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REPORT ON CITIZENSHIP LAW: KENYA

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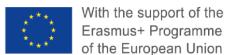
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Report on Citizenship Law

Kenya

Caroline Nalule

1. Introduction

Formal citizenship laws in Kenya can be traced back to the immediate pre-independence period when the Independence Constitution of Kenya was being crafted by both Kenyan elites and the retiring British administrators. Kenya attained independence on 12 December 1963, which was also the pivotal date with regards to modes of citizenship acquisition and loss in the newly independent state. In 1964, Kenya officially became a republic.

As this report shall reveal, there have been various iterations of Kenya citizenship law grounded in its constitution, which have been altered depending mainly on the political, and the socio-economic tides at a particular period in Kenya's ambivalent constitutional and political development history. Since attaining independence, Kenya has only had one widely participatory constitutional process that culminated in its current Constitution promulgated in 2010. Hitherto, the 1963 Constitution (the independence Constitution) underwent numerous amendments and modifications, which in 1969 were consolidated into one single Constitution document. There were subsequent amendments, but most notably in 1985, which amendment specifically affected some of the provisions on citizenship. Most of the amendments, however, effected between 1969 and 2008 were mainly more about political leveraging with some of the major changes including the introduction of a one-party state, its abolition years later and the re-introduction of a multi-party state. Yet, the constitution's provisions on citizenship have been the basis of the citizenship regime in Kenya from independence to the present day.

Demographically, Kenya has an estimated population of 47.6 million¹ constituted of at least 44 officially recognised ethnic groups². Ethnicity has always not only been a sensitive issue in Kenya, but has also been both politically decisive and divisive. Ethnic tensions were a major factor contributing to the violence that erupted following the presidential elections in 2007, as a consequence of which the country embarked on a path of national reconciliation, which in a way catalysed the completion of the constitution review process that resulted into

¹ Results from the 2019 census available at 2019census.knbs.or.ke accessed on 4 January 2020.

² Initially, there were 42 recognised ethnic communities, but in 2017, the Makonde and the Indians were added onto the list. See Katiba Institute, *Participation of Ethnic Minorities and Marginalized Communities in Political and other Governance Processes: Realities and Approaches* (Katiba Institute, 2019), p 18. The 42 and later 44 groups have been disputed as not accurately depicting the ethnic composition of Kenya, with some groups complaining that they have been lumped together with and subsumed into relatively bigger or more dominant groups – see *The Final Report of the Truth, Justice and Reconciliation Commission of Kenya* (TJRC 2013) p 224 available at <http://citizenshiprightsafrika.org/wp-content/uploads/2013/03/TJRC-Final-Report-Volume-IIC.compressed.pdf> accessed 4 January 2020.

the current Constitution of Kenya in 2010³. With the new Constitution, a number of laws, including the citizenship laws were accordingly revised and amended.

This report shall set out the developments of Kenya's citizenship regime tracing it from the colonial era to the present, highlighting relevant key phases and changes over the years and what may have influenced them. The report also discusses the implementation and application of the laws by both the administrative authorities and the judiciary. The report ends with a discussion of some of the on-going debates around citizenship in Kenya.

2. The colonial period (1895-1963)

Prior to colonialism, what was later to become the country of Kenya was composed of various communities mainly connected through kinship or common ancestral links. It is claimed that most of these communities were 'highly acephalous and segmented', characterised further by fluid ethnic boundaries and interactions mainly through, 'trade, intermarriages, limited and intermittent warfare'⁴. Society was thus based strongly on kinship ties and ethnicity, a trait that continues to permeate notions of social and political belongingness, and consequently influences definitions and understandings of nationhood in most African states.

When the Europeans embarked on the imperialist project benchmarked by the Berlin Conference of 1884-5, the territory that was later to become Kenya was an object of dispute between the British and the Germans who by then had control over most of Tanganyika to the south of Kenya. In 1886, the Anglo-German agreement and subsequent supplementary agreements settled the matter over which colonial authority would have control over which territory. Accordingly, in 1895, Kenya was declared a British protectorate, except for a narrow coastal strip about ten miles wide which was recognised as the territory of the Sultan of Zanzibar.

Prior to the arrival of the Europeans, Arabs and Asians had come to East Africa pursuing trade interests, particularly in slaves. Many of them, therefore settled along the coastal areas which were by then the major entry point to the hinterland. In the sixteenth century, when the Portuguese tried to take over control of the coast⁵, they were driven away by the Arabs who later took control of most of the coastal area. Therefore, by the time the Europeans took over this territory, it was composed of a mixed population.

Owing to its agricultural potential, British settlers moved into Kenya and took possession of large tracts of land for agricultural production. In 1920, Kenya was declared a Crown Colony to be administered by a British governor. However, the coastal strip that belonged to the Sultanate of Zanzibar, and other territories that would later be ceded to Somalia became the Kenya Protectorate in 1921⁶. The settler community needed labour in plenty for various projects including work on the agricultural plantations, building infrastructure such as

³ The constitution review process had been initiated almost a decade earlier, the Constitution of Kenya Review Act was enacted in 1998, and the Constitution of Kenya Review Commission was established in 2000, but the process stalled for various reasons, including rejection of an initial draft constitution in a referendum held in 2005. After the 2007-8 post-election violence, the constitution review process became a top priority.

⁴ P O Ndege, 'Colonialism and its legacies in Kenya', A lecture delivered during the Fulbright-Hays Group Project Abroad Program, July 5th to August 6th 2009 at the Moi University Main Campus, available at <http://africanphilanthropy.issuelab.org/resources/19699/19699.pdf> accessed on 5 January 2020.

⁵ A Y Lodhi, 'Muslims in Eastern Africa- their past and present', *Nordic Journal of African Studies* (1994) 3 (1), 88 at 89.

⁶ L Fransman, *Fransman's British Nationality Law*, 3 ed. (Bloomsbury Professional 2011) p. 1036. Ibid.

railways, security and defence, among others. Labour was sourced from the locals within Kenya and certain migrant communities that were specifically looking for work, but there were a number of foreign workers that were specifically brought in for specific labour roles. These included some Greeks, Goans, Portuguese, Somali, Indians and South Asians generally, Nubians from the Sudan, the Seychellois⁷, and the Makonde who mainly worked on the sisal plantations. South Asians and Arabs also continued to come into Kenya for trade purposes, while at the same time there were communities of freed slaves, such as the Yao who also settled in Kenya⁸.

In terms of political, economic and social governance structures, the country had a three-tier racial stratification. The Europeans, who governed and controlled commercial and business farming, occupied the top rung, in the middle were the Asians who dominated trade and commerce in urban areas, and the African native population came at the bottom. It has been strongly posited that in terms of the legal governance framework under British rule, there were two sets of laws. The one set of the formal and civic laws to govern the elite urban population considered as ‘citizens’ who enjoyed a wide array of civil and political rights⁹, and the other set of native or customary laws to govern the ‘tribes’, each according to its traditional norms and customs¹⁰. In other words, the concept of ‘citizenship’ as understood by the colonialists did not apply for the African populations for whom the customary or traditional sense of kinship and common ancestry continued to largely define belongingness to a specific ethnic community. The elite urban population under formal law were considered as British subjects, a status conferred upon ‘a person born in any of Her Majesty’s dominions and allegiance’¹¹.

The word ‘citizen’ only appeared in British laws with the British Nationality Act, 1948. This Act was intended to create a linked framework of citizenship laws among Britain’s Dominions (a phrase that applied to nine select countries including Canada, Australia, India, South Africa and Ireland) that had by then gained self-government or full independence and enacted their own specific citizenship laws. The 1948 Act recognised a ‘citizen of an independent Commonwealth country’ as having a special status in the UK, and also converted the former status of British subject into that of ‘citizen of the United Kingdom and Colonies’ (CUKC)¹². The term British subject remained in use, but as an umbrella term covering both CUKCs and citizens of independent Commonwealth countries, without much free-standing content. Those born in a protectorate without a claim to CUKC status or another citizenship continued to hold the status of ‘British protected person’.

A clear reading of this Act gives the impression that these new terms were defined almost exclusively for persons living in the nine specified Dominions and British settlers in the colonies and their offspring¹³. Apparently, it was never meant as a catch-all phrase to include all persons of African descent born in British colonies such as Kenya, whose rights and freedoms, particularly freedom of movement remained largely restricted compared to the

⁷ B Ng’weno & L O Aloo, ‘Irony of Citizenship: Descent, National Belonging, and Constitutions in the Postcolonial African State’, *Law & Society Review* (2019) 53 (1), 141 at 154.

⁸ *Ibid.*

⁹ The word ‘citizen’ is not used in its definitive technical sense, but rather as a term of racialized segregation adopted by the colonialists in their bifurcated governance practices. See M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University 1996) 17-18.

¹⁰ C M Shaw, *Colonial Inscriptions: Race, Sex and Class in Kenya* (University of Minnesota Press, 1995) 4-5.

¹¹ The British Nationality and Status of Aliens Act, 1914, Chapter 17, section 1.

¹² R Hansen, ‘The politics of citizenship in 1940s Britain: The British Nationality Act’, *Twentieth Century British History* (1999) 10 (1), pp. 67-95 at 77.

¹³ *Ibid.*, also British Nationality Act, 1948, sections 1(1) & 13(1).

European counterparts¹⁴. Nevertheless, for those Africans that could afford or had the opportunity to migrate to the Britain, the 1948 Act eased this process for them, although their migration to the United Kingdom was only ‘expected to be limited and temporary’¹⁵.

The blatant racial discrimination and marginalisation of Africans in politics and the economy in Kenya, their disenfranchisement, the expropriation of their land for European agricultural settlers, which turned the former land owners into squatters on their land, the high unemployment among the youth all partly contributed to massive disgruntlement and agitation among the African population. The resultant 1952 Mau Mau rebellion which was mainly led by the Kikuyu in central Kenya was defeated in 1958, but it had managed to amplify the cause for freedom and independence. Soon thereafter, the talks for independence gained momentum and Kenya attained its independence from Britain on 12 December 1963.

3. Citizenship regime from independence to 2010

3.1. Citizenship in the 1963 Independence Constitution

Kenya’s independence constitution¹⁶ was negotiated and finalised in Lancaster House, London, just like that of other former African British territories. Its provisions on citizenships were virtually taken from the same template as that of its neighbouring countries.

The chapter on citizenship was the first chapter in the 1963 Constitution and it set out the provisions on citizenship acquisition and loss, among others.

3.1.1. Acquisition of citizenship

Kenyan citizenship could be acquired in four ways:

- i). Became a citizen at independence - one automatically became a citizen of Kenya upon its independence if:
 - a) *Two generations born in Kenya*: He or she was born in Kenya to parents either of whom had been born in Kenya, and was on the 11 December 1963 a citizen the UK and Colonies or a British Protected Person¹⁷;
 - b) *Born outside Kenya to a citizen father*: A person who by 11 December 1963 was a citizen of the UK and Colonies or a British Protected Person, but was born outside Kenya and their father became or would, but for his death, have become a citizen of Kenya on 12 December 1963;¹⁸
- ii). Born after independence
 - a) He or she was born in Kenya after 11 December 1963, unless the father had diplomatic status, (or was a citizen of a country with which Kenya was at war

¹⁴ B Manby, *Citizenship in Africa: The Law of Belonging* (Hart Publishing 2018) 46.

¹⁵ Hansen, *ibid*, 89-90.

¹⁶ The 1963 Constitution of Kenya was set out in Schedule 2 of The Kenya Independence Order in Council 1963, Legal Notice No. 718 of 1963.

¹⁷ The Constitution of Kenya, 1963, section 1 (1).

¹⁸ *Ibid* section 1(2).

and the birth occurred in a territory occupied by the enemy). If the father's diplomatic status disqualified the person, the child still acquired citizenship based on birth in Kenya if the mother was a citizen¹⁹.

- b) A person was born outside Kenya after 11 December 1963 to a father who was a Kenyan citizen at that date. Note that Kenyan mothers could not transmit citizenship to children born outside Kenya²⁰.
- iii). By registration during a transitional period: the relevant provisions opened up Kenyan citizenship to qualify it as non-racialised and inclusive. Moreover these persons would have to register for citizenship within a specified period, which was, in most cases, two years from the date of independence unless otherwise provided²¹. The categories of persons that qualified for citizenship by registration were as follows:
- a) *Born in Kenya to parents who were not born there*: A person above 21 years of age who was born in Kenya and was on 11 December 1963 a UK citizen or British Protected Person, but neither of his or her parents was born in Kenya²².
 - b) *Woman married to a citizen*: A woman who on 11 December 1963 was married to a person who became a citizen of Kenya, or, but for his death, would have become a citizen of Kenya on 12 December 1963²³.
 - c) *Long-term resident citizen of the UK and Colonies*: A person who was on 11 December 1963 a citizen of the UK and Colonies or of the Republic of Ireland and was on that day ordinarily resident in Kenya but not on the basis of a temporary immigration pass²⁴.
 - d) *Naturalised citizens of the UK and Colonies*: A person who on 11 December 1963 was a citizen of the UK and Colonies having naturalised as such in Kenya before the coming into force of or under the British Nationality Act, 1948²⁵.
 - e) *Commonwealth citizens or citizens of African countries*: A commonwealth citizen or citizen of an African country that equally permitted Kenyan citizens to acquire their citizenship, and who had been ordinarily resident in Kenya for such period and under such authority prescribed by an Act of Parliament, and one of whose parents was a citizen of Kenya²⁶.

¹⁹ Ibid, section 3: "Every person born in Kenya after 11th December 1963 shall become a citizen of Kenya at the date of his birth: Provided that a person shall not become a citizen of Kenya by virtue of this section if at the time of his birth: (a) neither of his parents is a citizen of Kenya and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Kenya; or (b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country."

²⁰ Ibid, section 4.

²¹ Ibid, section 2 (1) & (6).

²² Ibid, section 2 (1).

²³ Ibid, section 2 (2) & (3). Note that only Kenyan husbands could qualify their foreign wives for citizenship, while Kenyan wives could not do the same for their foreign husbands.

²⁴ Ibid, section 2 (4).

²⁵ Ibid, section 2 (5).

²⁶ Ibid, section 6.

iv). By registration or naturalisation on an on-going basis:

- a) A woman who married a Kenyan citizen after independence was entitled to register as a citizen²⁷. Quite distinct from the earlier provision regarding married women who could apply for registration, this provision was more open, without any set qualifying time frames or dates. It was a catch-all provision for all foreign women married to Kenyan citizens, and no further conditions beyond the marriage itself were imposed.
- b) In contradistinction to citizenship by registration, persons who qualified for naturalisation had to fulfil all the following conditions:
 - Must have attained 21 years of age;
 - Must have been ordinarily resident in Kenya for 12 months immediately preceding the naturalisation;
 - Must have been ordinarily and lawfully resident in Kenya for an aggregate of four years within the seven year period preceding the said 12 months; must be of good character, have an adequate knowledge of Swahili, and had intentions of continued residence in Kenya. These points had to be proved to the minister's satisfaction.

A person whose application was successful would obtain a certificate of Naturalisation from the Minister²⁸. Thus citizenship by naturalisation was meant to provide an opportunity for those who had neither birth, descent or citizenship links to Kenya and the UK and Colonies to become Kenyans.

- iv. Commonwealth citizenship: An assumed status rather than a mode of acquiring citizenship, commonwealth citizenship was accorded to all citizens of Kenya under the Independence Constitution and subsequent laws, and it was also a status recognised for citizens of the UK and Colonies, Canada, Australia, New Zealand, India, Pakistan, Ceylon, Ghana, Malaysia, Nigeria, Cyprus, Sierra Leone, Tanganyika, Trinidad and Tobago, Uganda, Zanzibar, Rhodesia and Nyasaland²⁹. Commonwealth citizens could enjoy the same rights and privileges on reciprocal terms as Kenyans were allowed to enjoy in those countries. Usually, asides from immigration expedience, a Commonwealth citizen did not really enjoy the entire gamut of rights available to a Kenyan citizen. Reciprocity was the key³⁰.

3.1.2. *Prohibition of dual citizenship*

A significant provision of the Kenyan Independence Constitution was the prohibition of dual citizenship. In spite of the inclusive citizenship provisions, one was required to either renounce their other citizenship or cease being a Kenyan citizen if they were 21 years and above; and those registering or naturalising as citizens had to renounce any other citizenship to qualify. Only those who had not yet attained 21 years of age could hold dual citizenship, but had to decide on which citizenship to retain once they attained that majority age. Under the Constitution, persons who had attained 21 years before and after 12 December 1963 were given a two-year grace period to renounce their other citizenship, take an oath of allegiance

²⁷ Ibid, section 5.

²⁸ Ibid, section 7.

²⁹ Ibid, section 9.

³⁰ Ibid, section 10.

and make a declaration as to their Kenyan citizenship, failing which their Kenyan citizenship would be revoked³¹.

Courts in Kenya would later interpret the prohibition of dual citizenship as not applying to Kenyan citizens by birth unless they had expressly or impliedly renounced their Kenyan citizenship³². The renunciation had to be voluntary, as much as the acquisition of the citizenship of the other state had to be voluntary³³. In one case, it was explicitly stated that ‘there is nothing in the constitution that specifically prohibits the petitioner from acquiring Australian citizenship while at the same time retaining his Kenyan citizenship provided that the Australian law allows for its citizens to acquire and have dual nationality’³⁴. The courts’ have argued that under the 1963 constitution, the law ‘only prohibited persons of a certain category who were citizens of other countries at the time of independence to choose to be citizens of Kenya or that country. It did not apply to citizens of Kenya by birth’³⁵.

3.1.3. Deprivation of citizenship

The powers to deprive one of citizenship acquired either through registration or through naturalisation were vested in the minister responsible for matters of citizenship in Kenya. Circumstances that could lead to deprivation of citizenship included³⁶:

- i). Engaging in acts or speeches that were deemed to expressing disloyalty or disaffection towards Kenya;
- ii). Engaging, unlawfully trading, communication or doing business with an enemy with which Kenya was at war;
- iii). Being handed down a sentence of twelve months imprisonment or more within five years of having acquired Kenyan citizenship;
- iv). Taking up ordinary residence in another country for a continuous period of seven years or more since acquiring Kenyan citizenship save if one was away in service of Kenya, or registered annually at the Kenyan consulate their intention to retain Kenyan citizenship;
- v). Having acquired Kenyan citizenship through fraud, false representation or concealment of a material fact.

³¹ Ibid, section 12.

³² *Miguna Miguna v Fred Okengo Matiangi and others*, Petition No. 51 of 2018 [2018]eKLR; *Mahamud Muhumed Sirat v Ali Hassan Abdirahman and others*, Election Petition No. 15 of 2008 [2010]eKLR.

³³ Ibid, see also *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons and others*, Petition No.586 of 2012 [2014]eKLR; *Khalid Salim Ahmed v Attorney General and another*, Petition No. 78 of 2012 [2018]eKLR.

³⁴ *Sirat* case, supra note 32.

³⁵ Ibid, also *Miguna Miguna* case, para. 69.

³⁶ Constitution of Kenya, 1963, section 8 (1).

3.2 The Kenya Citizenship Act, 1963 and Regulations

The Kenya Citizenship Act (KCA) of 1963³⁷ did not make any substantive additions to the Constitutional provisions. It was rather focused on providing details in relation to aspects of citizenship by registration, naturalisation, and the renunciation and deprivation of citizenship.

Regarding registration, the Act added a provision on registration of persons of African descent. This was, arguably an expansion on the category of persons that could register as citizens, and whose eligibility requirements were in ways different from those required for citizens of other African countries, provided for under the Constitution, who wished to register as Kenyan citizens. Persons of African descent could register as Kenyan citizens if they could demonstrate that they: were of African descent; had been born in or one of their parents had been born in a specified country; had lived in the specified country for not less than ten years and *was not a citizen of an independent African state*³⁸ (emphasis mine); had been ordinarily resident in Kenya for five years; had adequate knowledge of Swahili or English; was of good character; and would be a suitable citizen of Kenya³⁹. A person of African descent could not be a dual citizen and was required to renounce their other citizenship upon acquisition of Kenyan citizenship. Failure to do so within 21 or 28 days of acquisition of citizenship would lead to nullification of the registration⁴⁰.

With regard to renunciation of Kenyan citizenship, a Commonwealth citizen or national of a foreign country who wished to do so, would make a declaration to that effect and upon its registration, their citizenship would cease. Moreover, the minister could refuse to register such a declaration if it was made during a war in which Kenya was engaged, and it is, in the minister's opinion, contrary to public policy⁴¹.

Both the Constitution and the Act vested vast powers in the minister in the grant and refusal of any application made under the Act. The minister's decision was final and not subject to any subsequent court process⁴².

The citizenship regulations⁴³ that were made under the KCA set out the forms and fees requisite for any of the applications mentioned under the Act.

3.3 The 1969 Constitution and the 1985 Constitution Amendment Act

Following independence, there were many amendments made to the constitution, hence the Constitution of Kenya Act, 1969 consolidated all prior amendments of the Constitution and resulted in a re-arrangement of the various chapters and sections of the Constitution. Consequently, while the citizenship chapter had appeared as the first in the previous

³⁷ Kenya Citizenship Act (KCA), No. 49 of 1963, and later Cap. 170, Laws of Kenya.

³⁸ The provision was probably meant to favour persons from states that were still struggling for independence, including members of liberation movements.

³⁹ *Ibid*, section 3.

⁴⁰ *Ibid*, section 5.

⁴¹ *Ibid*, section 6 (1 & 2).

⁴² *Ibid*, section 9. This provision may explain the paucity of judicial decisions on citizenship matters in the earlier years of Kenyan independence.

⁴³ The Kenya Citizenship (Forms and Fees) Regulations, available at <https://www.refworld.org/docid/3ae6b4ef3c.html> accessed on 5 January 2020.

constitution, it became chapter six within the new layout – but with no substantive changes to its provisions.

It was only the constitutional amendments of 1985 that had any substantive impact on the citizenship provisions. The 1985 constitutional amendment reformulated section 89 of the 1969 constitution which provided for citizenship at birth for persons born in Kenya after 11 December 1963, in order to create the requirement that either of that person's parents must be a Kenyan citizen⁴⁴. The initial provision which had in effect espoused the *jus soli* principle save for where neither of one's parents was a citizen and the father was either a foreign diplomat or citizen of an enemy country, was amended to incorporate a mandatory *jus sanguinis* component. The mere fact of birth in Kenya from independence, save for the specified qualifications, would no longer qualify one as a citizen by birth. One needed to be born of a Kenyan citizen⁴⁵. It has been argued that this amendment actually merely legitimated what had long been the practice of the Kenyan immigration officials. They had deliberately altered the interpretation of the *jus soli* provision to deny qualifying persons of citizenship⁴⁶. Since the amendment was to apply to all persons born after 11 December 1963, it effectually stripped of citizenship all those persons that had considered themselves as Kenyan citizens by birth, rendering them stateless⁴⁷. Their only recourse would thus be to apply for naturalisation as Kenyan citizens.

3.4 Impact of the citizenship law and subsequent changes

The citizenship law adopted by Kenya at independence sought to provide an opportunity for persons of all races resident in Kenya at the time to become citizens. As explained above, there were persons that automatically became citizens at independence if born of a Kenyan-born parent; while those without Kenyan-born parents but had strong connections to Kenya could register as citizens during a transitional period; and those that were born in Kenya after independence were to be recognised as citizens by birth unless born to a father who was either a foreign envoy (and the mother was not a citizen) or a citizen of an enemy country and were born in enemy territory. Then there were those that could benefit from the continuous naturalisation procedures.

It has been reported that at the time of independence, three percent of Kenya's population was constituted of Europeans, Asians and Arabs⁴⁸. Yet, in light of the racialized hierarchical colonial order, this small percentage held the economic and, previously, political power. Among this category, those who could not prove two generations born in Kenya were given an opportunity to register as citizens, but only a few took it up. Reportedly, in the first year of independence, despite a combined European and Asian population of over 250,000⁴⁹, there were only 3,911 registrations although the number did go up towards the end of the two-

⁴⁴ The Constitution of Kenya (Amendment) Act, No. 6 of 1985.

⁴⁵ B Manby, *Statelessness and Citizenship in the East African Community* (UNHCR 2018), p.10.

⁴⁶ R K D Shah, 'Britain and Kenya's citizenship law: a conflict of laws?' *Immigration and Nationality Law and Practice* (1992) 6 (4), p.120 at 121.

⁴⁷ Ibid. See also Ng'wen'o & Aloo, *supra* note 7, p.160.

⁴⁸ R M Maxon, 'Social and cultural changes' in B A Ogot & W R Ochieng (eds), *Decolonization and Independence in Kenya 1940-93*, (James Currey, London and East African Educational Publishers, Nairobi, Ohio University Press, Ohio, 1995) at p.110.

⁴⁹ J Gibbs, 'Uhuru na Kenyatta: white settlers and the symbolism of Kenya's independence day events' *The Journal of Imperial and Commonwealth History* (2014) Vol 42 (3), p. 503 at 505.

year grace period in 1965⁵⁰. The less-than-enthusiastic response to acquisition of Kenyan citizenship especially among the Europeans and the Asians, has been attributed to the fact that most of the European settlers packed up and left, while a considerable number of Indians took up British passports (since they could under the British Nationality Act, 1948), and as such they could not be considered as Kenyan citizens⁵¹. Yet the bureaucracy also drew out the process causing delays that went beyond the prescribed transition period following the last-minute rush of applications⁵². The sentiments at the time required that the non-African population identified with the newly independent state or lost their citizenship, hence the prohibition on dual citizenship⁵³. Most of the Arab population, however, took up the opportunity and acquired Kenyan citizenship⁵⁴ and they still continue mainly inhabit the coastal areas.

As in most post-independence African countries, there was an immediate move towards the Africanisation of the civil services and the economy in Kenya. Thus, by 1978, most of the European settlers who had not taken up Kenyan citizenship had left and they were gradually to phase out. Most of the Indians had stayed on, but some of those who had not acquired Kenyan citizenship were soon compelled to leave by the passing of both the Immigration Act and the Trade Licensing Act in 1967. Both laws restricted the employment and business space for non-citizens, and as a consequence, a large number of Indians emigrated to Britain where they still enjoyed favourable immigration status⁵⁵.

On the political governance front, Kenya went through a spate of political squabbles and in-fighting among its leaders. Successive leaders and governments sought to entrench themselves in power and weaken their opponents. Thus, the Constitution underwent numerous amendments, most of which were aimed at ‘centralising power in the hands of the executive and ultimately the president’.⁵⁶ Some of these changes included the abolition of the regional government arrangement, establishment of a one-party state and later the re-institution of multi-party politics. All in all, between 1963 and 2010 when the current Constitution of Kenya was promulgated, there were about 31 amendments and revisions to the 1963 constitution.

4. The current citizenship regime (2010 to present)

In 1998, Kenya embarked on a constitution review process that was set in motion with the enactment of the Constitution of Kenya Review Act, 1998. Owing to logistical, administrative, and political hurdles, the most notable of which was the public rejection of the draft constitution through a referendum held in 2005, the constitution review process lasted more than a decade⁵⁷. The process was completed in 2010 with yet another referendum in which 68.55% of the voters

⁵⁰ Maxon, *supra* note 48 at p.112; also D Rothchild, ‘Kenya’s minorities and the African crisis over citizenship’, *Race and Class* (1968) 9, p. 421 at 422-3.

⁵¹ Maxon, *Ibid.*

⁵² Rothchild, *supra* note 50 at p. 423.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 113-115.

⁵⁶ S Wanjala & K Kibwana, *Time to Change: An Open Letter to Kenyans* (Claripress 1997), 39.

⁵⁷ For more information on the constitution review process, see

<http://www.katibainstitute.org/Archives/index.php/past-constitutions/about-the-constitution-history>.

voted in favour of adopting the new draft. The new constitution was promulgated on 27th August 2010⁵⁸ following the publication of the referendum results.

Although citizenship issues had been neither the most controversial nor the most debated during the review process, two main issues had dominated the debate⁵⁹. The first one regarding the gender discriminatory provisions on citizenship acquisition; and the second, on dual citizenship. Consequently, as we shall see shortly, gender-neutral provisions were introduced, as well as a qualified acceptance of dual citizenship. The constitutional provisions on citizenships were to be operationalised by a new law, the Kenya Citizenship and Immigration Act (KCIA)⁶⁰ and its subsidiary regulations (KCIR)⁶¹, thus repealing the Kenya Citizenship Act and the Kenya Immigration Act, among others. Thus the 2010 constitution ushered in a new citizenship regime.

The section on citizenship is under chapter three of the constitution. Persons who were citizens prior to the coming into force of the new constitution retained the same citizenship status that they held. However, unlike the old constitution, citizenship in Kenya can now only be acquired by either birth or registration. Provisions on naturalisation no longer apply, although the level of discretion exercised by the authorities under the erstwhile naturalisation processes has now been shifted to the registration process, which hitherto was less discretionary.

4.1. Citizenship by birth

Citizenship is mainly attributed at birth on a *jus sanguinis* basis, referred to as “citizenship by birth” whether the person is born in or outside of Kenya. One’s place of birth is not as significant as that fact that one is born to parents, either of whom is a Kenyan citizen⁶².

Moreover, for the avoidance of doubt, citizenship by birth is extended to persons that acquired citizenship by virtue of sections 87 and 88 (1) of the previous constitution⁶³ i.e. persons born in or outside Kenya to Kenyan born parents who at the time of independence are citizens of the UK and colonies or British protected persons.

The constitution makes some significant amendments to the reading and effect of these erstwhile provisions. Firstly, section 87 (2) which only recognised children born outside Kenya to a Kenyan citizen father is rectified to include the mother as well. This in effect is a retroactive rectification of the discrimination against Kenyan citizen mothers whose children born outside Kenya were not eligible for Kenyan citizenship. Secondly, section 88 (1) entitled persons that were born in Kenya to non-citizen parents before 12 December 1963, but were CUKCs or British protected persons to register as citizens. The new constitution recognises such persons

⁵⁸ The constitution would come into effect upon publication in the Gazette or 14 days after the results of the referendum were published. It was published in the Gazette on 26 August 2010 vide Legal Notice 133 of 2010. However, the President held a public promulgation event on 27 August 2010, which is commonly regarded as a promulgation date.

⁵⁹ J C Ghai, ‘What constitution provides on aspects of citizenship’, 6 March 2018 available at <https://www.katibainstitute.org/> accessed on 15 February 2020.

⁶⁰ Kenya Citizenship and Immigration Act, No. 12 of 2011, entered into force on 30 August 2011 available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No. 12 of 2011>.

⁶¹ Kenya Citizenship and Immigration Regulations, 2012, Legal Notice No. 64 of 2012 entered into force on 12 June 2012, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2012/LN64_2012.pdf.

⁶² Constitution of Kenya, 2010, article 14 (1); KCIA, section 6 which defines citizenship by birth as provided under article 14 (1) read together with clause 30 of Schedule 6 of the Constitution.

⁶³ Constitution of Kenya, 2010, Schedule 6, clause 30.

as citizens by birth⁶⁴, thus granting them an elevated status. This is the one instance under the new citizenship regime where the status of former citizens by registration becomes one of citizens by birth. Arguably, it retroactively applies the *jus soli* principle to such persons. Since, however, such persons would have already become citizens by registration, this provision might not have much effect on their rights and privileges as citizens. Yet, at the same time, their citizenship status is now more secure and cannot be revoked by executive discretion.

4.2 Foundlings and presumption of citizenship by birth

There was no provision on foundlings under the old citizenship regime. When the provision was introduced in the draft constitution during the review process, it was sceptically considered by some who thought that it might encourage child traffickers to ‘dump’ children in Kenya or be exploited by foreigners who wished to settle in Kenya⁶⁵. The concerns of both sides were accordingly addressed in the new constitution. The 2010 constitution introduces a new provision on presumption of Kenyan citizenship by birth for a child found in Kenya, whose nationality and parents are unknown and who appears to be less than eight years of age⁶⁶. Any person that finds such a child shall present him or her to the Department of Children Services, which is enjoined to take all necessary investigations to determine the origins of the children. This may include the use of media, for as long it respects the rights of the child⁶⁷. If the department fails to ascertain the child’s identity and origin, it shall take out proceedings before the children’s court to determine the child’s age, nationality, residence and parentage⁶⁸. If the court is satisfied of the adequacy of the department’s efforts to ascertain the child’s identity and origin, it shall issue an order directing that the child be recognised as a citizen by birth or such order as it deems fit. Such child may then be registered in the register of children presumed citizen by birth⁶⁹. Although the law provides that the declaration for presumption should be made at the point of committal of a child to a care institution, the few reported court cases indicate that the issue will usually be raised in an adoption case whereby the adoptive parent prays that the child to be recognised as a citizen of Kenya⁷⁰. This strongly suggests that the cases on presumption are being presented to the court at a later stage than is envisaged under the law. The applicant will, among others, have to submit a report of the Director of Child Services.

It is an offence for anyone to orchestrate the abandoning of the child in order that she or he may acquire Kenyan citizenship⁷¹. Furthermore, this presumed citizenship by birth may be revoked if it is later discovered that it was acquired by fraud, false representation or concealment of material fact by any person; or if it is later revealed that the child is a citizen of

⁶⁴ Ibid.

⁶⁵ B Mkangi, ‘New law does not gift fraudsters citizenship, only protects children’ *Standard Media*, 17 July 2010 available at <https://www.standardmedia.co.ke/article/2000014130/n-a> accessed on 25 March 2020; S Wambui, ‘Clause on Kenya child citizenship defended’ *Capital FM News*, 18 May 2010, available at <http://citizenshiprightsafrika.org/clause-on-kenya-child-citizenship-defended/> accessed on 25 March 2020.

⁶⁶ Constitution of Kenya 2010, article 14 (4).

⁶⁷ KCIA, section 9 (1-3).

⁶⁸ Ibid, section 9 (4).

⁶⁹ Ibid, section 9 (5-6).

⁷⁰ *In the matter of baby CM*, Adoption Cause no. 242 of 2011 [2015]eKLR, para. 5; *In the matter of FM (minor)*, Adoption Cause No. 169 of 2017.

⁷¹ Ibid, section 9 (7).

another country; or that the child was older than eight years at the time the citizenship was conferred⁷².

4.3 Citizenship by registration

Under the old constitution, persons that qualified for citizenship by registration were those that did not qualify for automatic citizenship yet had strong ties to Kenya. The application for registration was to be done within a specified period after independence (except for women married to Kenyan men), and it was less discretionary. Eligible persons who did not fall within these transitional provisions could apply for naturalisation, which was a more discretionary process. The new constitution merges some aspects of acquisition of citizenship by registration and citizenship by naturalisation as appeared in the former constitution to come up with singular formula of citizenship by registration. Yet, in some aspects the constitution has broadened the range of persons that may qualify for citizenship in reflection of the current social, cultural and demographic composition of Kenya. The following are persons or categories of persons that may qualify for citizenship by registration under the 2010 Constitution and how they may go about it.

- i). A person married to a Kenyan citizen for a period of at least seven years.

A foreign husband or wife married to a citizen is entitled on application to be registered as a citizen based on seven years' of marriage⁷³. Further conditions as to eligibility are: the marriage must have been solemnised under a system of law recognised by Kenya, the applicant must not have been declared a "prohibited immigrant", the applicant must not have been sentenced to imprisonment for three years or more, the marriage was not entered into for the purpose of acquiring immigration or citizenship status, and it must still be subsisting at the time of application⁷⁴. Upon making the application, the applicant, in order to prove that they satisfy the eligibility criteria, must submit the following documents: a copy of the marriage certificate, a certificate of good conduct, a joint sworn affidavit, copy of spouse's passport, copy of the dependant's pass or permit held by applicant, and a copy of the applicant's passport. This is in addition to the prescribed application form, two passport photos and an application fee⁷⁵.

While this provision opens up the previous gender-biased restriction, it imposes a seven year period before one may qualify for citizenship. Under the previous constitution, the fact of marriage to a Kenyan citizen immediately qualified the wife of a Kenyan man to acquire citizenship on application.

The seven-year condition has left some spouses in a status limbo, if they do not hold any other qualifying immigration status. Besides citizenship, a spouse may apply for permanent residence, but only after the marriage has subsisted for three years. In one such case, the husband of a Kenyan woman, whose entry or business permit had expired immediately upon marriage, was to be deported as an illegal immigrant. The husband and wife both petitioned the court to declare these provisions of the law unconstitutional arguing that the prescribed

⁷² Constitution of Kenya, 2010, article 17 (2).

⁷³ Ibid, article 15 (1).

⁷⁴ KCIA, section 11.

⁷⁵ Citizenship checklist available at <https://fns.immigration.go.ke/services.php> accessed on 23 February 2020. The application fee currently is Kshs. 30,000/- (approx. US\$ 300) for non-East Africans, and Kshs. 5000/- (approx. US\$ 50) for East Africans.

period before one could become eligible for residency or citizenship status acted as a fetter that in effect discriminated against spouses of Kenyan citizens and violated the right to family and dignity. The court dismissed the petition on the ground that since the petitioner was illegally in Kenya, the court would not legitimise his status by granting the petition. The court defended the three-year time frame for eligibility for permanent residency as reasonable and justifiable, but noted that there was a lacuna in the law regarding the status of spouses that had not yet met that minimum threshold. The court thus recommended that the law should be amended to provide for interim residency status for spouses of Kenyan citizens⁷⁶.

Yet another effect of the new constitutional provision seems to be that former spouses of Kenyan citizens or divorcees are not eligible for citizenship by registration, which is also a departure from the previous position⁷⁷. In contrast, non-citizen widows and widowers who at the expiration of the seven years would have been entitled to register as a citizen, but for the untimely death of the Kenyan spouse, shall be deemed to have been lawfully present in Kenya for the unexpired portion of the seven years. They may apply to register as citizens at the expiry of the seven years subject to the same application conditions for registration by marriage⁷⁸. However, in addition to the marriage certificate, they should present the spouse's death certificate⁷⁹. However, should the widow or widower marry a non-citizen before the expiry of the seven years, they shall not be entitled to citizenship under that provision⁸⁰.

Although the law is silent on the situation of a non-citizen widow or widower who remarries a Kenyan citizen, in light of the eligibility requirements, the seven years will most probably run from the date of the second marriage. The law with regard to widows and widowers, arguably places them at an advantage over divorcees since it appears to presume that the marriage would have subsisted for seven years had it not been for the death of the Kenyan spouse. In fact the new citizenship law is silent on the situation of divorcees, which seems to suggest that they are disqualified from citizenship by registration and that those that are so keen on it may only resort to other pathways such as lawful residence.

ii). Adopted children

A non-Kenyan child adopted by a Kenyan citizen is entitled to citizenship by registration⁸¹. The language of the provision renders that grant of citizenship less discretionary so long as one satisfies the attendant conditions. The legal guardian or adopting parent of the child may make an application to register the child as a Kenyan citizen with proof of the adopting parent's Kenyan citizenship, that is, a Kenyan passport and ID or certificate of registration if the parent is a citizen by registration; a valid adoption certificate issued in Kenya or in a jurisdiction whose orders or decrees are recognised in Kenya; and proof of lawful residence of the child in Kenya, that is, a dependant's pass. The application should be made on a prescribed form and accompanied by two passport photos, a copy of the applicant's passport, if available, and an application fee⁸².

⁷⁶ *Khatija R N Mohamed & another v Minister for citizenship and immigration & others*, Constitutional Petition no. 38 of 2012 [2013]eKLR.

⁷⁷ Constitution of Kenya, 1969, section 88 (3).

⁷⁸ KCIA, section 12 (1-2).

⁷⁹ Citizenship checklist, supra note 75. The application fee in this case is KShs. 5,000/- (approx. US\$ 50).

⁸⁰ KCIA, section 12 (3).

⁸¹ Constitution of Kenya, 2010, article 15 (3).

⁸² KCIA, section 14; citizenship checklist, supra note 75. The application fee is currently at KShs. 20,000/- (approx. US\$ 200).

iii). Continuous lawful residence for at least seven years

The Constitution gives parliament the power to establish conditions for acquisition of citizenship by foreigners based on legal residence.⁸³ The list of requirements established by the KCIA for persons that wish to apply for Kenyan citizenship under this category is considerably longer than that of the other categories, and this route is by far the most expensive. Firstly, the applicant must have attained majority age and must have legal capacity. He or she must have been ordinarily⁸⁴ resident in Kenya for at least seven years immediately preceding the application, having resided in Kenya throughout the twelve months immediately preceding the application. The applicant must have been resident in Kenya under a valid permit or an exemption by the Cabinet Secretary and do not enjoy diplomatic immunity. Furthermore, the applicant must have adequate knowledge of Kenya and the duties and rights of citizens; must understand and speak Kiswahili or a local dialect; must not have been convicted of an offence and sentenced to three years imprisonment or longer; is not an adjudged bankrupt; must satisfy the Cabinet Secretary that he or she intends to continue residing in Kenya; and has made or is capable of making a substantive contribution to the progress or advancement in any area of national development in Kenya⁸⁵. Consequently, in addition to the prescribed form, the applicant must fill in a questionnaire and submit the permit he or she has held for the last seven years, a certificate of good conduct, personal bank statement, letter of proof of contribution made to national development, copy of passport, declaration concerning residence, an oath of allegiance and the application fee⁸⁶. Unlike an application for citizenship by fact of marriage or adoption, where it is specifically mentioned that an eligible person is entitled to registration upon application, the wording in the provision regarding lawful residence is such that the cabinet secretary has more discretion to grant or reject the application.

Specifically, the applicant shall not be registered as a citizen if at the date of making the application his or her country of citizenship is at war with Kenya⁸⁷.

A citizen by registration may apply for citizenship of his or her child born to him or her before they were registered as citizens. The same applies to a person who is a dependant of a citizen by registration and this may include a person suffering from a disability⁸⁸.

iv). Stateless persons, migrants and their descendants

This is a category where the new regime has responded to the contemporary diverse demographic and cultural composition of Kenya to include persons that, though long-resident in Kenya, may not have benefitted from the citizenship provisions of the old constitution, or were for one reason or another marginalised.

The new citizenship regime seeks to include such persons and thus makes provision for them. Under the citizenship law, a person without an enforceable claim to citizenship of another state and who has been living in Kenya since independence is eligible to apply for registration as a citizen. Additional conditions include: adequate knowledge of Kiswahili or a local dialect,

⁸³ Constitution of Kenya 2010, article 15 (2) and 15(4).

⁸⁴ The law provides two standards 'ordinarily' and 'continuously' which renders the provision rather ambiguous since both terms may have different meanings. See B Otukoya, 'Neither here nor there: residency as a condition for naturalisation', 3 February 2020 available at <https://globalcit.eu/never-here-nor-there-residency-as-a-condition-for-naturalisation/> accessed on 3 February 2020.

⁸⁵ KCIA, section 13 (1).

⁸⁶ The fee in this case is KShs. 200,000/- (approx. US\$ 2,000). See citizenship checklist, *supra* note 75.

⁸⁷ KCIA, section 13 (2).

⁸⁸ *Ibid*, section 13 (3) & (4). In case of the child or dependent, the requirements are similar to those for registering an adopted child, though a birth certificate is in this case substituted for an adoption certificate

intention to continue residing in Kenya, has not been convicted and sentenced to imprisonment for three years or longer; and understands the rights and duties of a citizen⁸⁹.

In similar vein, a person who voluntarily migrated to Kenya before 12 December 1963 and has been continuously living in Kenya may, upon application, be eligible for citizenship. The conditions for eligibility are identical to those of stateless persons, although long-term migrants additionally have to prove that they do not hold a passport or identity document of another country⁹⁰.

There is, however, a five-year time frame from the date of commencement of the KCIA within which applications could be made by stateless persons and migrants. In 2016, when the five years expired, the Cabinet Secretary extended the period for a further three years as stipulated by law⁹¹. Not many people of the targeted people had registered during the five years mainly due to administrative and outreach challenges⁹².

Yet the Cabinet Secretary has the discretion to grant citizenship to persons (including their children or dependants) who voluntarily migrated to Kenya after its independence day and who though may hold passports or identification documents of other countries, satisfy the conditions for stateless or migrant persons under the law. Such was the case of a young man of Asian heritage whose parents were British nationals, but he was born in and had lived in Kenya all his life. He applied for citizenship as a stateless person, but he had not received any response on his application for more than a year. While the court agreed with him that the decision on his application had been unreasonably delayed, it could not grant his prayer to declare him a citizen since that is not the court's responsibility⁹³.

The law further allows for the immediate adult descendants of both stateless persons and migrants that would have qualified for citizenship under the two categories to apply for citizenship by registration if: there is sufficient proof that the parents were either stateless persons or long-term migrants, they were born in and have been continuously living in Kenya, they hold not passport of identification document of any other country, have adequate knowledge of Kiswahili or a local dialect, intend to continue residing in Kenya, understand the rights and duties of a citizen, and have not been sentenced to imprisonment for three years or longer⁹⁴.

All applications for citizenship by registration are processed by the Immigration Department to which all applications should be presented. According to the regulations, all applications are made to the Cabinet Secretary and each must be supported by all the required and necessary documentation, accompanied by the prescribed non-refundable application fee, and a sworn affidavit⁹⁵. Presently, applications can be made through an online portal⁹⁶. Applications presented in person are submitted at the allocated counter within the department. The department shall then forward the applicant's file to the National Intelligence Service (NIS) which is mandated to provide a confidential security report for persons seeking to be

⁸⁹ KCIA, section 15.

⁹⁰ KCIA, section 16.

⁹¹ KCIA, sections 15 (2) & 16 (2); Legal Notice 178, *Kenya Gazette Supplement* No. 169 of 7 October 2016. The application fee in both cases is KShs. 2000/- (approx. US\$ 20)- citizenship checklist, supra note 75.

⁹² On the administrative side, the application forms only became available after several years, while the outreach failure meant that many of the targeted groups remained ignorant of the law and the process- Manby, supra note 45, p. 47.

⁹³ *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service*, Petition No. 137 of 2014.

⁹⁴ KCIA, section 17. The application fee is KShs. 2000 (approx. US\$ 20) – citizenship checklist, supra note 75.

⁹⁵ KCIR, regulation 10 (2).

⁹⁶ The Kenya foreign nationals service portal, <https://fns.immigration.go.ke>.

registered as citizens of Kenya⁹⁷. The NIS, upon completion of the said report forwards it to the Citizenship Advisory Committee (CAC) established by the Kenya Citizens and Foreign Nationals Management Board ('the Board').

The Board is the body that governs the Kenya Citizens and Foreign Nationals Management Service ('the Service'), which was established under the new citizenship regime to, among others, see to the implementation of laws, policies, and other matters relating to citizenship and immigration⁹⁸. The day to day functions of the Service are run by the Director who is its executive head, and who in some cases is the respondent in cases challenging decisions or processes regarding citizenship. Not only is the Service responsible for the administration of the KCIA, but also for the Births and Deaths Registration Act, the Registration of Persons Act, and the Refugees Act. The Service falls within the portfolio of the Ministry of Interior and Coordination of National Government, and so, some of the functions that assigned to the Cabinet Secretary will be carried out by the Service although the Cabinet Secretary makes the final decision. Such is the case in most matters to do with citizenship and immigration.

The CAC upon receiving the report from the NIS will assess the application and make its recommendation to the Cabinet Secretary. In some cases, the CAC may conduct interviews for some applicants in order to determine suitability of citizenship⁹⁹. Apparently, although the role of the CAC under the citizenship law is only mentioned with regard to revocation of citizenship¹⁰⁰, its functions also include making recommendations on applications of citizenship.

Where one's application is successful, they are required to take an oath of allegiance, which according to the checklist may be made and submitted at the point of applying. The applicant will then be issued with a certificate of registration in the prescribed form¹⁰¹. An unsuccessful applicant, under the law, may appeal to the Kenya Citizenship and Immigration Service Appeals Tribunal¹⁰², which hears appeals against the Board and the director. It is doubtful that this tribunal is yet fully operational¹⁰³ as most aggrieved parties will make applications for judicial review or present constitutional petitions before the High Court.

4.4 Dual Citizenship

The new constitution allows for dual citizenship for the first time, but employing rather imprecise wording that leaves some doubt as to who should actually benefit from this provision. At first instance, the constitution provides that 'a citizen by birth does not lose citizenship by acquiring the citizenship of another country'¹⁰⁴. Thus dual citizenship seems to be a preserve for Kenyan citizens by birth. This is further augmented by the provision that allows for Kenyan

⁹⁷ The National Intelligence Service Act, No. 28 of 2012, section 5 (1) g (ii).

⁹⁸ The Kenya Citizens and Foreign Nationals Management Act (KCFNMA), 2011, section 4 (1).

⁹⁹ This process was explained by officials from the department in the case of *Republic v Cabinet Secretary for Ministry of Interior and Coordination of National Government & others, ex parte Patricia Olga Howson*, Misc. Civil Appl. No. 324 of 2013 [2013]eKLR, para. 7.

¹⁰⁰ KCIA, section 21 (1).

¹⁰¹ KCIR, regulation 10 (4).

¹⁰² The KCFNMA, section 7 (1).

¹⁰³ Inquiries made with the citizenship section of the Kenyan Immigration department revealed that the Tribunal has not yet been established- Phone call conversation 17 March 2020.

¹⁰⁴ Constitution of Kenya, 2010, article 16.

citizens by birth who had previously lost their Kenyan citizenship to regain it¹⁰⁵. Yet under the law, a foreigner who applies to register as a Kenyan citizen shall be deemed to be a dual citizen if he or she does not provide evidence of renunciation of their other citizenship(s) within 90 days after registration as a Kenyan citizen¹⁰⁶. Thus a Kenyan citizenship by registration could also claim dual citizenship under the law. The judicial interpretation seems to favour the latter position. Consequently, former Kenyan citizens by registration who had lost their Kenyan citizenship when they took up the citizenship of other countries, may apply to be re-registered and hold dual citizenship¹⁰⁷. However, the practice seems to be that dual citizenship will only be granted if the other country of citizenship also allows for dual citizenship¹⁰⁸.

Although as a citizen, a dual citizen may apply for a Kenyan passport which they may hold simultaneously with their other passport, they may opt to have their non-Kenyan passport endorsed with an indication that one is a citizen of Kenya¹⁰⁹.

Dual citizenship, moreover is subject to conditions and obligations. For instance, a dual citizen has to disclose his or her citizenship within three months of becoming a dual citizen, failure of which may lead to a conviction and sentence to a fine or imprisonment not exceeding three years or both. The same sentence applies to a person found guilty of using dual citizenship to gain unfair advantage or facilitate the commission of or to commit a crime¹¹⁰.

The constitution precludes a dual citizen from being other state officer or member of the defence forces, unless that person ‘has been made a citizen of another country by operation of that country’s law, without ability to opt out’¹¹¹. Similarly, a person who has not been a citizen of Kenya for ten years immediately preceding the date of an election, may not be elected as a Member of Parliament¹¹². For the latter scenario, the court has clarified that while the constitution does not forbid a dual citizen from vying for electoral office or contesting in parliamentary elections, the dual citizen may be disqualified from assuming office upon election or appointment before he or she renounces his or her other citizenship, unless he or she has no ability under the laws of the other country to renounce that citizenship¹¹³. Moreover the law remains unclear on what would happen if a Kenyan dual citizen acquired a state office in the country of his other citizenship¹¹⁴.

The constitution further permits Kenyan citizens by birth who previously lost their Kenyan citizenship by acquiring the citizenship of another country to regain their citizenship¹¹⁵. Such person may apply to the cabinet secretary in the prescribed manner, the application should be accompanied by proof of previous Kenyan citizenship and proof of current citizenship in

¹⁰⁵ Ibid, article 14 (5).

¹⁰⁶ KCIA, section 20 (1-3).

¹⁰⁷ *Jisvin Pattini v Director of Immigration and another*, constitutional petition no. 251 of 2014 [2015]eKLR, para 35-36.

¹⁰⁸ Manby, supra note 45, p. 14.

¹⁰⁹ KCIR, regulation 8.

¹¹⁰ KCIA, section 8 (5). This provision has been criticised for its vagueness and being open to abuse by state officials- see R Shah, ‘Kenya’s citizenship laws revisited’ (2012) *Journal of Immigration, Asylum and Nationality Law*, vol 26 (3), pp 269 at p. 273; Ghai, supra note 59.

¹¹¹ Constitution of Kenya, 2010, article 78 (2) & (3)b.

¹¹² Ibid, article 99 (2).

¹¹³ *Bishop Donald Kisaka Mwawasi v Attorney General and others*, Civil Appeal No. 280 of 2013 [2014]eKLR. This position was reiterated in a more recent case regarding an ambassadorial appointment of a dual citizen - *Mwende Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs & 2 others*, Petition No. 367 of 2019 [2019] eKLR

¹¹⁴ D Psirmoi, ‘Puzzle of top Somalia official with Kenyan ID card’, *Standard*, 21 August 2018 available at <https://www.standardmedia.co.ke/article/2001292746>.

¹¹⁵ Ibid, article 14 (5).

the other country¹¹⁶, two passport photos and a fee of Kshs. 5000/- (approx. US\$ 50)¹¹⁷. The cabinet secretary shall cause the application to be registered upon its receipt, and thereafter issue the applicant with a certificate of regaining Kenyan citizenship¹¹⁸. In its interpretation on the provision on regaining citizenship, the High Court of Kenya clarified that regaining citizenship under the new constitution is not a matter of right but of law¹¹⁹. Therefore one cannot expect, by mere operation of the constitution, to be issued with citizenship documents such as a passport or ID, without following the prescribed procedure. However, where there has been undue delay on the part of the cabinet secretary to issue qualified persons with the certificate of regaining citizenship, the court has gone ahead to issue an order of mandamus for an applicant to be issued with not only the certificate of regaining citizenship but also identification documents. The court has interpreted the delay in the issuance of a certificate of regaining citizenship as an infringement of one's rights as a citizen, especially where one's citizenship by birth status is not contested¹²⁰.

It has been argued that a former citizen by birth who regains their citizenship effectively becomes a citizen by registration because of the nature of the process involved¹²¹. This, however, is a doubtful conclusion on two major grounds. One is that the processes and requirements for regaining citizenship and for registration are considerably different. The former is less rigorous than the latter. While registration is an application *de novo*, regaining citizenship is more or less a restoration of previous status. Moreover, the language in the provision on regaining citizenship, seems to limit the discretion of the cabinet secretary in issuing the certificate once the application has been properly made in the prescribed manner. The cabinet secretary seems more or less duty-bound to issue the certificate, which is not the case for applications for citizenship by registration. Two, while there may be some ambivalences regarding the provisions on dual citizenship, to be discussed shortly, there is no doubt that citizens by birth are in this regard privileged. It is therefore doubtful that the constitution would privilege a citizen by birth to regain their previous Kenyan citizenship only to be downgraded to the precarious status of a citizen by registration, which unlike citizenship by birth, may be revoked by executive fiat.

4.5 Loss and revocation of Citizenship

i). Renunciation

A Kenyan citizen by birth may renounce his or her Kenyan citizenship by making a declaration to that effect¹²². The Cabinet Secretary shall cause the declaration to be registered once satisfied of the applicant's identity, place of residence and that the applicant has been duly informed of the implications of the renunciation. Once the declaration is registered, the applicant is issued with a certificate of voluntary renunciation and they cease being Kenyan citizens forthwith.

¹¹⁶ KCIA, section 10 (2).

¹¹⁷ Citizenship checklist, *supra* note 75.

¹¹⁸ KCIA, section 10 (3) & (4); Kenya Citizenship and Immigration Regulations (KCIR), 2012, regulation 5.

¹¹⁹ *Bashir Mohamed Jama Abdi v Minister for Immigration*, High Court Constitutional Petition 586 of 2012 [2014]eKLR, para 27.

¹²⁰ *E W A & 2 others v Director of Immigration and Registration of Persons & another*, constitutional petition no. 352 of 2016 [2018]eKLR. In this case the petitioners, who were born to Kenyan parents, had been adopted by non-Kenyan parents while still very young and consequently been brought up outside Kenya.

¹²¹ Shah, *supra* note 110 at p. 276-77.

¹²² KCIA, section 19.

They are thus required to surrender their Kenyan identification documents to the relevant government agency¹²³.

The Cabinet Secretary may, however, withhold the registration under three circumstances. One, where Kenya is at war with another country¹²⁴. It is not clear whether this power is of general application during war time or if it should only be exercised if the applicant has some ties with a country with which Kenya is at war. Two, is where the Cabinet Secretary is satisfied that it would not be in the interests of Kenya to do so. Three, if registering the declaration would have the effect of rendering the applicant stateless¹²⁵.

A person who renounces their citizenship is at liberty to apply to regain it later under the relevant provisions.

ii). Revocation

This is yet another area under the new citizenship regime where there is remarkable progress. Revocation of citizenship (the term used in Kenya for procedures known as deprivation in many other countries) under the new law is less discretionary and relatively more accountable and transparent as a process. Before the Cabinet Secretary revokes one's citizenship, he or she is required to provide a written reasoned notice informing the person concerned of the intention to revoke. The concerned person is then given an opportunity to contest the revocation. The Cabinet Secretary may only revoke after this process. Moreover, the Cabinet Secretary's powers to revoke may only be triggered by a recommendation of the CAC¹²⁶. Where one's citizenship has been revoked, he shall be notified of the revocation with stated reasons within fourteen days of the decision¹²⁷. Clearly divergent from the old law where the minister's decisions were final, under the new law, an aggrieved person may within 30 days of receipt of the notification appeal to the High Court and thereafter to higher courts, if still aggrieved, until they exhaust the appeal hierarchy. Only then will the revocation set in¹²⁸. A person whose citizenship is revoked is required to surrender his or her citizenship identification documents, failure of which amounts to an offence¹²⁹.

4.6 Rights and privileges of citizens

- i). A citizen is entitled to a Kenyan passport and document of registration or identification¹³⁰.
- ii). Right of access to information held by the state, or other person and required for the protection or exercise of a right¹³¹.

¹²³ KCIR, regulation 5 (1).

¹²⁴ KCIA, section 19 (3).

¹²⁵ Ibid, section 19 (4).

¹²⁶ KCIA, section 21 (1).

¹²⁷ Ibid, section 12 (5).

¹²⁸ Ibid, section 12 (6-9).

¹²⁹ Ibid, section 12 (10-11).

¹³⁰ Constitution of Kenya, 2010, article 12(1) (b).

¹³¹ Ibid, article 35 (1).

- iii). Political rights including joining political parties, the right to vote and to stand for elective office¹³².
- iv). The right to enter, remain in and reside anywhere in Kenya¹³³.
- v). Holding land under all types of tenure. Non-citizens may only hold land on a leasehold tenure only¹³⁴.
- vi). Citizenship and Public offices: Only Kenyan citizens are eligible for being elected or appointed to a State office. Yet, as mentioned earlier, a dual citizen is precluded from being a state officer or member of the defence forces. State office includes the following offices: President, Deputy President, Cabinet Secretary, Members of Parliament, Judges and magistrates, member of a commission, holder of an independent office, member of a county assembly including the governor and deputies, the Attorney General, Director of Public Prosecutions, Principal Secretary, Chief of the Kenya Defence Forces, Director-General of the National Intelligence Services, Inspector General and deputies of the Kenya Police Service, and any office designated as a state office by legislation¹³⁵. Of these offices, the President and Deputy President should be Kenyan citizens by birth¹³⁶. By implication, therefore, holders of all the other offices could be citizens by registration, save for where some time limitations have been applied such as in the case of Members of Parliament.

5. Current controversies and debates

5.1 Marginalised communities, groups at risk of statelessness and initiatives to reduce statelessness

Kenya has a stateless population estimated at about 14,000 people¹³⁷. Most of the stateless population of Kenya comprises communities that had migrated to Kenya mainly during the colonial period, but by ignorance, neglect, indifference or bureaucratic marginalisation failed to take advantage of the citizenship provisions under the old regime. This is truer for those communities of an African origin who were entitled to apply for citizenship under prescribed conditions¹³⁸. These communities include the Nubians, the Pemba, WaShirazi, Wachangamwe,

¹³² Ibid, article 38.

¹³³ Ibid, article 39 (3).

¹³⁴ Ibid, article 64.

¹³⁵ Ibid, article 260.

¹³⁶ Ibid, articles 137 (1) (a) & 148 (1).

¹³⁷ C Opile, 'Birth registration drive combats statelessness among Kenya's coastal Pemba community', 6 November 2017 available at <https://www.unhcr.org/ke/12681-birth-registration-drive-combats-statelessness-among-kenyas-coastal-pemba-community.html> accessed on 21 January 2020. Back in 2016, however, the number was reportedly estimated at about 100,000 people - see <https://www.katibainstitute.org/predicament-of-citizenship-and-the-stateless/> accessed on 16 March 2020.

¹³⁸ Kenya Citizenship Act, Cap. 170, section 3.

the Rundi, Galjiel Somalis, the Nyarwanda, the Shona, and other ethnic groups from East Africa and around¹³⁹.

Although, the new constitution seeks to promote the right to a nationality¹⁴⁰, Kenya's stateless and migrant communities have so long been marginalised and have faced serious difficulties in applying for citizenship, as noted by various national Commissions,¹⁴¹ These difficulties were prominently demonstrated in the case of the Nubians which went before both the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the African Commission on Human and Peoples' Rights (ACmHPR). In both cases, the Nubians in Kenya alleged that they had not been automatically recognised as citizens of Kenya at independence, the consequence of which was a denial of the right to a nationality. They could only apply to register as citizens under the law, however their citizenship was tenuous in the sense that, *inter alia*, they were denied property rights, their children denied birth certificates, and they were continuously discriminated against in the acquisition of national identity cards as proof of citizenship, by being subjected to an arduous vetting process that only selected categories of applicants had to go through. In both cases it was found that the Kenyan government's actions were indeed discriminatory against the Nubians and their children, which resulted into the exclusion of the Nubians from the attendant benefits of citizenship¹⁴². The ACERWC, in particular, recommended to the Kenya government to allow children of Nubians born in Kenya who would otherwise be stateless to acquire Kenyan nationality. Although the cases focussed on Nubians in Kenya, there are other groups such as the Somalis in Kenya who also face similar difficulties in proving their citizenship or acquiring citizenship documents, in fact in some instances the problem has been presented as discrimination on the basis of religion, the Muslims being the disadvantaged in this respect¹⁴³.

In spite of the constitutional entitlement of each Kenyan citizen to a passport and document of registration or identification, and the above-mentioned decisions, virtually all marginalised communities in Kenya still experience difficulties in the acquisition of national identification cards, birth certificates and other documents necessary for identification. In more recent years, the discrimination has been particularly extended to Muslims of Somali heritage¹⁴⁴, with the government taking heightened security measures in response to the terrorist attacks by the Al-Shabaab group based in Somalia.

Nonetheless, under the new citizenship regime the government has taken some positive steps to address the plight of the marginalised communities and those at risk of statelessness. In 2017, the Kenyan government took the impressive and inclusive decision to declare some minority communities as tribes of Kenya. The first of such groups were the Makonde (of Mozambican origin) who, upon their declaration as the 43rd tribe of Kenya by the President,

¹³⁹ TJRC, supra note 2, p. 328; M Ndubi, 'The Shona: a stateless community in Kenya yearning for citizenship', 9 November 2017 available at <https://www.unhcr.org/ke/12739-shona-stateless-community-kenya-yearning-gain-citizenship.html> accessed on 21 January 2020; Manby, supra note 45, pp.47-51.

¹⁴⁰ Constitution of Kenya, 2010, article 53 (1)(a) provides for the right to every child to nationality from birth.

¹⁴¹ TJRC, supra note 2; KNCHR, *Out of the Shadows: Towards ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, (KNCHR & UNHCR, July 2010); Katiba Institute, *Participation of Ethnic Minorities*, supra note 2, pp. 41-44.

¹⁴² *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. The Government of Kenya*, ACERWC Communication No. Com/002/2009, decision of 22 March 2011; *The Nubian Community of Kenya v The Republic of Kenya*, ACHPR Communication 317/06, decision adopted at the 17th extraordinary session of the Commission, 19-28 February 2015.

¹⁴³ KNCHR, *Out of the Shadows*, supra note 141, p. 15.

¹⁴⁴ Katiba Institute, *Participation of Ethnic Minorities*, supra note 2, pp. 40-42.

proceeded to obtain both nationality certificates and birth certificates¹⁴⁵. The second group to be included among the tribes of Kenya was Kenyans of Asian heritage¹⁴⁶. However, unlike the Makonde who had been stateless, the second group referred to ‘Kenyans’ implying that these were Asians that had already acquired Kenyan citizenship. The president’s action was both applauded and derided in equal measure as some considered it as a political stratagem to gain more support in the presidential elections that were then looming¹⁴⁷.

While stateless persons have the opportunity to register as citizens, the procedures of registration may be prohibitive and out of reach for some of these communities, the most disadvantaged of which are based far from the urban centres and face both economic and literacy challenges. The procedures for application may be intimidating or even unaffordable for all, but some of the requirements may be waived as was the case for the Makonde for whom the application fees were waived¹⁴⁸.

More recently, the government of Kenya is grappling with the issue of double registration among the Somali community. The double registration came about by some Kenyan Somalis registering as refugees and thus appearing in the records both of the National Registration Bureau (in charge of national identity cards) and of UNHCR. For the latter’s case, they were primarily driven by the need to access some of the humanitarian and social assistance, as well as additional opportunities such as the prospect of resettlement, that are available for refugees. By registering as refugees, these Kenyan citizens, who were probably ignorant of the implications of this singular act, and some of whom were registered by the parents, were later to be informed that they were not citizens of Kenya but refugees. They were thus effectively stateless. The government of Kenya has embarked on a vetting process to determine each of the concerned individual’s status¹⁴⁹.

In its campaign to combat statelessness, the United Nations High Commissioner for Refugees (UNHCR) in Kenya has engaged the Kenyan government’s civil registration services in mobile registration activities in areas populated by stateless persons and persons at risk of statelessness. At the same time, they are still advocating for the remaining stateless persons to be granted citizenship¹⁵⁰. Taking forward the initiative of ending statelessness, the government, in August 2019, set up taskforce for the identification and registration of eligible stateless persons in Kenya as Kenyan citizens. The tenure of the taskforce is one year¹⁵¹. This does indeed demonstrate a degree of goodwill on the part of the Kenyan government to end statelessness in the country, much however shall hinge on the eligibility requirements that the

¹⁴⁵ It is reported that by March of that year, 1496 Makonde had obtained nationality certificates, and 1731 of those born in Kenya had been issued with birth certificates. Their naturalisation as citizens brought down the number of stateless person in Kenya by about 4000- see M Ndubi, ‘The Makonde: from statelessness to citizenship in Kenya’, 15 March 2017 available at www.unhcr.org/ke/Ez8g2 accessed on 21 January 2020.

¹⁴⁶ Kenya Gazette Notice No. 7245, No. 102/2017 of 21 July 2017.

¹⁴⁷ See D Mwere, ‘Kenyans of Indian descent become 44th tribe’ *Daily Nation* 22 July 2017 available at <https://www.nation.co.ke/news/Hindu-officially-becomes-Kenya-s-44th-tribe/1056-4027242-12m5ygi/index.html>; Z Patel and J Ghai, ‘Big Read: A tribe, a nation, a people – or just Kenyans?’ Available at <http://citizenshiprightsafrika.org/big-read-a-tribe-a-nation-a-people-or-just-kenyans/> accessed on 25 March 2020.

¹⁴⁸ Manby, *supra* note 45, p.43.

¹⁴⁹ M Yusuf, ‘Kenya vetting some 40,000 people who want to shed refugee status at Dadaab camp, *VOA*, 26 November 2019 available at <https://www.voanews.com/africa/kenya-vetting-some-40000-people-who-want-shed-refugee-status-dadaab-camp> accessed on 16 March 2020.

¹⁵⁰ Opile, *supra* note 137.

¹⁵¹ Kenya Gazette notice No. 7881 of 23 August 2019 available at http://citizenshiprightsafrika.org/wp-content/uploads/2019/08/Kenya-Taskforce-Identification-Stateless-Persons_Gazette.Vol_.CXXI-No.110_23Aug2019.pdf accessed on 16 March 2020.

taskforce shall develop. One of the groups already identified for imminent recognition as citizens are the Shona¹⁵².

5.2 The National Integrated Identity Management System (NIIMS)

In 2018, the government took the decision to set up an integrated population registration system abbreviated as ‘NIIMS’, otherwise known as the ‘Huduma namba scheme’. This system was to be legitimised through the enactment of the Huduma namba Bill which is yet to be passed. Yet, in order to truncate the process, the government decided to amend the Registration of Persons Act by enacting the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018¹⁵³, which included other random statutory amendments. The amendment was challenged in the court on a number of grounds, including: i) it would lead to further exclusion of already disadvantaged communities that had been denied identification and other registration documents, the Nubians were the case in point; ii) there had been no public consultations regarding the amendments in violation of the constitution; iii) there were lack of data protection safeguards in the law thus posing a threat to the right of privacy; and iv) the amendments were of such a substantive nature that should not have been dealt with in an omnibus Bill.

The court, having found that there had been sufficient public participation prior to the enactment of the law, held that the use of an omnibus bill to effect the impugned amendments was not unconstitutional. The stated benefits of the NIIMS were found to be constitutional and in public interest, the petitioners having failed to demonstrate the contrary, yet the court found that there were inadequate safeguards for the protection of children’s biometric data and this needed to be specifically provided for. Additionally the court found that the legal framework on the operations of NIIMS was inadequate and would pose a risk to the security of data thereof. On the issue of discrimination, the court did not find the impugned provisions discriminatory making the argument that the issues on discrimination that had been raised were with regard to legislation that was not the subject of the present adjudication. However, the court noted the risk of exclusion and recommended that the legislative framework address the issue of how those without access to identity documents or those with poor biometrics would be included in the NIIMS. The court then ordered the government to proceed with the NIIMS only as long as it implemented an appropriate and comprehensive legal framework compliant with the relevant constitutional requirements¹⁵⁴.

5.3 Corruption in citizenship matters

In 2014, a police investigation revealed that more than 5000 citizenship certificates were issued irregularly by different ministers that held the portfolio between 2005 and 2010¹⁵⁵. This is not to mention cases of those arbitrarily deprived of their citizenship. These investigation more or less lent credence to what had been published earlier in a series of reports by various

¹⁵² M Ndlovu, ‘4000 Shonas to be granted Kenyan citizenship by 2020’ *Bulawayo 24*, 11 June 2019, <http://citizenshiprightsafrika.org/4-000-shonas-to-be-granted-kenyan-citizenship-by-2020/> accessed on 16 March 2020.

¹⁵³ Enacted on 18 January 2019, available at <http://citizenshiprightsafrika.org/kenya-statute-law-miscellaneous-amendments-no-18-of-2018/> accessed on 16 March 2020.

¹⁵⁴ *Nubian Rights Forum & others v Attorney General and others*, Constitutional Petitions No. 56, 58 & 59 of 2019 [2020]eKLR.

¹⁵⁵ F Mukinda, ‘Police probe 5,752 irregular Kenya citizenship cases’ *Daily Nation*, 8 July 2014.

institutions¹⁵⁶. While the new laws promise a more transparent and accountable process and procedure, corruption is still endemic in public administration in Kenya¹⁵⁷.

5.4 Administrative failures and flouting of the laws

Despite the clear procedural legal guidelines, there have been numerous complaints of violation of the law. One such frequent complaint concerns the long delay in the handling and processing of the applications, much to the detriment of the applicants. Some applications have taken a considerably long time, in some cases almost four years, thus prompting the applicants to apply to the High Court for an *order of mandamus*. In the case where the applicants application had been delayed for almost four years despite being approved by the CAC, the judge described the respondent's failure to issue a certificate of citizenship as 'contumelious and inexcusable', amounting to an unreasonable delay in violation of the constitutional provisions on the right to fair administrative action¹⁵⁸.

Yet another reported transgression by the executive authorities has been manifest in cases where some citizens have been arbitrarily deprived of their citizenship leading to court action. The courts have not hesitated to castigate the relevant authorities and the state bureaucracy for violating, not only the law but the constitution as well. In one such case the cabinet secretary attempted to deprive a Kenyan citizen by birth of his citizenship on the basis that he was a citizen of Canada. The court issued a reminder that citizenship by birth cannot be revoked, but can only be voluntarily renounced¹⁵⁹. Decidedly, the Kenyan citizenship bureaucracy still faces the challenge of legal compliance, matching the practice to the law.

5.5 Proposal for "citizenship by investment"

In a most recent move, the government of Kenya has intimated that it shall be selling Kenyan citizenship to foreign nationals who already possess residence permits and have invested heavily in the economy. However, the legal and policy framework of how this will be managed is yet to be completed¹⁶⁰.

¹⁵⁶ KNCHR, supra note 141; TJRC report, supra note 2; The Commission on Administrative Justice, *Stateless in Kenya: An Investigation Report on the Crisis of Acquiring Identification Documents in Kenya* (August 2015) available at http://citizenshiprightsafrika.org/wp-content/uploads/2016/06/CAJ_Report-Identification-documents_2015.pdf accessed on 16 March 2020.

¹⁵⁷ See Transparency International Kenya, 'Kenya stagnates in corruption perception index', press release 23 January 2020 available at <https://tikenya.org/corruption-perceptions-index-2019/> accessed on 16 March 2020.

¹⁵⁸ *S N v Cabinet Secretary, Ministry of Interior and Coordination of National Government & another*, Misc. Civ. Appl. No. 406 of 2015 [2016]eKLR, para. 20; *Kulraj Bhangra Singh v Director General, Kenya Citizens and Foreign Nationals Management Service*, Petition No. 137 of 2014 [2014]eKLR; *Ex parte Patricia Olga Howson*, supra note 99.

¹⁵⁹ *Miguna Miguna v Fred Okengo Matiangi and others*, Petition No. 51 of 2018 [2018]eKLR.

¹⁶⁰ M Awal, 'Kenya to sell residency permits and citizenship to repay suffocating \$50 billion national debt', 19 December 2019, available at face2faceafrica.com/article/kenya-to-sell-residency-permits-and-citizenship-to-repay-suffocating-50-billion-national-debt accessed on 31 December 2019.

6. Conclusion

The Kenyan citizenship regime ushered in by the 2010 constitution engenders some progressive elements, but also left some lacunae. This include: actualisation of the right to a nationality, the status of spouses of Kenyan citizens whose marriage has not yet attained the requisite seven years; the appointment of dual citizens to certain offices that are not defined as state offices, yet are public offices such as ambassadorial and other diplomatic positions; the status of stateless persons and migrants who were unable to register within the constitutional and legislative deadline; and constitutional clarity on who is eligible for dual citizenship. There seems to be some disparity between the constitution and the law in this respect, which should be resolved in the constitution.

The biggest challenge yet is with regard to implementation of the law. Despite the enhanced constitutional and legislative safeguards, the authorities still seem to wield a high level of discretion leading to arbitrary and in most cases unconstitutional or *ultra vires* decisions. The processes as laid down in the law are still being flouted resulting into judicial reviews of the relevant authorities' actions. Some of the relevant bodies such as the Kenya Citizens and Foreign Nationals Management Service Appeals Tribunal are yet to be fully operationalised, though its role might cause a possible conflict and confusion on whether an aggrieved person should appeal to the tribunal or to the High Court as has been the case under the KCIA. By and large, while the Kenyan citizenship regime has come a long way since colonial times, and definitely since independence, and can be said to have progressively evolved in many respects, it is a regime still very much in the process of being defined and given practical effect.

COUNTRY
REPORT
2020/07

