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Presumption of Citizenship for Foundlings: Exploring enforceability of Article 14(4) of The Constitution of Kenya 2010

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Abstract

Article 14(4) of the Constitution of Kenya 2010 (CoK 2010) prescribes the presumption of citizenship to a child found in Kenya who is, or appears to be less than eight years of age, and whose nationality and parents are not known. This article explores the rationale and the mischief that article 14(4) of CoK 2010 endeavors to cure vis-à-vis the State's aptitude to implement such a provision. The article contends that Kenya's presumption of citizenship by birth for foundlings is significantly hazy. It is specifically in this haziness that the enforceability challenge of the provision lies. Whereas the CoK 2010 outlines various ways through which citizenship can be acquired, this article solely focuses on citizenship under Article 14(4). The article specifically examines the legal principles of acquisition of citizenship by birth; the *jus sanguinis* and *jus soli*, and expounds at length, the principle that is relevant to the specific area under discussion.

Key words: Citizenship, foundlings, *jus sanguinis*, *jus soli*, Nationality

1. Introduction

Whereas the terms "citizenship" and "nationality" technically have two distinct meanings, international human rights courts, advocates and scholars often use the two terms interchangeably.³ This article largely uses the term "Citizenship" to mean the legal link between an individual and a State, or a

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³ 'Citizenship & Nationality' (*International Justice Resource Center*, 15 November 2012) <<https://ijrcenter.org/thematic-research-guides/nationality-citizenship/>> accessed 13 February 2022.

territorial political entity, upheld by an ultimate political authority.⁴ This legal status bequeaths homogeneous rights and duties upon all members of a State. The concept of citizenship is as old as humanity. Its pedigree is in Athens and Rome and the long advancement from tribal to civic States.⁵ This is visible, albeit with minor variances, in the works of primordial writers as well as contemporary authors. Scholars suggest that the concept of citizenship contains many unresolved issues, sometimes called tensions, existing within the relation, that continue to reflect uncertainty about what citizenship is supposed to mean.

The 1948 Universal Declaration of Human Rights confers upon every individual, everywhere in the world, the right to have a legal connection with a State.⁶ Nevertheless, the United Nations High Commissioner for Refugees (UNHCR) estimates that there are at least 12 million stateless people globally.⁷ The number of stateless persons in Kenya is approximately 18,500.⁸ According to Article 1 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 1930, it is for each State to determine under its own laws who are its nationals.^[4] The Constitution of Kenya 2010 (CoK 2010) and the Kenya Citizenship and Immigration Act give no definition of citizenship but rather provide for conditions for its acquisition.⁹ Article 13(2) of the CoK 2010 provides that citizenship may be acquired by birth or

⁴ Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 156.

⁵ Emily Salamanca, "'Singulis Etruriae Populis": The Political Mobilization of the Etruscan Foundation Myth in the Self-Conception of Renaissance Florence' (2021) 13 *Carte Italiane*.

⁶ United Nations, 'Universal Declaration of Human Rights' (*United Nations*) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 13 February 2022, article 15.

⁷ 'OHCHR | OHCHR and the Right to a Nationality' <<https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx>> accessed 13 February 2022.

⁸ 'Stateless Persons' (*UNHCR Kenya*) <<https://www.unhcr.org/ke/stateless-persons>> accessed 13 February 2022.

⁹ 'Constitution of Kenya' (2010) <<http://www.kenyalaw.org/lex//actview.xql?actid=Const2010>> accessed 18 July 2018; Kenya Citizenship and Immigration Act No. 12 of 2011.

registration. This article specifically focuses on the matter of grant of citizenship for “foundlings” within the confines of Kenyan laws. Reference to foundlings in the CoK 2010 is alluded to under Article 14(4). In focusing on issues, problems and perspectives relating to citizenship for foundlings under the Kenyan laws, this provision forms the nucleus and as such informs the rationale of this article.

2. Citizenship Ascriptions

There are over 30 modes and sub-modes of acquisition of citizenship around the world.¹⁰ The most common modes applied by States are: (a) birthright acquisition; (b) residence-based acquisition (*jus domicile*); and (c) acquisition based on particular ties or characteristics.¹¹ Two legal principles embody acquisition of citizenship by birth: *Jus soli* (the law of the soil) and *Jus sanguinis* (the law of the bloodline).¹² Citizenship by immigration can either be acquired through striking a relationship with someone who is already a citizen or through length of residence within a State. Citizenship by particular ties include by marriage.¹³ One of the characteristics –based acquisition is where a child found in a country of unknown parentage.¹⁴ All these methods obviously admit of wide variations and interpretation in practice. In Kenya, the above conditions of acquisition of citizenship have been adopted with detailed elaborations both in the CoK 2010 and the Kenya Citizenship and Immigration Act. Since, foundlings are presumed to be Kenyan citizens by birth under the Kenyan laws, this article has confined itself to the analysis of citizenship by birth and its attendant legal principles.

¹⁰ Luuk van der Baaren and Maarten Vink, ‘Modes of Acquisition and Loss of Citizenship Around the World-Comparative Typology and Main Patterns in 2020’ (2021) 90 Robert Schuman Centre for Advanced Studies Research Paper No.# RSC.

¹¹ *Ibid*

¹² Vivian Gerrand, ‘Reimagining Citizenship in the Black Mediterranean: From Jus Sanguinis to Jus Soli in Contemporary Italy?’, *The Black Mediterranean* (Springer 2021); Azra Erdem Adak, ‘Citizenship, Territoriality and Post-Soviet Nationhood: The Politics of Birthright Citizenship in Azerbaijan, Georgia, and Moldova’ (2021) 23 *Insight Turkey* 287.

¹³ Robin Cohen, ‘Citizenship: From Three to Seven Principles of Belonging’ [2021] *Social Identities* 1.

¹⁴ van der Baaren and Vink (n 10).

2.1 *Jus Soli*

Jus soli is a Latin principle of common law, also known as the principle of birthright citizenship, under which citizenship is granted based on birth in a territory no matter the legality or status of the parents.¹⁵ The principle grew out of the early modern expression that based personal claims to land and inheritance on birthright connections to the sovereign domain.¹⁶ It appeared in common law as early as 1608 in Calvin's Case, where the King's Bench ruled that a Scotsman was not an alien, although alien born to England, and could claim testamentary benefits to land in England because he was born to British soil.¹⁷ The principle of *jus soli* has become an explicit part of the Constitution of many countries. For instance, reference to "natural born" in the United States Constitution is an implicit rule of *jus soli*; such that, a child born to a foreign national in the United States (USA) (whether the said foreign national is in the USA legally or not) automatically becomes a US citizen by birth. *United States v Wong Kim Ark* is a landmark case in which the Supreme Court held that virtually everyone born in the USA is a citizen of the USA.¹⁸

In granting citizenship to those born in a country, *jus soli* incorporates even the children of immigrants as citizens at birth or thereafter. Pure *Jus soli* may often be 'over-inclusive' by awarding citizenship to persons born in the territory by mere chance or because their parents moved there in order to obtain a particular citizenship for their children. However, in a number of countries, to put off illegal immigration, automatic birthright citizenship has been cushioned by imposing conditions such as requiring parents' legal

¹⁵ Christopher Robert Rossi, 'The Blind Eye: Jus Soli, And the "Pretended" Treaty of New Echota' (2021) 9 American Indian Law Journal 8.

¹⁶ Ibid

¹⁷ ibid; Caroline Sawyer, 'The Loss of Birthright Citizenship in New Zealand' (2013) 44 Victoria University of Wellington Law Review 653.

¹⁸ 'U.S. Reports: United States v. Wong Kim Ark, 169 U.S. 649 (1898).' (*Library of Congress, Washington, D.C. 20540 USA*) <<https://www.loc.gov/item/usrep169649/>> accessed 13 February 2022; Julie Novkov and Carol Nackenoff, *American by Birth: Wong Kim Ark and the Battle for Citizenship* (University Press of Kansas 2021); Amanda Frost, "'By Accident of Birth": The Battle over Birthright Citizenship after United States v. Wong Kim Ark' (2021) 32 Yale JL & Human. 38.

residence for a specified period of time within the country.¹⁹ Forms of *Jus soli* that involve lengthy delay, retrospective and onerous conditions, and administrative discretion in the granting of citizenship generally create unnecessary obstacles to full membership. As a result, immigrants and many human rights organisations prefer the granting of citizenship automatically at birth or by declaration at majority, and on the basis of prior parental residence over the generationally deferred acquisition of double *jus soli*, which requires that one parent has already been born in the country, and to facilitated naturalization, which tends to be subject to significant conditions and costs. *Jus soli* is generally accepted for foundlings, and for children who would otherwise be stateless at birth, even in countries whose laws are otherwise based on *jus sanguinis*.²⁰ The Kenyan Constitution at Article 14(4) embraces application of pure *jus soli*.

2.2 *Jus Sanguinis*

Jus sanguinis which is Latin for “right of blood” is a concept of Roman or civil law under which a person’s citizenship is determined by the citizenship of one or both parents, to wit, by descent.²¹ It is a social policy by which citizenship is not determined by place of birth as in the case of *jus soli* but rather by having one or both parents who are citizens of a nation.²² The proponents of this principle argue that birth at a State’s territory does not necessarily reflect a link between the individual and the State, but, descent and heritage play a pivotal role in defining who is, and can become, a citizen.²³ *Jus sanguinis* remains the most ordinary means of passing on citizenship in most countries. Application of this principle is explicit in the Constitution of Kenya 2010 which provides that a person is a citizen by birth if on the day of the person’s birth, whether or not the person was born in Kenya, either the mother

¹⁹ Van der Baaren and Vink (n 10).

²⁰ Ibid

²¹ Amanda Candeias and Angelo Segrillo, ‘Tracing The Debate Between Rosa Luxemburg And Lenin About The National Question’.

²² Szabolcs Pogonyi, ‘The Right of Blood: ‘Ethnically’ Selective Citizenship Policies in Europe’ [2022] National Identities 1.

²³ Candeias and Segrillo (n 21).

or father of the person is a Kenyan.²⁴ In general, the principles of *jus soli* and *jus sanguinis* remain valuable in explaining the deviating outcomes of citizenship policies across the globe. These outlines of citizenship policies continue to blur the distinction between the two principles by including elements of both in their broader procedures.

The word choice of the 1961 Convention on the Reduction of Statelessness at Article 2 brings to the fore the interplay between *jus soli* and *jus sanguinis*.²⁵ This 1961 Convention, rather than allow a child found abandoned on the territory of the State to automatically acquire the citizenship of that State, it declares that the child will implicitly have both the essential *jus soli* and *jus sanguinis* connections with the State.²⁶ The act of being “born on the territory” brings about the element of *jus soli* while “birth to parents possessing the nationality of the State” carries *jus sanguinis* ingredients. In such a scenario, the child will basically acquire citizenship as a matter of law, under the ordinary operation of the State’s citizenship laws which brings about similar effects in both *jus soli* and *jus sanguinis* regimes. However, the dominance of either a “by birth” or “by blood” citizenship policy concurrently reflects and defines how a country views “link” and who does, and does not, belong. In the circumstance, registration of birth is a critical factor in establishing the right to a citizenship in many legal systems, for the birth certificate will indicate where the child is born, making acquisition of nationality by *jus soli* possible, and to whom the child is born, and making acquisition of nationality by *jus sanguinis* equally possible.

3. Citizenship for foundlings

The Black's Law Dictionary defines ‘foundling’ as a deserted or exposed infant; a child found without a parent or guardian, its relatives being unknown.²⁷ A foundling, therefore, is a child bereft through death or

²⁴ ‘Constitution of Kenya’ (n 9), at article 14(1) .

²⁵ United Nations High Commissioner for Refugees, ‘UN Conventions on Statelessness’ (UNHCR) <<https://www.unhcr.org/un-conventions-on-statelessness.html>> accessed 13 February 2022.

²⁶ Ibid

²⁷ ‘Black’s Law Dictionary 8th Edition - PDF Drive’

disappearance of, abandonment or desertion by, or separation or loss from, both parents and who has been discovered by others; or a child committed to an orphanage or charitable or similar institution with unknown facts of birth and parentage and registered in the Civil Register as a “foundling.”²⁸ Without doubt, the codification and further amplification of the right to citizenship in global and regional human rights instruments has had a massive influence on the perception of acquisition of citizenship for foundlings. The global community has recognized the vulnerable position of foundlings in the society and adopted specific instruments to deal with their nationality status. It is noticeable from these instruments that the international community favours protection of human rights over claims to State sovereignty in the matter of citizenship ascription.²⁹

In the specific circumstance of citizenship for foundlings, the international community has thrown in progressive acceptance of prevention against statelessness for foundling found in the territory of a Contracting State by calling upon such a State to provide citizenship to such children. This was vividly captured in both the 1930 Hague Convention and the 1961 Convention on the Reduction of Statelessness.³⁰ The 1930 Hague Convention at Article 14 provides that, “A child whose parents are both unknown shall have the nationality of the country of birth and that a foundling is, until the contrary is proved, presumed to have been born in the territory of the State in which it is found”.³¹ Similarly, Article 2 of 1961 Convention on the Reduction of Statelessness provides that foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.³²

<https://www.pdfdrive.com/blacks-law-dictionary-8th-edition-d40394506.html>
accessed 4 July 2020.

²⁸ Mai Kaneko-Iwase, ‘Defining a “Foundling”’, *Nationality of Foundlings* (Springer 2021).

²⁹ Axel Martínez Shepherd, ‘Citizenship Beyond the Nation: Building Human Rights Inclusivity in a World of Exclusions’ (2021).

³⁰ Refugees (n 25).

³¹ *Ibid*

³² *Ibid*

Although the codification of the duty to grant citizenship to foundlings in the two Conventions cannot be taken as sufficient evidence owing to the small number of State parties to the instruments, it can be contended nonetheless that a rule of customary international law has been established, legally placing States under an overall duty to encourage the right to citizenship for foundlings.³³ It can be argued that the recognition of a general duty upon States to grant citizenship to foundlings is evident as the basis for the *opinio juris* since States feel compelled to address the situation of foundlings who would otherwise be stateless.³⁴ The regional instruments also mirror the desires of the global community on the subject of citizenship for foundlings. The Organization of American States, the European Convention on Nationality as well as the 1999 African Charter on the Rights and Welfare of the Child emphasize not only a general right of every child to acquire a nationality, but also directs State Parties to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the citizenship of the State in the territory in which he was born if, at the time of the child's birth, he is not granted citizenship by any other State in accordance with its laws.

Clearly, within the context of international and regional instruments, a State Party should provide in its municipal law, for foundlings to acquire citizenship by operation of law (*ex lege*). By and large, it would appear safe to conclude that the treatment of foundlings has truly become a matter of international custom which can be vouched to be reflective of the accurate aspiration of the global community.

3.1 Foundlings Phenomenon in Kenya

Various factors including lack of parenting skills, substance abuse, physical or mental disease of parents or relatives, weakening social values and economic

³³ Mai Kaneko-Iwase, *Nationality of Foundlings: Avoiding Statelessness Among Children of Unknown Parents Under... International Nationality Law* (Springer Nature 2021).

³⁴ Ibid

challenges are significant contributors to the growing number of dysfunctional families around the world, including in Kenya.³⁵ Consequently, the number of foundlings across the world, including in Kenya continues to grow.

In the small rural communities in Kenya, foundlings are cared for by their finders, or willing employers if the child is old enough to perform useful work. In an urban setting, care for foundlings has become primarily institutionalized, leading to growth of children's homes and religious communities devoted to the care of the poor.

Arguably though is that only the most prosperous of societies are able to provide institutional care for parentless children that rivaled the care children might otherwise have received if their parents had been alive and able to keep them at home. Many developing countries including Kenya are far from attaining such status. Nonetheless, important components of the social and economic policy on child welfare are increasingly being enacted by the Kenyan government. Having ratified the Convention of the Rights of the Child in July 1990, the Government of Kenya has developed a domestic legislation concerning childcare and protection. The enhancement of the Children's Act of 2001 gives effect to the obligations under the Convention of the Rights of the Child (CRC) and the African Children's Charter.

3.2 Article 14(4) – The Contention

A remarkable stage towards promulgation of the Constitution of Kenya 2010 was the debate that preceded and culminated into its adoption through a referendum. The referendum phase offered Kenyans from all walks of life, an opportunity to make their views known before taking a vote for or against the proposed constitution. It was at the plebiscite stage that plethora of issues arose and were exhaustively debated upon. Of the contentious issues that created a great divide amongst the Kenyan populace then was the least expected provision of Article 14(4). Although every draft that emerged during the constitution-making process in Kenya carried the content of Article 14(4),

³⁵ Graeme Garrard, 'Children of the State: Rousseau's Republican Educational Theory and Child Abandonment' (2021) 50 *History of Education* 147.

contention arose during the review of the Revised Harmonized Draft (RHDC) Constitution by the committee of experts (CoE), when the Parliamentary Select Committee on the Review of the Constitution (PSC) altered the right to citizenship for foundling by introducing a requirement to apply for citizenship instead of presuming them to be citizens by birth.³⁶ The committee was apprehensive due to the obvious difficulty of revoking citizenship acquired by birth.³⁷

In response, the CoE adjusted the PSC proposal to restore the right of citizenship for foundlings and provided explicitly for revocation by introducing Article 17(2) which annuls citizenship acquired under Article 14(4) if at any given time evidence emerged to show that any of the grounds on which citizenship was based turned out to be false. Article 17(2) provides as follows:

“The citizenship of a person, who was presumed to be a citizen by birth, as contemplated in Article 14(4), may be revoked if: -

- a) The citizenship was acquired by fraud, false representation or concealment of any material fact by any person.*
- b) The nationality or parentage of the person becomes known and reveals that the person was a citizen of another country; or*
- c) The age of the person becomes known and reveals that the person was older than eight years when found in Kenya.”*

³⁶ Committee of Experts on Constitutional Review, ‘Final Report of the Committee of Experts on Constitutional Review -Coe_final_report-2.Pdf’ <https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf> accessed 13 February 2022.

³⁷ Ibid

During the referendum, whether standing from an informed point of view or otherwise, the opponents of the proposed constitution raised as many queries on the provision of Article 14(4). A major concern that was raised was that Art. 14(4) could open up a heavy influx of foreigners and refugees, which in the long run could erode national values and culture. In their document that touched on almost every chapter of the proposed constitution, the Institute for Social Accountability (TISA) emphasized that the provision is an affront to the protection of Kenyan people and their culture especially with neighbouring countries facing conflicts and civil wars.³⁸ TISA therefore proposed that the article should be deleted. They further suggested that such provision for foundlings be made through a statute. These concerns mainly stem from fear that Kenya's unstable neighbours as well as terrorist networks could take advantage of such a provision to make unwarranted claim for Kenyan citizenship.

3.3 Effects of laws on *citizenship for foundlings in Kenya*

The constitution of Kenya 2010 at Article 13(2) provides for only two modes of acquisition of citizenship, acquisition by birth or registration. Consequently, presuming acquisition of citizenship by birth effectively bestows rights and privileges that go with such ascription. In both the repealed and the current Constitution of Kenya, citizenship by birth cannot be revoked. In actual fact, Article 16 of the Constitution emphasizes the privileged position of a *citizen by birth* by protecting dual nationality thus, "A citizen by birth does not lose citizenship by acquiring the citizenship of another country." It is therefore not necessary that one renounces their citizenship by birth in the event that they want to undertake citizenship of another country.

The Kenya Citizenship and Immigration Act, 2011 sets out a criteria to be satisfied prior to the grant of citizenship for foundlings. First and second are that such foundling ought to be or appear to be less than eight years of age,

³⁸ 'The Institute for Social Accountability' <<https://tisa.co.ke/>> accessed 13 February 2022, The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya.

and their nationality and parents are not known.³⁹ Third is that if the Government department responsible for matters relating to children fails to determine the origin and identity of the child in question, it shall present the child found to the Children's Courts and take out proceedings for the determination of the age, nationality, residence and the parentage of the child.⁴⁰ The court shall after determining the adequacy of the efforts undertaken by the Government department responsible for matters relating to children, issue an order directing that such a child be presumed to be a citizen by birth or any other order that it deems fit to grant.⁴¹ Where the court makes an order that the child be presumed to be a citizen by birth, it may direct the Director to register the child in the register of children presumed citizen by birth.⁴²

One criticism of this provision is anchored on section 9(1), which provides that any person who finds a child who is or appears to be less than eight years of age, and whose nationality and parents are not known shall present the child to the Government department dealing with matters relating to children and where there is no such department, present the child to the nearest Government department or agency. Here, considering the fact that Kenya is home to all categories of persons including stateless persons, refugees and illegal immigrants, reference to "*Any person...*" is certainly untenable. For instance, any of the above-mentioned persons regardless of their nationality, status in the country or even without regard to their mental capacity to depone to facts within their knowledge or upon information, can bring along a child and pursue claims for citizenship under Article 14(4).

Practical challenges for Kenya

States have special obligations towards its citizens, and grant of citizenship to a foundling then implies expanded obligations and duties to cater for the

³⁹ Kenya Citizenship and Immigration Act No. 12 of 2011, article 9 (1) to (4).

⁴⁰ *ibid*, section 9(4).

⁴¹ *ibid*, section 9 (5).

⁴² *ibid*, section 9 (6).

welfare of the child.⁴³ As illustrated, Kenyan streets are flooded with children who appear to be less than eight years of age and whose parentage are not known. In the circumstance the practicability of section 9(1) is put to test where Kenyans heed such a call to bring along any child who is or appears to be less than eight years of age, and whose nationality and parents are not known, and present them to the Government department dealing with matters relating to children.

The provision of the Act at section 9(3) where the Government department responsible for matters relating to children is directed to undertake the necessary investigations including, subject to the rights of the child under any written law, the use of media to determine origin of the child, appears impractical to enforce, especially due to capacity challenges, particularly to: (a) meet the cost of the process of investigation that includes use of media; (b) technical and monetary capacity to carry out such a process; (a) positively change the quality of the foundling's life, as a result of acquiring citizenship status. Some have argued that it is more ethical to prioritize the welfare of the child than to embark on the costly process of investigation in the manner provided. A contrary view that supports the step by step criteria is that it helps to detect and wean out those who are out to abuse the process.

Another criticism is that section 9 (4) complicates the process of determination of citizenship by conferring the department responsible for matters relating to children such a role whereas there exists a government agency that is responsible for matters relating to citizenship and management of foreign nationals. The Kenya Citizens and Foreign Nationals Management Service Act of 2011 provides for establishment of Citizenship Advisory Committee whose sole purpose is to guide in the process of determination of Kenyan citizenship.⁴⁴ Subsection 4 of section 9 of the Citizenship and Immigration Act

⁴³ Refugees (n 25); Abdulaziz Abdullah Alsaif, Thamer Adel Alkhadra and AlBandary Hassan AlJameel, 'Oral Health-Related Quality of Life (OHRQoL) among Groups of Foundling and Delinquent Children in Comparison with Mainstream Children' (2021) 28 *Journal of Population Therapeutics and Clinical Pharmacology*.

⁴⁴ Kenya Citizens and Foreign Nationals Management Service, Act No. 31 of 2011.

appears to entrust determination of citizenship upon the department responsible for matters relating to children.

In the same breath, conflict of roles appear at section 9(5) where it is states, “The court shall after determining the adequacy of the efforts undertaken by the Government department responsible for matters relating to children, issue an order directing that such a child be presumed to be a citizen by birth or any other order that it deems fit to grant.”^[14] The pertinent question that arises here is, who between the courts and the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals, is responsible for granting of citizenship in Kenya?

Moreover, the Kenya Citizenship and Immigration Act provides that, “Where the court makes an order that the child be presumed to be a citizen by birth, it may direct the Director to register the child in the register of children presumed citizen by birth”.⁴⁵ Ordinarily, Kenyan citizens by registration are issued with a registration certificate with a reference file at the Immigration department.⁴⁶ Although the fundamental principle of citizenship is the equality of all citizens, even for immigrants who may have recently acquired citizenship, in practice, citizens by registration have limited rights in comparison to citizens by birth in many jurisdictions. Some rights are restricted to citizens by birth, particularly the rights to hold certain state offices. For instance, both Kenyan Constitutions provide that for one to qualify to be elected president, they must be a Kenyan citizen by birth.⁴⁷ Other than a mere register, nothing seems to have been put in place to distinguish citizenship as granted under Article 14(4) and citizen by birth *per se*. It therefore follows that a foundling, who is presumed to be citizen by birth whether such has been acquired through fraudulent or appropriate means, shall enjoy full rights as a citizen by birth proper.

⁴⁵ Kenya Citizenship and Immigration Act No. 12 of 2011, section 9 (6).

⁴⁶ Kenya Citizens and Foreign Nationals Management Service, Act No. 31 of 2011, section 2.

⁴⁷ ‘Constitution of Kenya’ (n 9), article 137 (1) (a).

A further criticism is that while the Constitution provides for revocation of citizenship at article 17, without mention of which authority is to revoke, i.e whether the cabinet secretary or the courts, the Act provides only penalties for persons who bring into the country, conspires, assists or facilitates the abandoning of a child with the intention of conferring them citizenship at section 9(7). How then is revocation process instituted? By such an omission the drafters of the Act may have alluded to irrevocable nature of citizenship by birth for foundlings.

4. Conclusion

Despite the fact that the international law endeavors to guard against excesses in nationality laws of a State, the principle that a State determines who qualifies to be its citizen in accordance with its municipal law is backed by both judicial decisions and treaties. Judicial decisions include the 1923 decision by the Permanent Court of International Justice, in the Nationality Decree in Tunis and Morocco case, “in the present state of international law, question of nationality are ... in the principle within the reserved domain.” Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, further confirms this principle; “it is for each state to determine under its own laws who are its nationals.”

In determining nationality of a person, States employ connecting factors such as birth, descent, naturalization as well as the territorial origin of a person to establish genuine or effective link between the person and the state. In Kenya, these connecting factors for conferment of nationality cannot be relied upon in isolation so as to constitute good grounds for the grant of nationality. For instance, lack of clear birth records makes it difficult to prove claim to citizenship by birth. The consideration of the ‘territorial origin of a person’ determinant in the Kenyan circumstance poses a great challenge due to the porosity of Kenyan borders and its frequently unstable neighbours. In addition, the fact that Kenya is host to a huge refugee population makes the concept of territorial origin of a person difficult to obtain.

In context, it is easily perceptible from the foregoing paragraph that provisions of Article 14(4) of the constitution of Kenya and the attendant provisions

under Citizenship and Immigration Act on the matter of citizenship for foundlings without doubt creates avenues for unmerited acquisition of Kenyan citizenship. Although these provisions are consistent with international law and are as a matter of necessity designed to avoid the dreadful position of a child without citizenship, they have not been customized to suit the prevailing circumstances in the country.

The revocation clause at Article 17(2) of the constitution to say the least is unwarranted. The resultant effect of such a revocation runs contrary to the anticipated object of prohibiting the quagmire of statelessness in the country. Besides, the subsequent legislation under the Citizenship and Immigration Act that outlines the process of granting citizenship for children found on the Kenyan soil makes it even more cumbersome. Undoubtedly, the legal ramifications emanating from revocation of citizenship acquired by birth can lead to an endless contestation.

In a nutshell, this article has illuminated on the inherent flaws in the set of laws governing citizenship for foundlings in Kenya. The most fundamental contribution of human rights law to the prevention of statelessness is the enunciation of an individual's right to a nationality.^[18] Whereas it is in order for States to refrain from creating statelessness by adopting and implementing citizenship legislations within the confines of the principles enunciated in the International instruments, it is not proper to merely, for the sake of compliance, make laws whose provisions are not only hazy but also near impossible to implement.

4.1 Recommendations

As a matter of fact, it is not easy to have a process of conferment of citizenship for foundlings that is seamless in any jurisdiction. Even the relevant treaties and Conventions on the subject have espoused the desired principles of granting citizenship to foundlings but have provided no concrete obligations on its implementation mechanism. This is largely due to preservation of the concept of State sovereignty and the principle that birth at a state's territory does not necessarily reflect a link between the child and the state in which territory they were born.

It is discernible from this discourse that provisions in international and regional instruments regarding citizenship for foundlings, place emphasis on attribution of nationality to children born on state territory, but do not compel contracting state to adopt the form of automatic *jus soli* conferral of citizenship as constructed in the current Kenyan laws. In fact, the 1961 Convention on the Reduction of Statelessness at articles 1 & 4 provides for the attribution of nationality either *jus soli* or *jus sanguinis* at birth to a child who would otherwise be stateless but allows states to choose to delay the conferral of citizenship until late childhood or even early adulthood and set a number of additional conditions. By virtue of article 2 of the Constitution, Kenya is arguably a monist state and therefore even without the introduction of Article 14(4) the fact that it has ratified conventions and treaties that provide citizenship for foundlings makes such provisions to take effect automatically. As such therefore, all that was needed was to construct with precision statutory provisions encompassing principles enunciated by those instruments.

By and large it is possible for a foundling to obtain citizenship ‘substantively’ without the vague reference to ‘presumed citizen by birth.’ Such a child may be naturalized or may apply to become a citizen by *registration* when they attain the age of majority prior to which the child may be committed to children’s homes or orphanages for care and maintenance. Further, the application process makes it possible for the relevant government agency to impose conditions to avoid abuse of the system and to safeguard the rights of the child. In a nutshell, the full realisation of article 14(4) of the CoK 2010 with respect to granting of citizenship to foundlings is subject to numerous implementation challenges. This article therefore recommends that Kenya reviews her circumstances and proceed to effect necessary statutory and policy amendments with respect to the issue of the grant of citizenship to foundlings.

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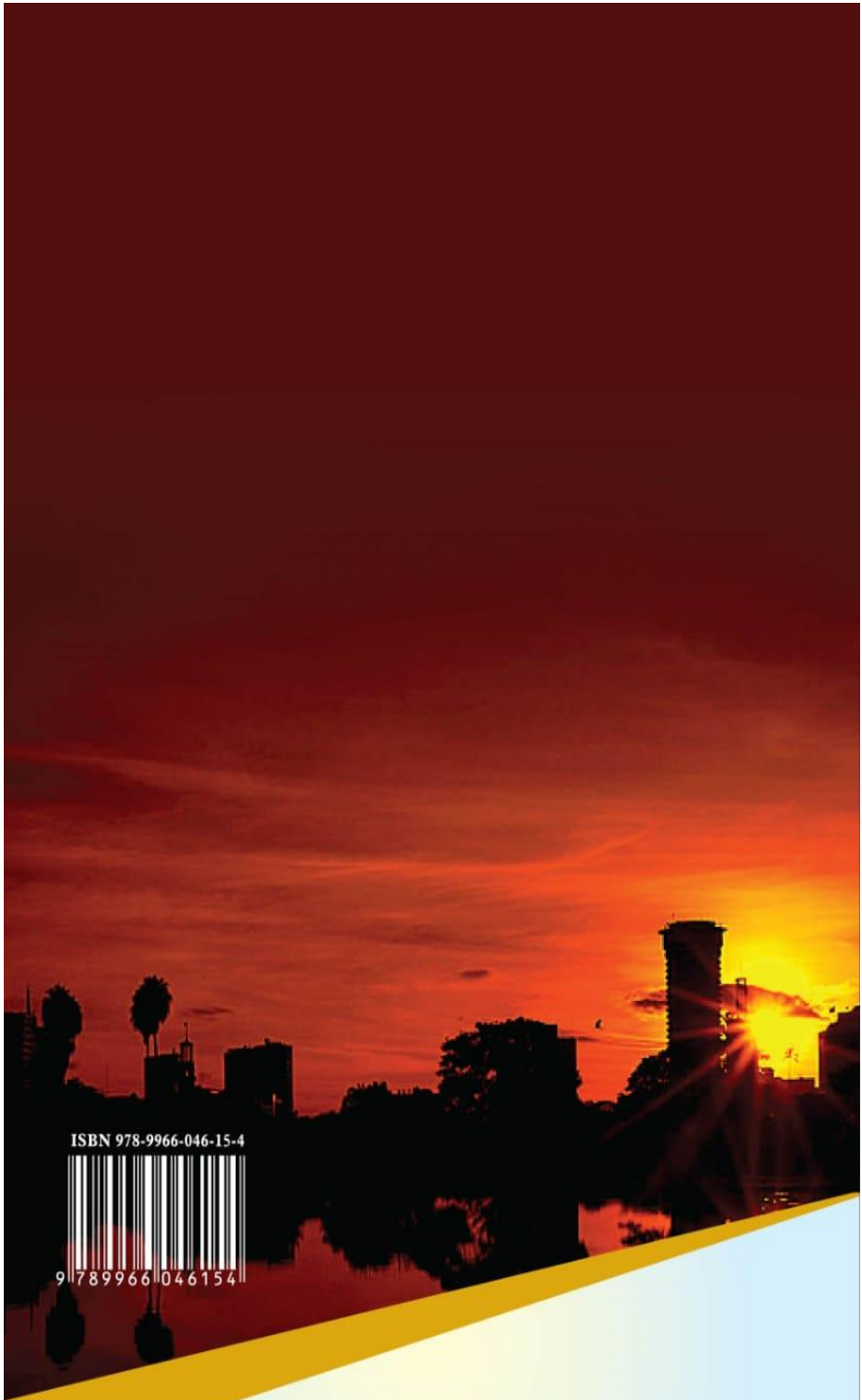
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