

Citizenship Discrimination and the Right to Nationality in Kenya

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I. INTRODUCTION

1. The Open Society Justice Initiative is an operational program of the Open Society Institute (OSI) that pursues law reform activities grounded in the protection of human rights and contributes to the development of legal capacity for open societies throughout the world. A major area of the Justice Initiative's work is the enforcement of international legal prohibitions on discrimination, statelessness and arbitrary deprivation of nationality.
2. A large but undocumented number of members of ethnic minority groups in Kenya are stateless. Groups such as the Kenyan Nubians, the Coastal Arabs and Kenyan Somalis all struggle with statelessness and discriminatory citizenship laws and practices. As a result, a large percentage of the population is unable to participate fully in the economic, social and political life of the country. Kenya's laws in this area remain profoundly discriminatory and ineffective in addressing issues of statelessness and citizenship discrimination. Specifically, the *Constitution of the Republic of Kenya* is discriminatory on the basis of gender (Articles 90 and 91) in contravention of the Convention on the Elimination of All Forms of Discrimination against Women; Kenya's nationality legislation does not provide effective protections against statelessness; stateless children born on the territory are not guaranteed citizenship despite Kenya's international obligation to do so under Article 7 of the Convention on the Rights of the Child; and, certain ethnic minorities have to go through a discriminatory vetting process to obtain identity cards and passports.

II. VIOLATIONS OF THE RIGHT TO NATIONALITY AND CITIZENSHIP DISCRIMINATION IN LAW

A. Scope of international obligations

3. Kenya is a party to several international and regional treaties containing legal standards on the right to nationality, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the African Charter on Human and People's Rights (ACHPR), and the African Charter on the Rights and Welfare of the Child (ACRWC).¹

¹ Acceded to the International Covenant on Civil and Political Rights on March 23, 1976; acceded to the Convention on the Elimination of All Forms of Racial Discrimination on October 13, 2001; ratified the Convention on the Elimination of All Forms of Discrimination Against Women on April 8, 1984; acceded to the Convention on the Rights of the Child on September 2, 1990; acceded to the African Charter on Human and Peoples' Rights on January 23, 1992; acceded to the African Charter on the Rights and Welfare of the Child on July 27, 2000.

4. Kenya is not a party to either of the two international conventions on statelessness: the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). These are key international instruments that establish certain minimum protections for stateless people and establish certain rules designed to prevent situations in which people are rendered stateless.

B. Constitutional and legislative framework

5. Citizenship law in Kenya is governed by the *Constitution of the Republic of Kenya* of 1963 and the *Kenya Citizenship Act* of 1963. The *Children Act* of 2001 has additional citizenship implications. The *Constitution* takes precedence over other laws, and provides for citizenship on a *jus sanguinis* basis. Specifically, Kenyan citizenship is primarily based on descent from a parent who has Kenyan citizenship.

C. National norms which violate Kenya's international legal obligations

6. Kenya's *Constitution* and legislation breach international human rights law with respect to citizenship and statelessness in the following ways:
 7. Gender Discrimination in Access to Citizenship. While citizenship for persons born in Kenya after December 11, 1963 can be passed to the child by either a Kenyan mother or a Kenyan father, Article 90 of the *Constitution* provides that only Kenyan fathers can pass citizenship to a child born outside of Kenya. In practice this means that a child born to a Kenyan mother abroad who does not acquire the father's nationality is at serious risk of becoming stateless. Similarly, unlike Kenyan men, Kenyan women are not able to pass citizenship to their foreign husbands.²
 8. No Effective Right of Children to Nationality. Although Article 11 of the *Children Act* of 2001 provides that "[e]very child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide assistance and protection, with a view to establishing his identity," the *Constitution*, which is superior to the *Children Act*, does not guarantee children's right to a nationality. Article 6(4) of the ACRWC requires Kenyan to amend its 'Constitutional legislation' to give effect to the principle that a child shall acquire the nationality of the state in which he or she is born, if at the time of birth the child is stateless.³

² Gender discrimination in citizenship law is a violation of Article 9 of the CEDAW. In particular, Article 9(2) requires State Parties to "grant women equal rights with men with respect to the nationality of their children."

³ Article 6(4) of the ACRWC states: '4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.' The CRC contains a similar obligation under Article 7.

9. As a result of Kenya's failure to grant its nationality to stateless children born on its territory, thousands of Kenyan-born children – most members of ethnic minority groups – are denied access to education, health care and a range of basic services to which other Kenyan-born children are entitled.
10. Arbitrary Deprivation of Nationality. Contrary to international law,⁴ Kenya's nationality law permits deprivation of nationality in cases other than fraudulent acquisition of citizenship;⁵ prohibits dual citizenship and does not require that the state prove that an individual has in fact acquired a second nationality before stripping him or her of Kenyan citizenship. The nationality law does not contain measures to protect against statelessness in cases of deprivation of citizenship. Nor does the law provide procedures for judicial or administrative review of decisions to deprive Kenyan nationals of their citizenship.
11. As a result of these deficiencies in Kenyan nationality law, Kenya is in effect placing vulnerable groups at risk of becoming stateless and/or suffering from citizenship discrimination. Failing to give effect to international human rights norms on citizenship and nondiscrimination in municipal law, Kenya is, in effect, contributing to the creation of statelessness.

III. KENYA'S PRACTICE ARBITRARILY DENIES CITIZENSHIP OR RECOGNITION OF CITIZENSHIP TO MANY

12. In addition to the foregoing legislative problems, Kenya's systematic practice in discriminating against ethnic minorities in access to citizenship renders thousands of such persons stateless.
13. Kenya currently has several large stateless populations, many of whom have resided in the country for generations. The three largest of these are the Kenyan Nubians, the Kenyan Somalis, and the Coastal Arabs. In law and practice, high percentages of these groups are deprived of the rights that are core to the ability to participate fully in the economic, social and political life of the country. Some are legally (*de jure*) stateless, and others face such difficulties in obtaining documentation to prove their citizenship (such as identity cards and passports)

⁴ Under international law, and in particular Article 15 of the Universal Declaration of Human Rights, Kenya has an obligation to ensure that no one is arbitrarily deprived of his/her nationality. A range of circumstances can make deprivation of nationality arbitrary, including: a) where the deprivation is discriminatory, b) where it results in statelessness, and c) where there is an absence of due process guarantees including a right to appeal the decision. Furthermore, internationally recognized best practices suggest that deprivation of nationality should *only* be permitted in cases of fraudulent acquisition of citizenship.

⁵ A Kenyan national by registration or naturalization can be deprived of citizenship under the following circumstances, set forth in Article 94 of the *Constitution*: a) the citizen has been shown to be disloyal or disaffected towards Kenya; b) the citizen has unlawfully traded or communicated with an enemy during war time; c) the citizen has received a prison sentence of at least 12 months during the first five years of holding Kenyan citizenship; d) the citizen has been, since becoming Kenyan, ordinarily resident in another country for a continuous period of seven years; and e) the citizen fraudulently obtained Kenyan citizenship.

that their citizenship is for practical purposes ineffective – they are *de facto* stateless.

14. Children are particularly vulnerable to *de facto* statelessness in Kenya since birth certificates expressly cannot be used as proof of citizenship. This leaves all children with tenuous citizenship until they receive their first identity card at age 18 or, less commonly, their first passport. In practice, children from ethnic groups considered to be indigenous to Kenya are *de facto* citizens, because they benefit from the assumption that they are citizens, while children from ethnic minorities such as the Kenyan Nubians are *de facto* stateless, and suffer from the opposite assumption, that they are not Kenyan citizens. Thus, individuals from minority ethnic groups, but not others, have to undergo a vetting process in order to obtain identity cards and passports. These individuals, but not others, are commonly asked to provide their parents' and grandparents' identity documents in order to secure their own. The fact that the vetting procedure is applied almost exclusively with respect to members of ethnic minority groups suggests that the right of certain minorities to citizenship is systematically questioned because of their ethnicity – a fundamentally discriminatory practice.
15. The Nubians first arrived in Kenya in the early 1900s, the vast majority of whom were ex-servicemen in the British colonial army. Kenya currently has no official statistics on the Nubian community but the community is thought to number at least 100,000 and the great majority lives in the infamous Kibera slum in Nairobi. By now, most Nubians have lived in Kenya for several generations but many still do not have Kenyan citizenship. As a result of statelessness, Nubians are typically prohibited from political participation, their access to healthcare and education is poor, public employment is out of the question, and their right to own land is severely restricted. Most Nubians live in temporary structures in slums and isolated villages, often on contested land. For example, the government continues to insist that Kibera is government land, and local politicians have arranged for parts of the slum to be 'developed' and sold or given to their supporters, pushing the Nubians into a smaller and smaller space and greater squalor.
16. The Kenyan Somali community is more dispersed than the Nubian community, but suffers largely from the same problems in access to nationality. Many have lived in Kenya for several generations, but their loyalty to the country is consistently questioned. While many Kenyan Somalis are denied nationality, some have also been arbitrarily deprived of their citizenship. The recent history of the Galje'el – a people of Somali descent – provides an example of Kenyan practice. In 1989 the so-called Yusuf Haji Task Force was dispatched in order to verify the nationality of Kenyan Somalis. As a result, in the Garsen Division of the Tana River District, at least 56 people had their identity cards taken away, effectively rendering them stateless. The total number of people deprived of citizenship through similar efforts is unknown. Despite numerous complaints by those whose cards were revoked, they remain stateless to this day. Indeed, as late as 2008 a letter addressed to a member of the Galje'el community stated that an

application for an identity card could not be processed ‘because the holder was declared to be a non-Kenyan by the ... Task Force of 1989.’

IV. RECOMMENDATIONS TO THE UPR WORKING GROUP

17. The Justice Initiative calls on the UPR Working Group and other States to ask the Kenyan state representatives:

- What steps will Kenya take to guarantee citizenship to stateless children born on its territory?
- What steps will Kenya take to end discrimination on the basis of gender or ethnicity in both law and practice?
- How will Kenya resolve the situation of stateless persons from ethnic minorities such as Kenyan Nubians, Kenyan Somalis and Coastal Arabs?

18. The UPR Working Group and other States should clarify that Kenya’s inadequate protections against statelessness in law and poor treatment of stateless persons constitute violations of international human rights law. Specifically, States should recommend that Kenya:

- Consider accession to the two treaties on statelessness, namely the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961);
- Remove all provisions from its nationality law that discriminate on ground of gender. Specifically, amend Articles 90 and 91 of the *Constitution*;
- Provide stateless children born on its territory with Kenyan nationality, in line with regional and international legal standards. Specifically, include these provisions in the *Kenya Citizenship Act* and under Chapter VI of the *Constitution*;
- Amend Article 94 of the *Constitution* to narrow the grounds for deprivation of citizenship. Kenya should also provide in law a guarantee of due process in cases of deprivation of nationality and prohibit in law deprivation where it would result in statelessness;
- Resolve all protracted situations of statelessness and in particular those which affect ethnic minorities by affirmatively assisting affected people in obtaining nationality. This includes documenting the scope of the problem through household surveys; pro-actively addressing statelessness by granting citizenship to all stateless children born on its territory and providing an accessible option of naturalization to stateless adults; improving birth registration; and ending discriminatory vetting processes.

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The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: anticorruption, equality and citizenship, freedom of information and expression, international justice, and national criminal justice. Its offices are in Abuja, Budapest, London, New York, and Washington DC.

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