukurahundi massacre is also another source of potentially stateless persons in Zimbabwe. Amnesty International notes that families of more than twenty thousands (20 000) people who were killed failed to get the deceased persons death certificates.³⁵ This therefore means according to section 10 of the Births and Deaths Registration Act, the children of the deceased persons will not be able to have their births registered for lack of their parent's death certificates and the deceased's descendants will not have birth certificates. Consequently the children of the deceased will be in fact stateless. In the ZHRC report on National Registration, the ZHRC noted that though there are several registration issues when it comes to birth registration such as corruption, attitudes of the Registrar General Officers amongst others, the registration requirements are the biggest issue.³⁶ The report explains that the issues of birth registration requirements is influenced by several factors.

From this literature review it is evident that the issue of statelessness is huge and keeps growing if States do not deal with Statelessness effectively. Though there are indeed varied instances that may result in people being stateless such as being stripped of a one's citizenship, failure to register to register births in Zimbabwe is the most

³¹ Institute on Statelessness Inclusion (2014) World Statelessness, p34.

³² [www.zimparis.gov.zw./](http://www.zimparis.gov.zw/)

³³ Note 6 above p 1.

³⁴ Ibid p 6.

³⁵ Amnesty international (2021) 'We are like stray animals: Thousands living on the margins due to statelessness in Zimbabwe' p 8.

³⁶ Zimbabwe Human Rights Commission (2020) 'Report on: National Inquiry on access to Documentation in Zimbabwe.'

notorious. Though statelessness cuts across all person the vulnerable minority groups are the most affected by statelessness, and of the groups children are found in all the categories thus children are the most affected by statelessness. It is from this backdrop that the researcher found it prudent to explore Zimbabwe's birth registration requirements and their nexus with statelessness. Whether these requirements act as barrier to the acquisition to the right to nationality. It is key to effectively deal with childhood statelessness not only because this is so mandated by several international instruments Zimbabwe is a party to, but because effectively dealing with childhood statelessness cuts statelessness's vicious cycle which has a tendency of cascading down generations.

8. SCOPE OF STUDY

Statelessness results in several instances such as arbitrary renunciation of Nationality or Citizenship, failure to register a birth or to acquire a national Identity Document or passport. Discriminatory laws can also result in statelessness however, this research will focus on requirements of birth registration in Zimbabwe in comparison to other African countries.

9. LIMITATION OF STUDY

The present research has been carried out with the aid of mostly secondary data as well as primary data that is two interviews. The researcher has settled for only three interviews instead of engaging other several key stakeholders such as Ministry of Justice, Legal and Parliamentary Affairs and other Civil Society Organisations. This is due to the lack of adequate and effective resources and time to properly carry out the interviews. Admittedly, statelessness is a global issue however, the research will limit itself to comparing the Zimbabwean birth registration situation to other African countries. This is ideal because other African countries have experienced similar conditions to Zimbabwe such as colonisation and most of them are developing countries such as Zimbabwe.

10. CONCLUSION

This chapter gave a brief background on statelessness and demonstrated through statistics from scholars that Zimbabwe is one the African countries which has the highest number of stateless people and of that population children are the most affected. A review of literature on the topic was done with scholars pointing towards failure to register births being the leading cause of child statelessness. The chapter also outlined research questions that are to be answered in this research in order to thoroughly investigate the researcher's topic. Finally, the chapter stated the objective

of the study and the scope to be covered in the research coupled with the limitations of the study.

CHAPTER 2

THE NOTION OF STATELESSNESS AND THE INTERNATIONAL AND REGIONAL INSTRUMENTS THAT GUARD AGAINST STATELESSNESS

1. INTRODUCTION.

This Chapter will unpack the notion of Statelessness both *de jure* and *de facto* and the link between statelessness and the right to nationality. A picture will be drawn on how statelessness through the right to nationality is at the centre of achievement of all other fundamental human rights. A discussion of the consequences of Analysis of the development of International and Regional Frameworks concerning Statelessness will also be done. Attention will also be paid on what causes one to be rendered stateless despite the several provisions of International and Regional legal instruments however focusing much on the issue of birth registration.

2. DEFINING STATELESSNESS.

Having seen the gravity and stench of statelessness, the United Nations General Assembly (UNGA) passed a Statelessness Convention which was aimed at providing States with practical solutions of addressing the needs of Stateless persons and well as affording them security and dignity as the States concerned resolved their matters.³⁷ Article 1 of the Statelessness Convention defines a Stateless Person as one who is not recognised as a national of any state by operation of the law. This therefore means that one will be deemed Stateless where they are not acknowledged as a National of any State, such acknowledgement is evidenced by being given national documentation such as a birth certificate, a national identification card and a passport.³⁸ The question of being a national or citizen of a particular country shows one's link or connection with the country, this can be severed by a number of reasons such as disloyalty, naturalisation or even change of a countries' law.³⁹ Pudar explains that statelessness can result because of the exclusion of certain groups of people from a nation by relevant bodies or even its law.⁴⁰ This means that a nation has the authority through a body it empowers to determine nationals of its country.

³⁷ Note 2 above.

³⁸ Note 18 above, p5.

³⁹ G De Groot and MP Vink (2010) Loss of Citizenship Trends and Regulations in Europe in European University Institute, 3.

⁴⁰G Pudar (2011) Persons at risk of statelessness in Serbia in 2011 United Nations High Commissioner for Refugees Reports, p6.

Edwards and Van Waas note that the notion of statelessness is not a new concept discovered by the UNGA but rather a political issue wherein States strip an individual membership of its nation and the predicament has survived the development of international law.⁴¹ At international law, both global and regional levels, laws have come to impose significant restrictions on the freedom of states to regulate access to nationality, the prevention and reduction of statelessness.⁴² It thus implies that the issue of Statelessness is difficult to deal with as it speaks to the autonomy of States, meaning that without the political will of a nation to deal with statelessness effectively it will continue to strive and grow at the detriment of the individuals who will have been rendered stateless.

Van Waas avers that from the letter of the provisions in the International Instruments, states are free to determine who their nationals within the limits of international Law are.⁴³ There is however a gap of enforcement mechanisms to the enjoyment and non-discrimination of the right to nationality.⁴⁴ This is mainly because international law is by consent of states and as such if a state does not ratify and accede to an instrument it will not be bound by its provisions and also even after ratification there is body which properly enforces the provisions of the instruments. This is evidenced by the case of Zimbabwe not acceding to international Instruments such as the Convention on the Reduction of Statelessness it will therefore not be bound by its provisions.⁴⁵ In essence therefore, the question of whether one is a nation of a state is solely on the state in question.

Important to note is that not being documented does not necessarily translate to statelessness, however, the majority of stateless people are undocumented. The practical manifestation of statelessness is normally shown by the inability to access proper documentation because naturally a state will not afford documentation to an individual they do not acknowledge and accept as their national.⁴⁶ However, one can be undocumented merely because, they have not come around to initiate process to acquire such documentation such an individual will not be stateless. However, where one has initiated process with the competent authorities in a State to no avail, such a person may be potentially or actually Stateless.⁴⁷ It is the aspect of being documented

⁴¹ M L Siegelberg (2020) 'Statelessness A Morden History, p35.

⁴² L E Van Waas (2012) Fighting statelessness and Discriminatory Nationality Law in Europe in European Journal of Migration and Law, 14(3), 244.

⁴³ Note 4 above, 247.

⁴⁴ Note 8 above.

⁴⁵ <https://www.newsday.co.zw/2017/05/govt-urged-deal-statelessness-rights-welfare-children/>.

⁴⁶ P George and R Elphick (2014) 'Promoting Citizenship and Preventing statelessness in South Africa: A Practitioner's guide', p1.

⁴⁷ Adam H A (2005)'Kenyan Nubians: standing up to statelessness' in Citizenship and Statelessness Project in Africa, p3.

or otherwise that separates stateless people into those that are *de jure* stateless and *de facto* stateless thereby having different effects with regards to the extent of protection they are afforded at International law.⁴⁸ The effects of statelessness are essentially the same despite the type of statelessness one falls under.

De jure statelessness means that one will be deemed stateless at law that is from a legal perspective.⁴⁹ Hence one is considered de jure statelessness when their circumstances fall squarely within the formal definition given under the Statelessness Conventions.⁵⁰ Kohn defines *de jure* statelessness as an individual's fate whereby all States which they have factual links fail to consider such person as their national by operation of the States in question's laws.⁵¹ For example a fugitive from country A, who was only recognised by country A as its national, has been stripped off such nationality by country A because of his insurgence, such a person will be stateless as after having been stripes off no State recognises him as a national. It is easier to trace people who are *de jure* stateless as often times they will have had an official interaction with the relevant authority which decides of conferring or revoking one's nationality which has a bearing on statelessness.⁵² After such interaction such authorities usually document such interactions as opposed to *de facto* whereby when ones does not meet the requirements called for by the authority they are simply turned away by the officials. As a result, the statistics of people that are de facto statelessness are as a result of field surveys by researchers and institutions this is why it is difficult to accurately account for the actual number of people that are stateless.⁵³

Whereas *de facto* statelessness on the other hand, is when one associated himself with a State but does not have or has failed documentation to that effect. Weissbrodt and Collins explain that one may be de facto stateless even inside the country of their nationality, for instance, where such person fails to establish their nationality in principle in or outside of their country.⁵⁴ George and Elphick note that one can have roots in a country as well as have a family and a village they come from but be in fact statelessness due to failure to register a birth or to acquire national identity documents.⁵⁵ De facto statelessness is the fate for most people all over the world, they

⁴⁸ K Ustyomenko 'Defining Statelessness: The Conception of the Definition and Why It Matters Today.' (Unpublished thesis, University of Columbia in the City of New York, 2013), p 4.

⁴⁹ B Manby '*Citizenship and Statelessness in Africa: The law and politics of belonging*' (Unpublished Dissertation, Maastricht University 2015), p 39.

⁵⁰ S Kohn (2011) De Jure Statelessness in the Real World: Applying the Prato Summary Conclusions, p4.

⁵¹ G Pudar (2011) Persons at risk of statelessness in Serbia in 2011 United Nations High Commissioner for Refugees Reports, p6.

⁵² Note 13 above.

⁵³ T Chauke (2021) 'Statelessness and Nationality' in South Africa in Lawyers for Human Rights, p4.

⁵⁴ Weissbrodt D & Collins C (2006) '*The Human Rights of Stateless Persons*' in Human Rights Quarterly, p251.

⁵⁵ Note 3 above, p 3.

are in fact nationals of the States they claim nationality but have failed to acquire national documentation to that effect.⁵⁶ Massey expands the definition of de facto statelessness to persons who are outside their country of nationality and are either genuinely unable or for valid reasons are not willing to avail themselves of the protection of that country and in most case such individuals end up refugees in other nations.⁵⁷

The Global refugees' protection international instrument, the Convention on the status of Refugees provides that for refugees owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it⁵⁸ Refugees can thus either de jure or de facto stateless. "*De jure stateless refugees*" are persons not having a nationality who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their former habitual residence and are unable or, owing to such fear, are unwilling to return to it. Whereas "*De facto stateless refugees*" are persons who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their nationality and are unable or, owing to such fear, are unwilling to avail themselves of the protection of that country.⁵⁹ In the case of refugees who are unwilling to avail themselves of the protection of the country of their nationality, it is their well-founded fear of being persecuted which gives rise to their "valid reasons" for refusing such protection and hence to their de facto statelessness.

3. THE EFFECTS OF STATELESSNESS.

The right to Nationality was first provided for in the Universal Declaration on Human Rights (UDHR). The UDHR states that everyone has the right to a nationality and that such right should neither be arbitrarily taken away nor should one be denied the right to change such nationality.⁶⁰ The right to Nationality is rooted in the existence of an unpretentious and effective relationship between an individual and a State.⁶¹ The first

⁵⁶ B Manby 'Citizenship and Statelessness in Africa: The law and politics of belonging' (Unpublished Dissertation, Maastricht University 2015), p 39.

⁵⁷H Massey (2010) Legal and Protection Policy Research Series: the United Nations High Commissioner for Refugees, P10.

⁵⁸ The 1951 Convention on the Status of Refugees as well as the 1967 Protocol relating to the Status of Refugees.

⁵⁹ United Nations High Commissioner for Refugees Reports.

⁶⁰ Article 15 of the 1948 Universal Declaration on Human Rights.

⁶¹M Archiron (2005) 'Nationality and Statelessness: a Handbook for Parliamentarians', p 8.

time this link was recognised was in a case decided by the ICJ in 1955, the Nottebohm Case. In that case, the court held that:

“According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. Nationality helps one develop a sense of emotional attachment to the State which will have recognised him.”⁶²

This therefore means where there is no connection or attachment between a State and an individual through effective documentation and recognition at law, the right to nationality is not being enjoyed rendering such a person stateless or at the very least potentially stateless. In the African context, nationality also gives an individual a sense of belonging. The right to nationality is thus deprived or infringed upon where one is rendered stateless. Bloom advances that one cannot meaningfully grapple statelessness without looking at nationality and citizenship as the concepts are interwoven in that the right to nationality acts as a shield against statelessness.⁶³As previously alluded to, the reduction and protection against statelessness is protected by the right to nationality. This means therefore that where there is statelessness or its risk thereof, the right to nationality as provided for in the international instruments and enshrined in the Zimbabwe Constitution under Chapter three will be infringed upon. The link between statelessness and other fundamental Human rights will thus be looked at from the effects of infringing upon the right to nationality.

The achievement of the right to nationality is pivotal as it unlocks access to the achievement of other fundamental human rights. This is because, naturally States afford protection and seek to promote the wellbeing of their citizens before anyone else. As expounded, the right to nationality is seen or materialised through proper documentation that is a birth certificate, a national identity card and a passport. It is these documents that one needs to produce in order to benefit from the several rights afforded by a State. For instance in Zimbabwe, for a person to be able to write the Grade 7(Seven) Zimbabwe School Examination Council (ZIMSEC) examinations, a birth certificate is required.⁶⁴ This is the same for the Ordinary as well as the advanced level ZIMSEC examination which require national documentation for one to register for them. The effect is that if one does not have such documentation they will not be able to sit for the mentioned examination and thus infringing on their right to education.⁶⁵ In that

⁶² Nottebohm case (Liechtenstein v Guatemala) [1955] ICJ Rep; Digested in 49 A.J.I.L 396.

⁶³ Note 21 above, p61.

⁶⁴ Note 18 above.

⁶⁵ Note 9 above, s75.

regard the deprivation of the right to nationality negatively impacts on the right to education.

The International Convention on Civil and Political Rights (ICCPR) provides that all eligible citizens should be afforded the right to participate in all public affairs in the States they are in including the right to vote.⁶⁶ This right is also provided for in the Zimbabwe Constitution which also affords the political rights inclusive of the right to vote to its Zimbabwean citizens.⁶⁷ The Zimbabwe Constitution provides that any Zimbabwean can vote provided that they have attained the age of majority which is 18 years, proof of such is seen on the national identification documents.⁶⁸ A hurdle is suffered where one's right to nationality has been infringed and they are without national documentation to prove their Zimbabwean citizenship and age. The effect is that though such a person will indeed be a Zimbabwean citizen, they will not be able to vote because of the lack of national documentation by virtue of being *de facto* stateless. This entails therefore ones political rights is automatically crippled by the infringement of the right to nationality.

Property rights are also inhibited by the deprivation of the rights to nationality. Article 17 of the UDHR stipulates that everyone has the right to own property either on their own or in concert with others, these rights were also incorporated in the Zimbabwe Constitution.⁶⁹ When one acquires property ordinarily it should be transferred to them through the Deeds Registry office wherein such person will be given a title Deed in favour of them. Where one has acquired such property and wants such property to be legally transferred to them, national identity documentations are required.⁷⁰ It means therefore that one cannot legally acquire property and register it in their name through the Deeds registry office if they are stateless and undocumented. The right to nationality in this case has positive direct impact on one's property rights in Zimbabwe, in that if their right to nationality is infringed so will their property rights.

Another right that is affected when one is deprived off the right to nationality is the right to freedom of profession, trade and occupation as provided for in section 64 of the Zimbabwe Constitution. The Supreme law of Zimbabwe provides that every person has a right to elect a profession, occupation and trade of their choice and that such might be regulated by the law. This can prove to be very difficult if not impossible when

⁶⁶ Article 25 of the International Convention on Civil and Political Rights of 1976.

⁶⁷ Note 9 above, S 67.

⁶⁸ The Zimbabwe Electoral Commission provides that for one to be able to register to vote they must have a National Identity card or Passport, the same requirement is given for one to actually vote after having duly registered. www.zec.org.zw/pages/how_to_register/

⁶⁹ Note 9 above, section 71.

⁷⁰ S5 of the Deeds Act see also the Deeds regulations under Deed Registries (Amendment No.9) Regulations of 2005 which requires the names of the transferee and the transferor to be written of the Deeds exactly as they appear on the national identity documents.

one is undocumented. For instance, working in the Government, a person cannot work in the Civil Service without proper effective national documentation worse more in the Security Services such as the Zimbabwe Republic Police or the Zimbabwe Defence Forces, this is despite such a person being in fact a Zimbabwean national who is merely undocumented. This is justifiable as allowing for an undocumented person to work for the Government can be fatal to a State and can pose a threat as well as expose a Nation's security. In essence, this means that a person who's right to nationality has been infringed upon cannot work in the formal sector as national documentation is a prerequisite for entry. In this case, the room to pick a profession, trade or occupation of choice falls away by the mere fact of being stateless and undocumented.

It is evident that the right to nationality is pivotal to the achievement of other fundamental rights. Archiron astounds that Chief Justice Warren as he then was, correctly noted in one of his Judgments that the right to nationality which also speaks to citizenship is a man's basic right to have rights.⁷¹ This is because of the domino overarching effect that the right to nationality has on other fundamental rights, tempering with the right to nationality also affects several other rights. It is for this reason that several international and regional frameworks were put in place in order to reduce as well as guard against statelessness through advocating for the realisation of the right to nationality. The effects of Statelessness can be drawn from its link to fundamental human rights. This is so in that where one is deemed stateless, they do not belong to any nation and such their right to nationality is trampled upon.⁷² Where the right to nationality is flouted several other fundamental rights are infringed upon as demonstrated in the discussion of the link between the right to nationality and other fundamental human rights. When one is without a birth certificate they cannot write the National examinations hence affecting one's education. This in turn has a bearing on their standard of living and literacy levels.

As alluded to, when one is stateless their liberty to choose any occupation, trade or profession of choice is severed. Often time the stateless population finds itself working in odd jobs such as illegal mining or giving labour to large scale farms where their labour is abused and rewarded with very low wages.⁷³ The stateless population is often exploited as they usually very illiterate and ignorant of other legal avenues they can use to assert their labour related complaints. Hence, they end up settling for less so they can be able to provide food and shelter for them and their families.

Properties such as land, houses and other immovable commercial structure are a stable source of wealth which one can enjoy and keep for their future generations. Where one

⁷¹ Note above, p 1.

⁷² Note 17 above, p 12.

⁷³ Note 17 above, p 12.

cannot at law have property registered in their name because of statelessness the privilege of legally owning immovable properties is taken away from such an individual thereby negatively affecting their wealth and their future generations' wealth.⁷⁴ In essence statelessness perpetuates poverty for the stateless individuals, their families and their future generations. This is also caused by the cyclic nature of statelessness whereby one is born stateless and fails to acquire a nationality till they grow up and marry in statelessness and in turn give birth to a stateless child.⁷⁵

A national of a State has the right to be heard in matters that concern them. An effective way of participating in public matters of a Nation is through the right to vote. One however cannot exercise such right if they are stateless, this is because, though such a person might be a citizen of that country they will not have the requirements that enable them to register to vote and to actually vote, that is national identification documents. It is therefore clear from the scenarios illustrated above that statelessness has dire consequences in that it limits several other important fundamental civil, political as well as economic rights of an individual thereby perpetuating poverty and exploitation among other ills.

As can be deduced in the above discussion, statelessness has a number of negative effects to the people that are affected by it. It has a far reaching effect because it shoots down on the right to nationality which underpins arguably all other fundamental civil and political rights amongst others. Bloom goes on to note that statelessness has the effect of taking away one's intrinsic sense of belonging.⁷⁶ The author also avers that statelessness brings a sense of inferiority and also attacks the fundamental right to equality as the stateless population often times cannot access the benefits that one would have normally received.

4. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS ON STATELESSNESS AND THE RIGHT TO NATIONALITY.

It is accepted that national documentation consists mainly of a birth certificate, a national identity document and in some instances a passport. George and Elphick define birth registration as the permanent and official recording of a child's existence by an administrative authority or board of that represent a State and the evidence of birth

⁷⁴ The Borgen Project 'How Statelessness affects global Poverty' www.borgenproject.org/statelessness-global-poverty/#:/text=Stateleness%20is%20as%20mucho%20of.accompanied%20by%20J=joblessness%20and%povert/

⁷⁵ Note 17 above, p 9.

⁷⁶ Note 21 above, p98.

registration is evidenced by a birth certificate.⁷⁷ Focus shall be placed on the birth certificate and its acquisition because it is the primary document that ascertains one's nationality paving way for the rest of the national identification documents. As such, attention will be paid to legal instruments that stipulate on statelessness and birth registration and acquisition.

The 1954 Convention relating to the Status of Stateless Person was the first Convention to specifically touch on the issue of statelessness. The Convention acknowledges that statelessness is a worldwide problem that required States to take positive steps to deal and resolve Statelessness issues in their respective Nations.⁷⁸ Another key aspect raised by this Convention was realisation and advocacy to protect identified stateless persons pending the States' concerned resolving the statelessness of the identified person.⁷⁹ This Convention as the first one to deal with the Statelessness and defining it, is thus the cornerstone on the notion of Statelessness.

The 1954 Statelessness convention was followed by the Convention on Reduction of Statelessness⁸⁰, an extension of the 1954 Convention. The Convention on Reduction of Statelessness went into detail as how States were supposed to guard against future statelessness and encourages the continuation of States in dealing with issues of Statelessness in their States. The Convention is aimed at avoiding statelessness at birth but does not prohibit revocation of nationality under certain circumstances and the granting citizenship to all currently stateless persons retroactively.⁸¹ The spirit of the Convention thus was to encourage States to ensure that all children born in their Nations are effectively registered by all means necessary in order to guard against future statelessness and also to cut the vicious cycle of statelessness. The 1954 Convention and the 1961 are thus called the Statelessness Conventions as they are the first two to deal directly with the issue of global statelessness and are thus the frameworks and yard sticks to other international and national laws on statelessness and the right to nationality.

Several other international legal instruments address the right to a nationality. Such as the 1957 Convention on the Nationality of Married Women which reverberates the UDHR by instructing the maintenance of the right to a nationality and the right not to be deprived of a nationality where a woman has subsequently divorced with her husband, and also that children born by such a woman be able to acquire nationality through

⁷⁷ Note 5 above, p8.

⁷⁸ Note 2 above, Article 28.

⁷⁹ Note 2 above, Article 31 & 32.

⁸⁰ 1961 Convention on the Reduction of Statelessness.

⁸¹ Note 40 above, Article 2 & article 7.

her.⁸² The 1965 Committee on the Elimination of all forms of Discrimination against Women (CEDAW) obliges States to guarantee non-discrimination particularly in the enjoyment of several fundamental human rights, including the right to nationality.⁸³

The ICCPR provides for the non-discriminatory prompt birth registration of every child as well as the right to a nationality.⁸⁴ The 1989 Convention of the Rights of Children (CRC) which has been ratified by almost every State worldwide, including Zimbabwe stipulates that each child within a State's jurisdiction has a right to nationality without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's status.⁸⁵ Article 7 of the CRC goes on to state that such children must be registered immediately after birth. Finally, the CRC Article also stipulates that all member states must ensure that their national laws are in line with their obligations under the relevant international instruments in particular where the child would otherwise be stateless.

The African Charter on the Rights and Welfare of the Child (ACRWC) is the only African Regional legal instrument which delves on issues to do with birth registration and the right to nationality. It is in many instances a replica of the CRC and defends the child's right to acquire a nationality. The 1999 ACWRC stipulates that every child shall have the right from birth to his/her name and that every birth be registered immediately after such birth.⁸⁶ The ACWRC further provides that State Parties must ensure that their domestic legal framework recognise the principles laid out in the Charter. One can thus clearly see that from the inception of the Statelessness Conventions to the ACRWC, the aim is to reduce statelessness as much as possible and to ensure that every child is afforded the right to a nationality through birth registration. Furthermore, coalitions such as that of the UNHCR and the UNICEF have been formed by international organisations in order to create awareness on the child's right to nationality and prevention of childhood statelessness.⁸⁷

5. CONCLUSION

The Chapter discussed the general concept and concept of statelessness. Statelessness is essentially when an individual is not accepted by any state as their national. Statelessness may be *de jure* whereby an individual is not considered as a national of any State or nation by operation of the law or *de facto* which results when though one

⁸² Article 1 - 3.

⁸³ Article 5.

⁸⁴ Article 24 of the 1966 International Covenant on Civil and Political Rights.

⁸⁵ Article 2 of the 1989 CRC.

⁸⁶ Article 6.

⁸⁷ www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/.

has actual strong ties to a nation such as a family or village, they fail to register a birth at the Department of the Registrar's offices for one reason or the other.. The most prevalent type of statelessness is the de facto whereby persons identify themselves as being nationals of certain States, but having due regard of all factors such persons may in fact be stateless or potentially stateless. Statelessness through the right to nationality which is evidenced through national identification documents, can act as a barrier to the achievement of other fundamental human rights. There are several International Instruments (Regional included), that provide for the reduction of current and future Statelessness and the realisation of the right to nationality through effective and prompt birth registration.

CHAPTER 3

NATIONAL LEGAL FRAMEWORK IN RELATION TO STATELESSNESS AND CAUSES OF STATELESSNESS IN ZIMBABWE

1. INTRODUCTION

This Chapter will discuss the Zimbabwean legal framework on statelessness and the right to nationality. An analysis of the extent to which this framework is in accordance to International and Regional laws on provisions dealing with the reduction of Statelessness through affording the right to nationality and prompt birth registration. In this Chapter, a discussion on some of the causes of failure to register births will be done. In that discussion, parallels will be drawn as to whether the Department of the Registrar General's office is contributing to the barriers of national birth registration in Zimbabwe. This will be done through evaluating the information received during the interviews held with Legal Resources Foundation and the Zimbabwe Human Rights Commission as well as explaining what became of the interview between the researcher and the Department of the Registrar General's office.

2. ZIMBABWE'S LEGAL FRAMEWORK ON STATELESS, RIGHT TO NATIONALITY AND BIRTH REGISTRATION

The starting point with regards to Zimbabwe's legal framework is ascertaining which international and regional frameworks on statelessness and the right to nationality it is a part of, as at international law, a State is bound only by the International agreements it is a part of. Zimbabwe is a party to all international and regional frameworks discussed under 2.4 above, except for the Convention on the Reduction of Stateless. This is however of not much effect as the provision in this 1961 Statelessness Convention were adopted in the ACRWC which demands for the protection of children through availing them the right to nationality and ensure their prompt birth registration. Zimbabwe does not have any legislation that specifically deal or addresses statelessness however nor does it have a definition of statelessness. However, its commitments to the international obligations it is a part of can be deduced from the several rights that it affords to its citizens as well as the several obligations that have been placed on the State to afford the right to nationality on its Zimbabwe citizens can be attributed to efforts of trying to curb and reduce statelessness.

The Constitution of Zimbabwe (Amendment No. 20) of 2013

The Constitution of Zimbabwe states that Zimbabwe is bound by all international legal instruments. These include Conventions, Covenants, Treaties and Protocols that it is a part of and the Supreme law further mandates the Legislature to incorporate provisions stipulated in the International Instruments in its domestic law.⁸⁸ The incorporation of international law on statelessness and the right to nationality are seen under Chapter 3 of the Zimbabwe Constitution which places burden on the State regarding the conferring and deprivation of the Zimbabwean Citizenship.⁸⁹ The spirit of the right to nationality in the Zimbabwe Constitution can be sensed throughout the whole Chapter which gives instances in which one can enjoy the right to nationality through acquisition of the Zimbabwean citizenship.

The Constitution provides three instances in which a person can become a Zimbabwean citizen, that is, by birth, descent or registration. Any person can be registered as a Zimbabwean citizen where they have been married to a Zimbabwean for at least five years, or where a person has lived in Zimbabwe continuously and legally for a minimum of ten years and or where a child who is not a Zimbabwean has been adopted by a Zimbabwean citizen.⁹⁰ Zimbabwean Citizenship can be conferred by virtue of a person being born of parents whom either or both of them is a Zimbabwean Citizen, or where either or both grandparents was a Zimbabwean Citizen.⁹¹ This type of citizenship is called citizenship by descent whereby a person is afforded the right to nationality because one of their direct descent was a Zimbabwean citizen, at international customary law this also known as *jus sanguinis*.

The third instance provided for in the Constitution is acquisition of the Zimbabwean citizenship by virtue of being born in Zimbabwe, this notion follows the international customary principle of *jus soli* which citizenship basing on the birth place of the person. Zimbabwe gives citizenship to every person born in Zimbabwe provided that at the time of such birth either or both parents were a Zimbabwean citizen, or if either of the person's grandparents was a Zimbabwean the time of such birth.⁹² The Constitution goes on to stretch the ambits of citizenship by birth to include persons born outside Zimbabwe by either or both Zimbabwean parent who were ordinarily resident in Zimbabwe or who were working outside of Zimbabwe for the State or an international

⁸⁸ S327 of the Zimbabwe Constitution.

⁸⁹ Sections 35-43 of The Zimbabwe Constitution.

⁹⁰ S38 (1)-(3) of the Constitution of Zimbabwe, such registration however is subject to the conditions that the person interested in being registered as Zimbabwean Citizen, satisfies all conditions stipulated in the Citizenship Act and duly makes an application for registration.

⁹¹ S37 of the Constitution of Zimbabwe.

⁹² S36 (1) of the Constitution of Zimbabwe.

organisation.⁹³ In addition, the Constitution places a presumption on children of fourteen years and below, that every such child found in Zimbabwe and appears to be of the said age will be presumed to be a citizen by birth.⁹⁴ This means that where a foundling is discovered within the Zimbabwean borders, they are considered to be Zimbabwean citizens by birth and afforded the right to nationality until a time when the contrary is proved.

There are rights and benefits that accrue to a person by virtue of being a Zimbabwean national. That is, the protection of the State, birth registration and issuance of other identity documents including travel documents. These obligations placed on the State are in sync with the Children's rights provided for under the Declaration of Human Rights.⁹⁵ Section 81(C) of the Constitution of Zimbabwe provide that every child born in Zimbabwe or out of Zimbabwe and is a citizen *by jus sanguinis* has the right to prompt provision of a birth certificate.⁹⁶ Finally, the Supreme law gives a blanket protection on children by stipulating that when dealing or deciding on matters that affect a child, their best interest must be considered.⁹⁷ One can therefore interpret the provision to say that where a State through its competent authority is faced with a decision of affording a right to nationality to a child in Zimbabwe through national birth registration, due regard must be placed on what the best interest of the child would be in the circumstances.

Births and Deaths Registration Act [Chapter 5.02]

Chapter 3 of the Constitution of Zimbabwe mandates the Legislature to pass relevant legislation that will pursue and ensure fulfilment of the State's objective to ensure the right to nationality and national birth registration as well as Citizenship. The main Acts that deal with the issues of statelessness, citizenship and birth registration are the Citizenship of Zimbabwe Act⁹⁸ and the Births and Deaths Registration Act . This research will only focus on the Births and Deaths Registration Act it is the one that zooms in on issue of national registration.

Part III of the Births and Deaths Registration Act give the guidelines and requirements for several instances that should be met for one to be able to register a birth in Zimbabwe. For instance, where a child is born out of wedlock in Zimbabwe,⁹⁹ a birth

⁹³ S36 (2) of the Constitution of Zimbabwe.

⁹⁴ S36 (3) of the Constitution of Zimbabwe.

⁹⁵ Chapter 4 of the Constitution of Zimbabwe.

⁹⁶ S81 (c) of the Constitution of Zimbabwe

⁹⁷ S81 (2) of the Constitution of Zimbabwe incorporated from Article 3 of the Convention on the rights of Children and Article 4 (1) of the African Charter on the Rights of Women and Children.

⁹⁸ Chapter 4.01.

⁹⁹ S12 and 19 of the Births and Deaths Registration Act.

that has occurred out of Zimbabwe, a child born in Zimbabwe but abandoned¹⁰⁰ and an adopted child amongst other instances. The requirements are different in all the several different cases, however it can be deduced that the aim of the Act is to ensure that birth registration is afforded to Zimbabwean citizens. This is so because the supporting documents and witnesses required at the Department of the Registrar General's office are meant to bear proof that though the born child or person does not have national documentation they are indeed Zimbabwean nationals. Remarkably, the Births and Deaths Registration Act goes on to give the Registrar General the discretion to continue registering a birth even where all the requirements have not been met.¹⁰¹ This is ideal as it is in line with s36 (3) of the Constitution that places an obligation on the State to make a presumption in order to afford a child the right to nationality, as well as s81(3) of the Constitution which mandates that the best interests of the child be considered when deciding in matters concerning a child.

It is submitted that, the Zimbabwe's legal framework has made serious and recommendable efforts to ensure the right to nationality to its Zimbabwean citizens. This can be seen by its incorporation of all the major provisions on birth registration and the right to nationality from both International and Regional Instruments in its domestic Legislation that is, the Constitution of Zimbabwe and the Births and Deaths Registration Act. Also, from the efforts of the legislature to ensure that foundlings are afforded the right to nationality in accordance with the best interests' principle.

The process of determining the statelessness of an individual or otherwise in a State is not an easy one and requires qualified personnel. Such individuals should be experts in the area of statelessness and should be able to fairly make determinations on statelessness affording nationality and national registration.¹⁰² A central authority responsible for such determinations would reduce inconsistent decisions in a State and would be more effective.¹⁰³ In Zimbabwe the central authority in charge of determining issue of Zimbabwean nationality, national registration including birth registration and issuance of national identification documentation is the Department of the Registrar General.¹⁰⁴ Where the Department of the Registrar General is not certain of whether to register a birth or not, the Minister has the powers to order register or to refuse such registration.

3. BARRIERS OF BIRTH REGISTRATION IN ZIMBABWE

¹⁰⁰ S15 of the Births and Deaths Registration Act.

¹⁰¹ S24 of the Births and Deaths Registration Act.

¹⁰² Strydom H et al (2016) 'International Law', p 141.

¹⁰³ Note 26 above, p 14.

¹⁰⁴ S3 of the Births and Deaths Registration Act.

As alluded to in the background under chapter 1, Zimbabwe has been listed as the top four (4) countries that house the biggest stateless populations in Africa and has been term the main Statelessness Crisis in Southern Africa.¹⁰⁵ The Zimbabwe Universal Periodic Review Report (UPR) averred that their research showed that approximately three hundred thousand (300 000) people in Zimbabwe are stateless due to several reasons but mostly failure to acquire birth certificates.¹⁰⁶ Research has shown that fifty percent (50%) of Zimbabwe’s orphans do not have birth certificates, ninety five percent (95%) of the children living in institutions do not have birth certificates¹⁰⁷ and that thirty percent (30%) of all children in Zimbabwe do not have birth certificates.¹⁰⁸ Ridderbos adds that of the stateless population is Zimbabwe three percentage (3%) of them are farm workers who illegally migrated to Zimbabwe form countries such as Malawi and Mozambique who were mostly not documented and moved to Zimbabwe during the colonial era.¹⁰⁹ Such parent’s children pass on their statelessness to their children as they do not have enough requirements to effective give notice of the births of their children to the department of the Registrar General. Pursuant to the alarming number, The Zimbabwe Human Rights Commission conducted a nationwide survey on the status on birth registration and national identity documentation as a whole and compiled a report on their findings. In an interview conducted by the researcher with the ZHRC¹¹⁰, they indicated that their survey or research was as a result of the imperial evidence which revealed that people in Zimbabwe were complaining that they were failing to register birth and to acquire national identity documents in all Zimbabwe’s ten provinces. The ZHRC indicated that their findings were that there were several factors which inhibited birth registration and acquisition such as:

Lack of knowledge of the requirements for birth registration

The interviewee indicated that, their general observation was that people were not aware of the exact requirements needed for one to register for a birth in their circumstance. This would see to people approaching the Department of the Registrar General’s office with inadequate information and thereby being refused to register a birth. The ZHRC noted that in that survey a number of people did not know the birth registration requirements, including those that had previously visited the Department of the Registrar General’s office to try and give notice of a birth and were turned away

¹⁰⁵ Note 1 above, p3.

¹⁰⁶The 2020 40th Zimbabwe Universal Periodic Review for the period January - February 2022.

¹⁰⁷ Reform of birth registration law urged in The New Humanitarian [www.thenewhumanitarian.org/fr/node/215842]

¹⁰⁸J Cassim (2021) ‘Stateless Zimbabweans endure prejudice without identity: Registrar General Fails to implement new Citizenship law’ continues to function under discriminatory 1984 Citizenship Act’. [www.aa.com.tr/en/Africa/stateless-zimbabweans-endure-prejudice-without-identity/2308737].

¹⁰⁹ K Ridderbos (2008) ‘Stateless Farm workers in Zimbabwe’ in International Displacement Center, p1.

¹¹⁰ Interview was conducted via a Zoom meeting on the 17th of May 2022.

for lack of adequate requirements, they were still unsure of the particular requirements needed for them to be able to effectively give notice to the Department of the Registrar General and have the births of their children subsequently registered. The ZHRC attributed the lack of knowledge of birth registration requirements to lack of enough awareness campaigns on the requirements as well as the DRG not giving out enough information on their birth registration requirements. Finally the ZHRC also noted that the lack of knowledge was also caused Births and Deaths Registration Act not being fully comprehensive on the birth registration requirements but rather being too wide to the extent of giving too much room for interpretation. Where the laws are too general or vague, the resultant effect is that people and authorities may interpret and apply such laws differently resulting in a lot of inconsistencies.

Refusal by hospitals to issue birth record of the children born

A barrier that was noted by the ZHRC in their research was that several medical facilities were using the birth record as a leverage or collateral to have the medical bills of the birth process owing to them paid by the parents who would have given birth. The difficulty that arose was that most of the parents who had their children's birth records withheld by the medical facilities concerned were mostly the low earning community with most surviving on odd jobs or peasant farming for them to afford food on the table. This meant that such persons would be unable to pay the medical bills and their children's birth records would remain withheld, of which it is one of the key requirements for birth registration, thus a barrier to birth registration. The Zimbabwe Human Rights Commission noted that the act or conduct of withholding a birth record by the health institutions was not effective as it did not result in the payments of the medical debts accumulated and that the institutions could easily turn to suing the parents through summons to recover the medical costs that will have been incurred instead of withholding the birth records. The ZHRC also noted that there were other options such as entering into an agreements with the parents of the born children to perform some piece jobs in order to satisfy the debt.

The Department of the Registrar General's office

Language barriers

The ZHRC posited that, as with the findings in their report, there were a number of issues at the Department of the Registrar General that also added to the barriers to birth registration. Such as language barriers, whereby a personnel is employed by the Department of the Registrar General and placed in a district or province where he or she does not speak their native language and having to resort English. This can be dire especially to the clients (the demanders of birth registration) where such persons are illiterate and cannot speak or hear English. In such an instance, the effect might be that there will be a communication break-down with the clients holding the brunt part

of the stick and ultimately failing to register a birth. The ZHRC noted that serious considerations were supposed to be done and arrangements to have people that are able to communicate in the native language of a particular place be placed or assigned to work in such areas in order to remove the language barrier and where there are no personnel that can communicate in a language of a particular community or district, to have the Department of the Registrar General invest on workshops or training that will facilitate and enable ease in communication by the Department of the Registrar General personnel and the clientele they will be serving to ensure effective communication.

Policy inconsistencies of what exactly the requirement for birth registration are.

Another hurdle faced under the Department of the Registrar General are the inconsistencies in the various Department of the Registrar General's district offices have with regards to the requirements needed for one to register a birth. The ZHRC noted that it had a case study whereby an individual failed to register a birth being told that they did not have enough documents required for them to register the birth of their child by a personnel in one of the Department of the Registrar General's offices and was given a list of what was required for them to register the birth. The individual went back home and returned on another day with all the documents that had been listed, only to find another Department of the Registrar General's officer in the same district who again turned the individual away citing that they did not have all the required documentation to register a birth. Having been turned away, the individual then tried their luck which paid off in another district. Though the case study above, ended in the successful birth registration what will be the fate of those who cannot afford the transport costs of going back and forth to the Department of the Registrar General's offices and the extra costs of travelling to several other districts till they successfully register the births of their children.

Complexities of the birth registration requirements

The ZHRC also noted that some of the requirements themselves are to some impossible to attain. For example the requirement where a child is not born in a medical institution, to go with the midwife and other supporting witnesses discourages people to go for birth registration. This is because most mid-wives are of old age and usually very busy and are not willing to travel and stand in the long winding queues at the Department of the Registrar General's offices. A requirement of concern is when an orphan has passed the age of eighteen (18) and want to register their birth they are required to go the Department of the Registrar General's office with a person that can attest to their age who is between 10-15 years older than them , together with their parent's death certificate. This requirement may seem attainable when the orphan in

question is 20-30 years old, but may prove to be difficult when such person is a senior citizen of about 60 years and has to bring a witness who is 75 years old to attest to their birth. These requirements can even be more taxing when these witnesses are undocumented themselves.

The researcher inquired from the ZHRC whether in their view, the requirements by the Department of the Registrar General were in aligned to the Births and Deaths Registration Act, to which response was that the Department of the Registrar General's district offices have a manual that is inspired by the Births and Deaths Registration Act. Also that though some of the requirements are very difficult to impossible to attain, the requirements are aimed at insuring State Security and to some extent combat crimes. The final question asked was whether the discretion of the RG provided for in s24 of the Births and Deaths Registration Act was being used in instances where one does not meet all requirements needed to register a birth. The ZHRC averred that most of the Department of the Registrar General personnel do not know of such discretion and that, even if they knew about such they do not have the liberty to make such huge decisions but rather are guided by their guides or manuals.

An interview with the Legal Resources Foundation (LRF),¹¹¹ yielded similar outcomes for the researcher as the LRF noted that though there were barriers such lack of knowledge on the birth registration requirements by the clients as well as general ignorance by the clients of the need and importance of birth registration, most of the challenges faced were as a result of the Department of the Registrar General's office. The LRF noted that the major challenges were with Department of the Registrar General's office were administrative bureaucracy and policy inconsistencies. The LRF opined that the bureaucracy was caused by the volumes of work that the department has to deal with and the need to guard against abuse by the public they end up posing strict requirements that act inversely and become barriers in themselves. With regards to policy inconsistencies, the LRF noted just as the ZHRC that the requirements were in fact different from one Department of the Registrar General District office to another, leading to uncertainty and speculation at the peril of those want to register births.

Interview with the Department of the Registrar General's office

An application was made to have an interview with the Department of the Registrar General's office which was positively responded and the researcher was told that a date will be scheduled for a face to face interview. A pre-interview security check interview was done and the researcher was told to await a call regarding the date of the interview. Upon a follow up by the researcher, the researcher was notified that the

¹¹¹ Zoom interview meeting held on the 17th of May 2022.

interview had been called off as the Department of the Registrar General's office had an ongoing national investigation on undocumented persons thus it could not comment or divulge information pending their investigation and further stated that the State's position is that Zimbabwe does not have stateless persons but undocumented persons hence it could not partake in the interview. The questions that were meant to be asked in the interview applied for were attached to the application letter and are as follows:

- 1) There are several requirements that one needs to attain a birth certificate depending on several facts such as parents' marital status and whether or not one's parent(s) are dead. What inspired these requirements?
- 2) Where did the requirements emanate from?
- 3) Whether the manuals used by the Department of the Registrar General's offices are the same nationwide?
- 4) What happens when one falls short of the requirements?
- 5) Are there instances whereby the requirements are relaxed?
- 6) Is there a remedy where cannot meet the requirements at all?
- 7) What's your take that the requirements are cumbersome (difficult to attain) to the extent that a sizable number cannot meet them thus placing them at a risk of being stateless?

Unfortunately, these questions which would have aided much in drawing a clearer picture as to where exactly the problem lies with the issue of birth registration requirements from the view of the Department of the Registrar General who is the supplier of birth registration remain unanswered. This leaves the researcher with no option but to draw parallels from literature review as well as the interviews held by other stakeholders that the Department of the Registrar General's office and its requirements for birth registration are indeed a barrier to birth registration. A barrier that infringes on one's critical right to nationality and leads to statelessness or at the very least potential statelessness.

4. CONCLUSION

The Zimbabwean legal framework has taken strides to align itself with the international as well as regional instruments it ratified with regards to reducing current and future actual as well as potential statelessness in obligating the State to ensure the right to nationality through passing Zimbabwean citizenship by birth, descent and registration. The State also undertook to make a presumption to consider all foundlings to be citizens by birth in line with the best interest principle. Further the Constitution of Zimbabwe provides for the right to prompt birth registration. Also the parent Act on birth registration that is the Births and Deaths Registration Act gives the office of the Department of the Registrar General's discretion to register a birth regardless of the

applicant not fulfilling all the requirements for birth registration. Despite, these sound laws, there are several barriers to birth registration the notorious one being the conduct of the Department of the Registrar General's office and the birth registrations requirements.

CHAPTER 4

THE LEGISLATIVE REQUIREMENTS FOR BIRTH REGISTRATION IN ZIMBABWE IN COMPARISON TO OTHER JURISDICTIONS.

1. INTRODUCTION

In the previous chapter a discussion was done as to the causes of statelessness or its risk thereof. It was observed that the Department of the Registrar General's office was one of the major drivers if not the biggest, of de facto statelessness. This chapter will analyse the requirements of national birth registration in Zimbabwe as provided for in the *Births and Deaths Registration Act [Chapter 5:02]* in light of the values and spirit of the Zimbabwe Constitution. The research will also compare the birth registration requirements in the Births and Deaths Registration Act to similar Legislation of other jurisdictions highlighting key differences and as well as noting lessons that can be drawn from other jurisdictions.

2. REQUIREMENTS FOR BIRTH REGISTRATION AS PER THE ZIMBABWE BIRTHS AND DEATHS REGISTRATION ACT.

The Births and Deaths Registration Act makes mandatory the giving of notice of the occurrence of a birth and registration of birth of any person who is born in Zimbabwe from the period beginning from the 20th of June 1986.¹¹² The Act goes on to list the persons that must give notification of a birth within forty-two (42) days of the birth having occurred, the primary persons being the father or mother of the born child.¹¹³ Apart from the biological parents, the Act mandates any member of a household in which the birth took place, a person in charge of a health institution wherein the birth occurred, a Chief in whose area of jurisdiction a birth will have occurred as well as any person of the age of majority to give notice of such birth to the Registrar of the district where the birth would have taken place.¹¹⁴ Upon such notice, the Department of the Registrar General is required to note such notices of births received and to maintain relevant registers in a prescribed form-in essence the registration of births.¹¹⁵ The Act goes on to give further requirements need for the registration of births of children born out of wedlock, children born in Zimbabwe as well as births of abandoned and adopted children.

¹¹² S10 of the Zimbabwe Births and Deaths Registration Act.

¹¹³ S11 (1) as read with s11 (2) of the Births and Deaths Registration Act.

¹¹⁴ S 11(1) (a) to (f) of the Births and Deaths Registration Act.

¹¹⁵ S4 of the Births and Deaths Registration Act.

Where a child is born out of wedlock, either parent of the child may give notice to the Department of the Registrar General for registration of such a birth. The Act however provides that the name of the father will not be included in the registration of the birth unless the mother of the born child requests so to the Department of the Registrar General and the alleged father acknowledges self as father to the child.¹¹⁶ Where the mother to a child born out of wedlock is dead or has abandoned such child, the alleged father can request his name to be included on the birth registration. The general sentiment given by this provision is that where a child is born out of wedlock, the mother of the child is the one with the leading seat with regards to giving notice of a birth, despite section 11 of the Births and Deaths Registration Act which places an equal obligation on the biological parents to give notice of their child's birth.

Regrettably because of the crafting of section 13 of the Births and Deaths Registration Act, there have been several cases as noted by both the ZHRC and the LRF in interviews held with them by the researcher, that such has been a barrier to birth registration to children born out of wedlock. The Institute on Statelessness Inclusions noted a case study whereby a mother gave birth to a child out of wedlock and deserted the child before giving notice of the child's birth. When the father tried to give notice of the birth of the child, he was turned away at the Department of the Registrar General's office and was told to come with the mother of the child for the birth to be registered.¹¹⁷ The fact that section 12 does not provide for the father to initiate registration of the birth of his child infringes the constitutional rights of both the father and the born child.

The Act in this instance discriminates the father based on gender as it make specific and relatively easy provisions for the mother of the child to give notice of birth and neglects to give provisions for the father thereby flouting the right to equality.¹¹⁸ The exclusion or omission to also provide for the giving of notice by the father for Children born out of wedlock is against the best interest principle provided for the Convention the Rights of Children, the African Charter on the Rights of women and Children as well as enshrined in the Constitution.¹¹⁹ This omission discriminates between children born out of wedlock and those born in a legally recognised marriage, yet the Constitution advocates non-discrimination of children and for prompt registration of children's births. What is more alarming as rightly noted by UNHCR is the fact that most unions in Zimbabwe are not legally recognised marriages.¹²⁰ This means that most children are

¹¹⁶ S12 (a) of the Births and Deaths Registration Act.

¹¹⁷ Institute of Statelessness and Inclusions in conjunction with the ZHRC's 2018 report on Child Statelessness in Zimbabwe, p 5.

¹¹⁸ S of the Zimbabwe Constitution states that

¹¹⁹ S81 of the Zimbabwe Constitution.

¹²⁰ Rulashe P (2011) 'Statelessness: Falling through the cracks in Southern Africa' in UNHCR Africa Reports.

factually ‘*born out of wedlock*’, thereby increasing the percentile of children’s birth registration that can be potentially troublesome thus significantly opening a gap for de facto statelessness.

The law is however slowly progressing as noted in the recently decided case of *Bernard Tashu and Anor v the Registrar General of the Births and Deaths*,¹²¹ whereby Tashu was in an unregistered customary union with one Fungai Dzvova between 2008 and 2009 when they separated. The union resulted in the birth of a son who is categorised as a child born out of wedlock as their union is not recognised as a marriage according to the Zimbabwean law. Tashu had custody of the son and had on multiple times failed to have the birth of his child registered at the Department of the Registrar General’s Office as the mother to his child was not there to confirm Tashu’s paternity. The court in its ruling in favour of Tashu acknowledged that having fathers register the birth of their children born out of wedlock could indeed open room crime such as trafficking however the child’s best interest principle took precedence and also the Births and Deaths Registration Act indeed discriminated the fathers of such children based on gender. This was a positive step in Zimbabwe’s jurisdiction however the Births and Deaths Registration Act still needs to be amended in line with this development.

The Births and Deaths Registration Act continues to provide for the registration of births that would have occurred outside Zimbabwe by parents who are citizens by birth, descent or registration. Section 13 of the Births and Deaths Registration Act continues to differentiate children born out of wedlock and those from a marriage, thereby giving the same negative consequences as those in section 12 of the Act. Worse more, section 13 of the Births and Deaths Registration Act adds further risk of statelessness to children that are born on non-Zimbabwean women and Zimbabwean men who are in unions not recognised as marriages. In this instance if a mother to the Child fails or refuses to give notice of birth, the effect is that such child may effectively not be recognised as a Zimbabwean citizen and at the same time not recognised as a citizen in the country where that child will be born, thus at great risk of both de jure and de facto statelessness. This is contrary to the spirit of chapter 3 which confers citizenship to any child that is born of a father who is a Zimbabwean citizen however, no matter has yet been brought before the courts challenging s13 of the Births and Deaths Registration Act.

Where a person or people adopt a child, the Births and Deaths Registration Act requires such persons to give notice to the Department of the Registrar General of such coupled with documents that support and prove that there was indeed an adoption of a child. The Births and Deaths Registration Act stipulates that the person who gives notice and applies for the birth registration of an adopted child must produce a court order of such

¹²¹ HH-2021 (unreported).

an adoption together with an adoption certificate and any document such as a baptism certificate that relate to the birth of such a child, a prescribed form and proof of the adopter's Zimbabwean citizenship.¹²² The Births and Deaths Registration Act states that where a child has been abandoned, any person of eighteen years and above who would have taken charge of the child to give notice of the birth of such a child.¹²³ This is in line with the constitutional provision on foundlings, that a presumption should be made that such foundlings are Zimbabwean citizens and should be registered and conferred the Zimbabwean nationality.

There have been difficulties in effecting section fifteen of the Births and Deaths Registration Act that is registration of birth of abandoned children. Though the Births and Deaths Registration Act is clear that any person who is of the age of majority and has taken charge of such abandoned child can give notice to the Department of the Registrar General for the purposes of birth registration, this has proved to be very difficult. The Amnesty International noted is several case studies that there a sizable number of instances whereby a female gives birth to a child out of wedlock and abandons such child with their parents (grandparents to the born child).¹²⁴ When such grandparents attempt to give notice of the birth of these abandoned children, they are often times sent away and told to come with the biological parents of the child for birth registration at the Department of the Registrar General's office.

This is a difficult task for the grandparents as they will have no knowledge of the whereabouts of their children and in some instances, they might know where their children will be but the children will be reluctant to go and give notice of the birth of their children. Another instances where a mother may abandon their child is when they remarry. The Zimbabwe Women Lawyers Association (ZWLA) noted that such mothers reported that their husband were not allowing them to register the birth of their children nor to stay with children from previous relationships in their matrimonial homes causing the women to abandon the children at their parents' homes.¹²⁵ These scenarios were supposed to be remedied by section fifteen of the Births and Deaths Registration Act which is in line with the Constitution and the best interest of the child principle.

The Births and Deaths Registration Act provides that where the place of birth as well as the date in which the child was born is not known, the Department of the Registrar General's office may assign to such child a putative place of birth and birth of date. This will however be done after the Department of the Registrar General's office will

¹²² S 14 (a) - (d) of the Births and Deaths Registration Act.

¹²³ Section 15 of the Births and Deaths Registration Act.

¹²⁴ Note above 17, p4.

¹²⁵ Gonyora Zulu A.K (2018) 'Birth Certificate Registration of Children Born out of Wedlock' in Zimbabwe Women Lawyers Association.

have done due inquiry to ascertain that the date and or place of birth is not known and with information they will have gathered the approximate date the child would have been born.¹²⁶ This provision is commendable as it is a positive step by the law to ensure that a child's birth is registered. Section 17 of the Births and Deaths Registration Act stipulates that the Department of the Registrar General may register a birth whose notice was given by persons not specifically mentioned as responsible persons under the Births and Deaths Registration Act.¹²⁷ The use of the terms may in sections 15 and 16 do not make it mandatory on the part of the Department of the Registrar General to register such births. This means therefore that the children whose categories falls under sections 15 and 16 are a risk of being denied national birth registration rendering them stateless although being in actual fact Zimbabwean citizens.

The Act also confers powers upon the Department of the Registrar General's office to use their discretion where a notice is given but without meeting the necessary requirements. The Birth and Death Registration Act give the Department of the Registrar General discretionary powers to register a birth where some requirements in giving a notice of birth are not satisfied.¹²⁸ The Department of the Registrar General in this instance is required to carefully examine the information it will have been given as well as make further inquiries from the person giving notice and any other required information and thereafter make a decision to register the birth or not to register it. This provision should be utilised more than it is currently being used by the Department of the Registrar General. This is because often times and real life scenarios conditions are not always ideal whereby the appropriate persons are giving notices of birth in the required manner. There thus great need for the Department of the Registrar General to positively use its discretionary powers to the benefit of children and to reduce statelessness by evoking the best interest principle. This manner of decision making is entrenched in the Zimbabwe Constitution which stipulates that wherever decisions are being made that affect the rights of children, the best interests of the child in question must be considered and a decision made accordingly.¹²⁹ In this instance the child's right to nationality is likely to be affected when considering to register a birth or not as such the Department of the Registrar General ought to effectively exercise its discretion.

In a nutshell, the Births and Deaths Registration Act gives requirements that need to be met for the registration of children born in different circumstances. The Act differentiates the requirement need for a child that is born out of wedlock. This differentiation opens a big gap and an avenue for child statelessness as most children in Zimbabwe are born out of wedlock due to the fact that the most common type of

¹²⁶ Section 16 of the Births and Deaths Registration Act.

¹²⁷ Section 17 as read with sections 11 and 16 of the Births and Deaths Registration Act.

¹²⁸ Section 24 of the Births and Deaths Registration Act.

¹²⁹ S81 of the Constitution.

union is Zimbabwe, the unregistered customary law union is not recognised as a marriage in Zimbabwe, as such all children born to these unions are technically out of wedlock. There are also some provision in the Births and Deaths Registration Act that are peremptory and thus give room for the Department of the Registrar General to refuse registration of a child's birth though such as were a child's place or birth or date of birth is not known, in such a scenario, the Department of the Registrar General having 'due regard' of the information it will be seized with may or may not register the birth of such a child.

3. A CRITIQUE OF ZIMBABWE'S BIRTHS AND DEATHS REGISTRATION ACT IN LIGHT OF OTHER SOUTHERN AFRICAN JURISDICTIONS.

In this segment, the researcher will critically analyse the birth registration requirements of other countries to that of Zimbabwe by equating various countries' birth registration Acts to that of Zimbabwe. The researcher take cognisant of the fact that countries are not on the same level plain with regards to economic and social development, their histories , culture, policies and political will. A comparison will be done with several Southern African countries as they insect with Zimbabwe in many areas such as that the countries are in the same continent and region as Zimbabwe, they are all developing countries though at deferent stages of such development and that they have the same colonial history in that these countries were once colonised and later gained independence. The countries that this research will look into are South Africa, Malawi, Botswana and Zambia.

The South African Births and Deaths Registration Act of 1992 is the one which regulates the registration of births in South Africa. The Act stipulates that either or both parents of the of the born child , or the person having charge of the child or any person requested to do so by the parents of the said child may give notice of birth and have the child's birth registered by the Department of the Registrar General. The South African Act gives a smaller time frame to give notices of births that is within seven (7) of the birth of the children, where the responsible persons exceed, the seven day period there will be made to pay registration fees as way to penalise and encourage the prompt registrations of birth.

In the Zimbabwe Act, where one exceeds the forty two window period, the Department will refuse to register such a birth where the born child was given birth to after the 20th of June of 1986 and were a person is aggrieved may apply for registration of birth to the Minister who will have a final administrative decision on the matter before any court processes are initiated. For the Zimbabwean Act this is another legislative miss

as section 25 appears to promote statelessness through the refusal of birth registration after a twelve month period. This is because not every person who has the duty to register a birth will have the financial means and expertise to make applications to the Minister concerned to have a birth registered and where this fails to apply to the courts. Unlike the Zimbabwe Births and deaths Registration Act, South Africa allows a person requested by the parents to give notice of a birth to the Registrar. This is commendable as it adds to the list of person that can give notice of a birth.

As with the Zimbabwe Births and Deaths Registration Act, the South Africa Births and Deaths Registration does not provide for the giving of notice of a birth by a father where a child is illegitimate. An illegitimate child means a child born outside a marriage and is also known as a child born out of wedlock. The South African Births and Deaths Registration Act stipulates that a mother of such a child should give notice of birth and that the surname to be use in such an instance is that of the mother unless a request is made by both the mother and the person declaring to be the father, then the surname of such father will be used.

Where a child is abandoned, the South African Act provides that such matter is to be handled under the Child Care Act whereby a social worker or authorised officer will handle such a case and initiate for the birth registration of such a person. The Act further mandates to continuously process the inquiry on cases of the abandoned children and where an inquiry leads to the discovery of the birth parents of the abandoned child with regards to birth registration to be corrected and updated accordingly. This is ideal in that social workers and authorised offers will have the required expertise to successfully cause the registration of birth of the found abandoned children, unlike any person who takes charge of an abandoned child as provided in the Zimbabwe Births and Deaths Registration Act. If any person is allowed to take charge of an abandoned child and that person does not have the necessary expertise, they might not be able to successfully register the birth of the child in question. It is thus also recommendable for the Zimbabwe Births and Deaths Registration Act to mandate that all abandoned children are to be reported to the department of Social work who will then initial the process of birth registration of such a child.

Finally, the South African Births and Deaths Registration Act provides that notice of birth of a child born outside South Africa by a South African to give notice of birth through the head of a South African delegate in the country wherein the birth took place such a diplomat, a consular or even a regional representative. This provision make it easier for birth registration for children born out of South Africa but are South Africans. The Zimbabwe Births and Deaths Registration Act does not provide that notice can be given through the Head of a Zimbabwean Mission where a Zimbabwean child is born outside Zimbabwe. What this means is that at the time the parents have not yet

given notice to the registrar such child will be de facto stateless up until a time when the parents can go to the Department of the Registrar General's office to register the birth of that child. Unlike the Zimbabwe Births and Deaths Registration Act, the South African Births and Deaths Registration Act does not specifically deal with the birth registration of adopted children, this is however provided for in the Child Adoption Act where a social worker is assigned a case as with the abandoned child and will help the adopters to have the births of such children registered.

The birth registrations in Botswana are also governed by the Births and Deaths Registration Act Chapter 30:01. The Botswana Births and Deaths Registration Act greatly limits the list of people who can give notice of a birth to the Registrar to just the mother or father of the child who are in a legally recognised marriage, a medical practitioner or midwife in charge of an institution where the child was born and the mother of a child born out of wedlock. The Act does not give any other requirements for registration of births with regards to abandoned children or those adopted compared to the Zimbabwean and South African Births and Death Registration Acts. This means therefore that more discretionary powers are given to the Department of the Registrar General, this might be at the peril of children. Where the Department of the Registrar General is conferred to much discretionary powers without the guidance of the of the law, there is more room for abuse and influence from other forces such a politics thereby opening greater room for statelessness or its risk thereof. The Botswana Act however, gives an aggrieved party whose notice of birth and further registration of a birth has been denied the right to contest the Department of the Registrar General's decision through the High Court.

In Zambia the Births and Deaths Registration Act Chapter 51 also lists the persons that are responsible for giving notice of a birth. The Act states that the mother or father or both who are in a marriage can give notice of a birth, in the absence of the biological parents, the Zambian Act mandates an occupier of a house in which the child was born or the in charge of a medical institution where birth took place to t give notice to the registrar of such birth. In addition to the list of persons who are obliged to give notice , the Zambia Births and Deaths Registration Act stipulates that any person who will have taken charge of the born child can also give notice of the birth of such child. Similar to the Zimbabwe's Births and Deaths Act, the Zambia Act in that it only allows for the mother of an illegitimate born child to give notice of their child's birth thereby discrimination on fathers' of the illegitimate children. The Zambia Act goes on to exclude such fathers as responsible for giving notice of births by noting that such fathers are not bound by the law to give notice of the birth of an illegitimate child. This is undesirable as it implies that were the mother is not available to give notice of the birth of such child, the father, a biological parent and primary guardian of the child in

question is not duty bound to give notice of the birth of their child. This has serious implications on statelessness in that it gives a leeway for statelessness to increase.

The Zambia Act also provides for the birth registration of abandoned as well as adopted children, the provisions are similar to the Zimbabwe Births and Deaths Registration Act, except that the Zambia Act mandates the Zambian Registrar to upon receipt of as much information as possible from a person having charge of an abandoned child, should register the birth of such child. This is different from the Zimbabwe Act which does not mandate the Registrar to ensure the birth registration of an abandoned child but rather confers discretionary powers to refuse registration of such a child's birth where the Department of the Registrar General is not satisfied with the information it will have been given in a notice of birth of such children thereby placing this category of children at a risk of being de facto statelessness.

The Malawi Births and Deaths Registration Act Chapter 24.01 regulate all matters to do with notices of births and the registration of births. The Act is similar to the Zambia BDR Act in that it lists the father and or mother of a born child, any person present when the child was born and a person having charge to give notice to the Department of the Registrar General's office of such birth so as to facilitate the registration of the born children's birth by the Department of the Registrar General. Just as most discussed jurisdictions, where a child is exposed or abandoned, the Malawi Births and Deaths Registration Act states that the person who will have taken charge of the abandoned child has the duty to give notice such child to the Malawi Department of the Registrar General and give all knowledge and information they have of the exposed child in question, the Act does not however guarantee the registration of birth of such a child.

The Malawi Act is the same as the Zambia Births and Deaths Registration Act in that it does bind the father of a child that is born out of wedlock to give notice of the birth of his child who will have been born out of wedlock. The Zambia, Malawi as well as the Botswana's Births and Deaths Registration Acts give a three months period for the duty bound persons to give notice of births thus a longer time compared to the Zimbabwe and Souths African ones with shorter periods. It is also noteworthy that Zimbabwe's Birth and Death Registration Act in comparison to all the other discussed jurisdictions is the only one with a provision with a provision that stipulates that the Department of the Registrar General will refuse to register a birth where a period of twelve months will have elapsed from the time a child was born.

To a greater extent the Zimbabwe Act adheres to the Constitution in that it provides a number of persons that can and are mandated to give notices of the birth of children thereby increasing the chances of having a born child's birth registered thereby shrinking the risk statelessness. However the Act goes on place heavy demands in

different categories of children such as those born out of wedlock. The Father of a child born out of wedlock cannot according to the Act register the birth of, this position was however successfully challenged in the Tashu case as discussed in the Chapter but the provision has not yet been amended. All other discussed jurisdictions also do not provide for the father of a child born out of wedlock or an illegitimate child to on his own give notice of the birth of his child, Zambia and Malawi go further to state that the father is not legally bound to give notice of the birth of his illegitimate child.

Difficulties in the requirements for registering the birth of an abandoned child were noted whereby though the Act provides for the registration in practice it has proved to be difficult and people are turned away at the office of the Department of the Registrar General for lack of enough information and requirements. A glance at other Southern African jurisdictions showed that South Africa's birth registration requirements are nearer to the dictates of the International and Regional instruments and has some aspects that can be emulated such as assigning a social worker or an officer capacitated to deal with situations whereby a child has been abandoned or adopted. This lifts off a great burden from the persons obliged to give notice of a birth as they will be aided by personnel with the expertise and resources that result in the easy birth registration of children and thereby reducing statelessness.

The Zimbabwe Act had the second shortest time in which the responsible persons are required to register the births of their born children. It follows South Africa which requires that a notice of birth is to be given within seven days, Zimbabwe requires such to be done within forty two day of the birth of the child with the rest of the discussed country requiring notice to be given within a three month period. Other jurisdictions such as South Africa, Botswana and Zambia give provisions for the responsible persons to send other people who are not responsible persons on their behalf and with the proof of such authorisation to go and give notice and have a child's birth registered, this is not provided for in the Zimbabwean Act and the deduction is that the responsible persons are to appear before the Department of the Registrar General and personally give notice of the birth of a child in order for the birth to be registered. This is ideal as the absence of the responsible person will not hinder the child from being registered promptly in line with the CEDAW and the CRC.

4. CONCLUSION

An analysis was made of the Zimbabwe's birth registration requirements and whether such requirements are in line with the dictates of the Zimbabwe Constitution which is influenced by the International and Regional frameworks that Zimbabwe is a party to. The Zimbabwe Act to a greater extent is with the Constitution though there is room for development especially on s25 of the Act that stipulates that the office of the Registrar

will refuse to register a birth where a notice is given after twelve (12) months. Unlike other Southern African jurisdictions the Zimbabwe Act does not provide for a notice of birth to be given by a person who is not listed as a responsible on the behest of a responsible person. Though the Zimbabwe has some requirements that lay heavy on the responsible persons such as when a child is abandoned and where a child is born out of wedlock, section 24 of the Act gives a remedy. The Department of the Registrar General in such instances ought to consider all cases on their merits where the responsible person fail to give meet the requirements in the Act and use its discretion to register a birth or not to register it.

CHAPTER 5

SUMMARY OF FINDINGS AND RECOMMENDATIONS

1. INTRODUCTION

In Chapter one, the researcher demonstrated that the issue of statelessness is real in Zimbabwe with some statistics showing that there is a huge percentage of people are stateless or at the risk of being stateless. The bulk of the affected population are children due to difficulties in national birth registration. This Chapter will draw parallels from the findings gathered throughout the research of whether indeed the birth registration requirements are the driving force behind child statelessness or its risk in Zimbabwe. From the summary of findings and conclusions drawn recommendations and possible roadmaps will be proffered.

2. SUMMARY OF FINDINGS

Statelessness has grave negative consequences to its victims and infringes on ones right to a nationality which when flouted has a negative domino effect on other fundamental rights such as the right to education, to vote and property rights amongst other rights. Research has shown that there are several causes of statelessness in Zimbabwe such as the lack of awareness of the people that are responsible for giving notice of a birth, social and cultural barriers whereby because the persons who have the duty to give notice of a birth to do place necessary importance on doing so, and the holding of a birth record by health institutions in lieu of satisfying the maternity bill. However the biggest cause that were blamed for to have children registered was the requirements needed at the Department of the Registrar General's office.

The Zimbabwe Human Rights Commission and the Legal Resources Foundation noted in interview done with them by the researcher, that their surveys indicated that they were many complaints wherein people were being turned away at the Department of the Registrar General's office for lacking the requirements needed for them to register the births of children. An investigation on what the requirements are according to the DRG's office was fruitless as the researcher failed to have an interview with the department. However other stakeholders indicated that generally the Department of the Registrar General's District offices have manuals that they use as a guide to see if one has all the requirements needed for a birth to be registered. Of concern was that there were case studies whereby people would fail to register birth on the basis that they do not have enough requirements and information for a birth to be registered in one district on to easily registered and acquire a child's birth certificate in another district.

Furthermore, the research revealed that there were people that had been turned away on for lack of requirements but were not told what the requirements were. For those that were told what requirements were need to have a child's birth registered, they indicated that some of the requirements were impossible for them to attain, examples where were grandparents were left with their grandchildren and did not know the whereabouts of the parents of the children in question,¹³⁰ or where both parents of the child are dead and not death certificates were acquired and there are further complications in acquiring such death certificates.

It is based on these complications pertaining to the birth registration requirements needed when giving notice of a birth at the Department of the Registrar General's office that the researcher saw it prudent to analyse what the Zimbabwe Births and Deaths Registration Act's position regarding requirements of birth registration and whether it is the cause of the failure and refusals to register births at the Registrar's office. Zimbabwe is a party to the international and regional instruments that seek to reduce and guard against statelessness such as the Convention relating to the Status of Stateless Persons, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Children and the African Charter on the rights of Women and Children.

The requirements and provisions in the international and regional frameworks in which Zimbabwe is a party are incorporated in the Zimbabwe Constitution under Chapter three where it lists the several instances one can be a Zimbabwean citizen that is by birth, descents and by registration. The Supreme law, goes on to confer citizenship to all children born of parents who are Zimbabwean citizens by any way of the three mentioned categories or where the grandparents to the child were a Zimbabwean citizen. The Constitution further makes a presumption that all foundlings found in Zimbabwe are Zimbabwean citizens. In addition to this, the Constitution under section 81 states that when making decisions that affect a child their best interest are to be considered. Finally the Constitution mandates that an Act of parliament be enacted that deals with issues of birth registration and citizenship.

The Births and Deaths Registration Act is that one that regulates the receipt of notices of births of children and issues to do with registration of births. The Acts relatively long list the people that are responsible for giving notices of births to the Department of the Registrar General and thus casting a wide net to ensure that most people be able to give such notices. However, the Birth and Death Registration Act starts to take back when it does not provide for a father of an illegitimate child to give notice of the birth of his child without the mother of the child. This provision opens an avenue for potential

¹³⁰ The responsible people duty bound to give notice according to s 5 of the Births and Deaths Registration Act.

statelessness seeing that most children are born out of wedlock in Zimbabwe as the popular unregistered customary law union is not a legally recognised marriage. Also, where the mother of the child refuses to give notice or is not available at all to give such notice, a risk that could be remedied by allowing the father to give notice as was correctly held in the *Tashu* case. This provision is however not peculiar to Zimbabwe but to several other jurisdictions like Botswana, South Africa, Malawi and Zambia as noted in Chapter 4 above.

Another claw back of the Zimbabwe Births and Deaths Registration Act is in relation to abandoned children. Though the Act provides for a person with the charge of the child in question to give notice of birth, it goes on to give a condition that the registrar will only register such birth if it is satisfied with the information given by the person in charge of the child. If the Department of the Registrar General is not satisfied they can refuse the registration of such. The norm as observed in the ZHRC report is that people are turned away and told they do not have enough information or evidence that can enable them to give effective notice to have the child's birth registered. This leaves most abandoned children stateless or at the risk of it against the best interest principle provided for by the Zimbabwe Constitution.

The final provision in the Births and Deaths Registration that takes away from it is section 25 of which provides that the Department of the Registrar General will refuse to register on births whose notices are given after twelve months unless upon application the Minister allows such. The researcher is agreeable that births are to be promptly registered as is dictated by the Constitution however there are instances whereby it could be out of the control of the person responsible to promptly give such notice. Even where the person responsible for giving notice is at fault for not promptly giving the required notice, the child should have to suffer because of the transgressions of the person responsible for giving notice. Though it may seem as there is a remedy that an aggrieved party may make an application to the Ministers not all persons may have knowledge of such, the expertise to make such application or enough resources to pursue the matter. Be that as it may, section 24 of the Birth and Death Registration seems to remedy or rather cover up all of the Act's weaknesses as it confers powers upon the Department of the Registrar General to exercise its discretion in deciding to register a birth or not where the notice of birth does not meet the standard called in regards to requirements.

From the observations that were noted by the researcher there appears to be two sets of birth registration requirements, those that stem from the Act and those from the Department of the Registrar General through its manuals or guides. There are indeed setbacks in the Act as discussed but these can all be cured by the discretionary powers of the Department of the Registrar General, if it were to make decisions incorporating the dictates, the spirit and value of the Constitution. The birth registration

requirements in the Births and Deaths Registration Act cannot be faulted as opening door for child statelessness or its risk. In the researcher's opinion, the birth registration requirements by the Department of the Registrar General which are inconsistent, unclear and unknown coupled with its failure to use its discretionary powers are the major barrier to birth registration. The Department of the Registrar General's birth registration requirements are indeed a doorway to statelessness in Zimbabwe.

3. RECOMMENDATIONS

The Constitution provides that where an Administrative Authority acts, such act or conduct ought to do so in a legal, substantially and procedurally fair, transparent and accountable manner.¹³¹ An Administrative Authority in terms of the Administration of Justice Act refers to any Minister or member of the Civil Service, the Department of the Registrar General falls within the definition of an Administrative Authority. In light of the Administrative rights provided for in the Constitution, the Departments of the Registrar General should make known to the public its birth registration requirements. This can be done through awareness campaigns and workshops with key personnel that will be able to disseminate information to the communities such as Chiefs and Religious leaders amongst others. Such campaigns will help in spreading accurate information on the requirements needed when one is giving notice of a birth.

Another recommendation is that the Department of the Registrar general should make available information relating to the requirements for Birth Registration to the general public, this will help in ensuring certainty and uniformity of the birth registration requirements. It is agreeable that people's cases may vary in many ways however a general guideline should be given. This will enable the responsible persons to approach the Department of the Registrar's office having prepared and carried all the information and documentary proof required thereby saving costs of the citizens and reducing statelessness or its risk.

The Constitution also calls for substantial justice in the decision making of a Public Authority. This is also relevant to the Department of the Registrar General should ensure that its decisions are substantially fair and avoid turning people away for lack of enough birth registration requirements where it will be in the interest of justice to use its discretionary powers to cripple statelessness. The Department ought to consider what will be in the best interest of the children in question as the Constitution demands.

Finally, it is a fact that the Births and Deaths Registration Act pre-dates the Zimbabwe Constitution. There is there for need for the Act to be aligned to the Constitution so that its provisions reflect the spirit and values of the Constitution, such as equality with regards to status of children in different categories, the inclusion of the children's best

¹³¹ S68 of the Zimbabwe Constitution.

interest principal and removal of the provisions that claw back from the positive provisions of the Act. There is also need to emulate from other jurisdictions positive traits such as the ability of a responsible person to give authority for another person to give notice of a birth on their behalf. Aligning the Act will help in ensuring both procedural and substantial decision making by the Department of the Registrar General. Having aligned the Births and Deaths Registration Act, there is need to cascade that alignment to the manuals and guides that are used by the Department. This is because it will be of little effect to have legal reforms without changing or aligning the guides that the Department's officers use in making decisions to register births or to refuse birth registration.

4. CONCLUSION

There are two sets of birth registration requirements, those that stem of the Birth and Deaths Registration Act and those from the Department of the Registrar General through its manuals and guides. The Act though having some provisions that are not in sync with the ambit of the Constitution, these shortfall can be easily remedied by section 24 of the Act which allows for the Department to use its discretionary powers were it is face with a case whereby the birth registration requirements are not fully met. In this regard, the Act's do not detrimentally contribute to child statelessness, Zimbabwe thus has sufficient legal frameworks to reduce and guard against statelessness. Problematic however, are the birth registration requirements by the Department, this is because they are uncertain, inconsistent and unknown. The Department's birth registration requirements are a door way to statelessness in Zimbabwe, as people fail to meet them as they are uncertain causing them to be turn away and their children rendered stateless. The recommendations are to align the Act with Constitution, then align the Department's manuals and guides with the law. Thereafter awareness campaigns on the requirements should be made and the information relating to the requirements be made accessible to the public. Finally Department should use its discretionary powers in a way that promotes the reduction and guards against statelessness.

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APPENDICES

Appendix 1

Interview Questions to the ZHRC

1. What inspired your report on National Inquiry on access to Documentation in Zimbabwe?
2. What were your findings with regards to the National Birth Registration requirements.
3. In your view is the Zimbabwe Constitution in accordance to the International instruments on the right to nationality and stateless to which Zimbabwe is a party?
4. Are the birth registration requirements in line with the Constitution?
5. Section 24 of the Birth and Death Registration Act stipulates that where one is unable to satisfy all the requirements, they must try and reasonably prove they are of Zimbabwean nationality. Do you think that this avenue is being fully utilised by the Department of the Registrar General? And why do you say so?
6. In your opinion from the research and report you compiled on National Inquiry on access to Documentation in Zimbabwe, are the national birth certificate requirements a doorway to statelessness?

Appendix 2

Interview Questions to the Legal Resources Foundation

1. Have you conducted surveys on people without birth Certificates? What was your outcome?
2. What are the most affected areas?
3. What has been the major hindrance of the people from attaining birth certificates?
4. In your view, are the requirements to national Birth Registration Constitutional?
5. What are your recommendations or suggestions on the betterment of acquisition of Birth Certificates?

APPENDIX 3

Interview Questions to the Department of the Registrar General

- 1) There are several requirements that one needs to attain a birth certificate depending on several facts such as parents' marital status and whether or not one's parent(s) are dead. What inspired these requirements?
- 2) Where did the requirements emanate from?
- 3) Whether the manuals used by the Department of the Registrar General's offices are the same nationwide?
- 4) What happens when one falls short of the requirements?
- 5) Are there instances whereby the requirements are relaxed?
- 6) Is there a remedy where cannot meet the requirements at all?
- 7) What's your take that the requirements are cumbersome (difficult to attain) to the extent that a sizable number cannot meet them thus placing them at a risk of being stateless?