Citizenship in Africa: The Law of Belonging

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The Importance of Nationality
Law in Africa

It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important.

– Martin Luther King, Jr.[1]

Citizenship is not just a legal concept but also a profoundly political question of self-definition, periodically the focus of controversy anywhere in the world. The history of Africa has exaggerated these controversies. The carving up of the continent by European powers, without respect for pre-existing political boundaries and institutions; the temporary creation of large zones of free movement; the forced recruitment of labour from one region to another; the adjustment of borders and jurisdictions among the colonial powers, followed by an often troubled and hasty transition to independence and re-imposition of smaller political units; not to mention ongoing irredentist demands for new States (some of them successful), have all made membership a fraught affair. There are libraries of books on these problems, their fundamental causes, and proposals for their resolution.

But to what extent does formal legal citizenship play a role in these difficulties; and thus to what extent does citizenship law reform provide a possible route out of them? African politicians have manipulated and mobilised ethnic identity to devastating effect without any recourse to citizenship law (Rwanda); countries with blameless citizenship laws have also seen crises in which ethnic divisions have played a dominant role (Chad, Angola); other countries have seen identity-based violence that owes nothing to membership of the national polity, but rather a lower-level administrative-political unit (Nigeria); the African Union has a major strand of programming around 'managing diversity' coming out of the surveys of governance carried out by the African Peer Review Mechanism (APRM), yet analysis of these surveys does not find it necessary to mention citizenship laws.[2] Often, the law is poorly understood even by those supposed to implement it.

This chapter attempts to draw out some of the lessons from the preceding case studies that indicate why citizenship laws may merit further consideration in

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[1] Speech at Western Michigan University, 18 December 1963.
[2] 'Diversity Management in Africa: Findings from the African Peer Review Mechanism and a Framework for Analysis and Policy-Making' (UNECA 2011).

these discussions. They are put forward tentatively: an analysis of the continents' laws combined with a few country studies cannot begin to put forward a cast-iron case around the significance of citizenship law in Africa. But they attempt to highlight some of the findings and conclusions that it may be interesting to explore further, including: the common patterns and continuities (or discontinuities) across the continent; the influence of international law on these changes; the very deliberate instrumentalisation of citizenship law by some governments; the extent to which the initial framework of citizenship law has had an independent impact on national politics, even when this was not the intention when the laws were adopted; the role of nationality law reforms in promoting integration rather than exclusion; the degree to which tolerance of undetermined nationality can provide a buffer against the worst impacts of exclusionary laws; and finally, the daily and increasing importance of nationality documentation and administrative systems to even the most marginalised.

My conclusion is to agree with Catherine Boone, framing an argument around ethnic politics, that ethnic identity is not so much an 'essentially pre-political or non-political' preference or ideology, but 'better understood as a juridical status, or a state-recognised or even state-imposed political identity, which operates through state processes.'[3] Her own focus is on the impact of land tenure regimes as constitutive of ethnic identity. This book has considered another aspect of juridical status, that of legal citizenship at the national level, and its impact on both national and local identities and politics. I argue that the interaction between membership in both the ethnic or 'primordial' and in the national sense is at least partly shaped – at both levels – by the law.

10.1. Categories of the Excluded and Commonalities with other Regions

Those communities within Africa whose members have found that their legal right to belong to the national community is contested are generally of five main types.

Firstly, descendants of people who migrated, or were forced to move, during the colonial period, when administrative borders among territories of one colonial power were open. This set divides in turn into two main sub-categories: those whose ancestors came from outside the continent (from Europe, Asia or the Middle East); and – less well advertised, but far more numerous – those whose ancestors came from elsewhere in Africa (farmworkers in Zimbabwe, tenant farmers on cocoa plantations in Côte d'Ivoire, Nubian soldiers in Kenya, and many others).

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[3] Catherine Boone, *Property and Political Order in Africa: Land Rights and the Structure of Politics* (Cambridge University Press 2014) 317; see also Catherine Boone, 'Land Regimes and the Structure of Politics: Patterns of Land-Related Conflict' (2013) 83 Africa 188.

Most African States that were formerly part of the British, French, and Portuguese empires relied on rules of double *jus soli* to determine nationality at independence. These provisions aimed to exclude (especially non-African) recent arrivals from automatic attribution of citizenship; though a further right to opt for nationality was often provided to some. Where double *jus soli* rules or stronger rights based on location of birth remained in place, the exclusionary effect disappeared over time in relation to pre-independence migrants; but in the British territories where the absolute *jus soli* rule initially applied after independence was repealed, and in the States that adopted laws relying on descent from the outset, the transitional rules (or lack of them) created exclusions that continue till today.

Secondly, ethnic groups whose pre-colonial boundaries cross modern borders, so those speaking the same language now find themselves in two (or more) different States. Among these groups are pastoralists whose nomadic lifestyle takes them across multiple borders.

Thirdly, post-independence migrants and refugees (and their children) in African States face the same challenges of integration (legal and cultural) into the national polity as in other parts of the world in this era of globalisation.

Fourthly, the creation of new States and border changes since independence have left many thousands stranded between two countries without recognition in either.

Fifthly, scattered throughout the continent and not belonging to any recognised 'community', there are those vulnerable children who cannot in law or fact gain recognition of nationality: those with foreign fathers who are affected by gender discrimination in the law, those born out of wedlock, child workers or trafficked children (even within one country), children of mothers with mental disability or illness or who have been raped in war; and those separated from their parents, because they are orphans, by conflict, or as child labour. Even more vulnerable are children of unknown parents – especially, but not only in countries where the law establishes no presumption of nationality in their case. Unlike the other groups at risk of statelessness because of ethnic, racial, or religious discrimination in nationality laws, these children are not necessarily identifiable as a group. Though being a member of a marginalised ethnic group certainly increases the risk to a child who is at the margins of the marginalised, children from any part of society may find themselves in this category, where the law and its implementation do not provide them with a secure legal identity at birth.

Sometimes these categories overlap: in eastern Congo, some of the ancestors of the Banyarwanda were always in the territory of modern-day DRC, and a contemporary international border has cut through a historical polity; others came as forced or voluntary labour on Belgian plantations; added to these are massive outflows of refugees fleeing pre- and post-independence violence in Rwanda and Burundi, and those in search of fertile unoccupied land. There are all too many children separated from their parents and communities or born of rape. Weaknesses of State administration means that all Congolese face challenges

in documenting their identity, and conflict has even destroyed those records that exist, especially in the east.

These categories are not fundamentally different from those in other continents, though the particular modalities of exclusion have varied. The underlying reasons for exclusion are also similar, including the impact both of mass migration (forced or voluntary) and of State succession. For example, among those whose status is challenged in other regions have been stateless Russian speakers in the Baltic States or the Meshketian Turks forcibly moved within the Soviet Union; members of the ethnically Cambodian Khmer Krom who live in Vietnam; the descendants of Haitian sugar workers in the Dominican Republic; the children of Balkan Roma refugees born in Italy; Bihari Urdu speakers in Bangladesh; and vulnerable children in any continent.

What is perhaps different in Africa is the difficulty of understanding the scale of the problem, and the blurred edges of belonging, when so many people are undocumented and thus in effect of undetermined nationality, not fitting neatly into binaries of citizen or non-citizen. By contrast, for example, to the rules applied later in the century on the break-up of the Soviet Union, Czechoslovakia, and Yugoslavia, the determination of who belonged where in Africa at decolonisation was based on a much less well-documented existing status. Even in new States that had some foundation in pre-colonial polities (such as Rwanda, Swaziland, or Lesotho), there were no administrative records on which to base continuity of nationality bridging the colonial period.

Along with this confusion, the brutal history of the continent has given a particular inflection to many of the same issues.

Finally, therefore, we can say that states where there was major expropriation of land and forced population transfer during the colonial period have seen the greatest challenges around nationality and belonging. They have also seen the most adjustments to their nationality regimes in relation to acquisition of nationality at birth and through location of birth – though the legal changes adopted to respond to these issues vary widely. Some of these countries were subject to detailed examination in Chapter 7.

The exceptions to this final rule (to date) are Namibia and South Africa. The relative size and wealth of the historical immigrant population of those two countries has combined with the history of the liberation struggle and negotiated achievement of majority rule to shift controversies over their place in the political economy into other fields of law.

10.2. Patterns, Continuities, and Discontinuities in the Law

The categories left at risk of statelessness are also shaped by the same legal frameworks as in other continents. The nationality laws and institutional architecture

adopted in African States at independence closely modelled those of the outgoing colonial powers. Even where new laws were drafted from scratch – as in the case of Ethiopia or Liberia – external models played an important role in shaping the language and concepts used. This book has tracked the changes that have been made to the law in response both to efforts to exclude certain individuals and communities, and to resolve disputes over the right to belong following campaigns by various interest groups or in the context of peace settlements at the end of conflict.

The only two clear trends in nationality law that show the same directionality across the continent are those that are also shared with other continents: towards greater gender equality, and towards greater acceptance of dual nationality. In relation to the basic legal regime governing acquisition of nationality at birth (based on descent or location of birth), it is harder to see clear patterns shared across the different legal systems, though a move towards descent-based regimes overall.

More generally, the legal regime bequeathed by the colonial power had and has continued to have a dominant impact on the rules for attribution of nationality at birth. There was thus a striking similarity of legal regimes at independence among States with the same colonial heritage; with perhaps half a dozen basic types across the continent. This heritage has continued to be highly influential, even in the reverse sense that the Commonwealth countries have collectively almost all repealed their initial *jus soli* provisions. Yet *both* the double *jus soli* provisions of the former French and Portuguese colonies *and* the descent-based Arab and Belgian models have been more stable. The adoption of descent-based regimes in the Commonwealth States often constituted a deliberate effort to reduce access to citizenship for the 'non-African' population. At the same time, these changes created a set of rules that were more easily comprehensible in the popular imagination, as well as possible to implement in very fragile States with weak civil registration systems, where even the borders of the State were often unclear. Remarkably, however, the idea that the second generation born in the territory should automatically acquire nationality at birth has been completely acceptable in those States – with otherwise similar characteristics to the Commonwealth or Belgian territories – where the double *jus soli* regime happened to be adopted from the French tradition. The popular imagination appears to be quite flexible.

As argued in Chapter 5.6, however, the legal heritage is by no means the only variable. Post-independence governments with a socialist outlook tended to adopt more open nationality laws and reject discrimination based on sex; while individual political leaders committed to pan-Africanism have also made a difference to the tenor of nationality policy. From the 'demand' side, organised pressure from national and international sources has often brought nationality law reform: from the women's movement, diaspora groups, children's rights organisations, human rights groups more generally, and UN agencies, especially UNHCR. Reforms have often been contagious, especially between countries of the same official language, as pressure groups and politicians have drawn inspiration from legal changes in other African countries. This contagion also applies to some of the rules that have limited access, including the introduction of discrimination based on race,

religion, and ethnicity. It is harder to isolate consistent reasons to explain why some States have adopted such rules and others have not, as both small and ethnically homogeneous and large and ethnically diverse States have at different times reached for the same tools.

It is striking that there have been relatively few amendments to the rules on naturalisation, and no clear direction in those changes that have been made. Transitional rules adopted at independence to provide preferential access to nationality to some categories of person with specific types of connection have for the most part lapsed, but the provisions on naturalisation open to all on the basis of long-term residence have remained fairly static. By contrast with European countries, which have reviewed naturalisation rules and created or amended citizenship tests as they have debated the means of integrating new migrants, African States have not given these questions significant legislative attention. Although some have introduced language or cultural requirements, such amendments as have been made have mainly related to period of residence (with changes in both directions, though usually to require more years). Efforts to create greater congruence between cultural 'nationhood' and republican or liberal 'citizenship' have focused rather on attribution of nationality at birth, most obviously in those countries that have incorporated explicit language discriminating on the basis of race, ethnicity or religion. Rules on naturalisation have in all countries remained highly discretionary and within the control of the executive, usually the head of State; the numbers naturalising are correspondingly low. The exceptions relate to rather rare initiatives to integrate large groups, such as the Rwandan and Burundian refugees in Tanzania, or the special procedures adopted in Côte d'Ivoire by the new government following the civil war.

The procedural rules on nationality have shown even more continuity based on the pre-colonial heritage; including continuity in rules around identification and proof of nationality. The Commonwealth States reflect an unfortunate legacy of excessive executive control over the domain of nationality, with no role for the courts. Countries such as Kenya demonstrate the long shadow cast by procedures put in in place by Britain to control the 'native' population. In the former French and Belgian territories by contrast, nationality belongs to the ministry of justice rather than the ministry of the interior, and the courts have the final say on who is a national from birth. This difference in procedures does not cast a magical spell of due process over nationality administration in the civil law countries; but it does make an appreciable difference to the level of discretion that can be applied.

10.3. The Influence of International Law

Without a review of the records of parliamentary debates on legislation it is hard to know what direct influence international and African legal standards have had on these trends. Nonetheless it seems reasonable to propose that their influence has increased. For the first few decades of independence, there is little sense

that international, continental and sub-continental standards had any effect on nationality law reforms – in line with the general understanding of the time that determination of nationality was within the complete discretion of the sovereign State. In recent years, however, there has been increasing reference to international law, as well as to decisions of the African regional human rights bodies, in debates around nationality law reform. For example, the introduction of protections for children of unknown parents in the Commonwealth countries where this was absent was influenced by campaigns by child rights groups founding their arguments on international law; similarly, the push for gender equality was firmly grounded in the CEDAW standards (despite the rear-guard action of the North African States which meant that the Protocol on the Rights of Women in Africa adopted in 2003 continued to permit discrimination; see Chapter 1.2).

Decisions of the African Commission on Human and Peoples' Rights in relation to the prominent cases of denial of nationality to politicians also received high profile coverage in discussions around reforms at national level in countries such as Zambia and Côte d'Ivoire – though it is hard to disentangle different contributing factors. The decision of the African Committee of Experts on the Rights and Welfare of the Child in the case of the Kenyan Nubian children was also part of a broad set of advocacy efforts that had significant impacts in improving the recognition of the Nubians as Kenyan (Chapters 1.2 and 7.3.1).

More recently, the efforts of UNHCR have led to greatly increased accessions by African States to the Convention relating to the Status of Stateless Persons and the Conventions on the Reduction of Statelessness. In West Africa, regional and national declarations and plans of action to prevent and reduce statelessness reference these treaties front and centre in the reforms and activities they propose. Similar documents adopted by International Conference on the Great Lakes Region, with UNHCR support, are also evidence of a political recognition of the damage that lack of access to citizenship has caused. The draft Protocol to the African Charter on Human and Peoples Rights on the right to a nationality and the eradication of statelessness adopted by the African Commission on Human and Peoples' Rights in 2015 would radically strengthen rights to 'belong', if endorsed by the political institutions of the AU. The impact of this increased normative effort at continental level is too soon to tell.

African States have responded in the past to international debates on the adoption of new normative frameworks relevant to questions of citizenship and belonging in a way that suggests an understanding that they could have an influence at national level. For example, during the UN process leading to the adoption in September 2007 of the UN Declaration on the Rights of Indigenous Peoples, the African Union expressed strong concerns about the potential of the declaration to 'create tensions amongst ethnic groups and instability within sovereign states'.[4]

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[4] 'Draft Aide Memoire : African Group : United Nations Declaration on the Rights of Indigenous People' (2006); see generally on these debates, Felix Mukwiza Ndahinda, *Indigenousness in Africa: A Contested Legal Framework for Empowerment of 'marginalized' Communities* (TMC Asser Press 2011).

A number of African communities had already organised around an identification as 'indigenous', including not only the forest-dwelling Batwa ('Pygmy') populations of Central Africa or the traditionally hunter-gatherer Khoi-san ('Bushmen') of southern Africa, more closely fitting the international understanding of the concept, but also nomadic pastoralists across the Sahel and East Africa, and the Movement for the Survival of the Ogoni People (MOSOP) in the Niger Delta of Nigeria (whom nobody had previously thought of as 'indigenous' in the international sense). The AU Assembly requested an advisory opinion on the issues from the African Commission on Human and Peoples' Rights, which endorsed the Declaration's ambition to reduce discrimination against marginalised groups, but came to the conclusion that 'any African can legitimately consider him/herself as indigene to the Continent'.[5] On this basis – that the Declaration would not create hierarchies of ethnic groups based on 'who was here first' – and faced with international pressure on the issues, most African States eventually agreed to sign the Declaration, with abstentions only from Burundi, Kenya and Nigeria. But the discussion certainly revealed that States believed that the Declaration might later be invoked with the aim of impacting their national laws.

10.4. The Instrumentalisation of Nationality Laws

When it comes to the application of the law in practice, the most obvious political role of nationality law has been its instrumentalisation by politicians. Denial of (proof of) nationality has been a tool used above all against political opponents and those who are believed to be their supporters. Many other scholars have focused on the connection between the flaring of identity-based conflict and the widespread (re)introduction of multiparty elections following the end of the Cold War (see Chapter 1.4). This book concentrates rather on the manipulation of the law as a specific tool within that process: politicians did not only use inflammatory rhetoric, mobilisation of ethnic militias, and manipulation of the electoral process to achieve these ends; they used the laws on citizenship.

The political utility of instrumentalising citizenship law is most obvious in the case of individuals whom the government in power considers to be troublesome. The most notorious cases in Africa where citizenship law has been abused to sideline high profile politicians are those of Kenneth Kaunda in Zambia and Alassane Ouattara in Côte d'Ivoire – a former President and a former Prime Minister – who were both denied the right to run for office again on the grounds that their citizenship had been recognised in error. Other less well known cases encompass not only politicians, but union leaders, journalists and academics whose opinions and activities have troubled the government of the day. Denial of nationality is an

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[5] African Commission on Human and Peoples' Rights, 'Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples.' (African Union 2007).

especially powerful tool, because it puts the person outside the realm of those who have a right to share in the State's resources and to participate in the State's political institutions; and as a presumed non-citizen, a significantly reduced ability to access the courts. Above all, it can be used to remove the person from the country, out of reach of political ambitions: most dramatically in the case of John Modise, who was deprived of nationality when he became a candidate for the Botswanan presidency. Perhaps most usefully for those invoking them, creative interpretation of nationality provisions can achieve all of these things while appearing to respect the forms of the rule of law (Chapter 5.5).

It is striking the extent to which broader efforts to undermine actual or potential political opponents have used amendments to the law around acquisition of nationality at birth to achieve that aim, or imaginative reinterpretation of the rules on State succession, rather than any formal invocation of the powers of deprivation. In this, the newly independent States learned well the lessons taught by the former colonial powers. In some countries, the pre-colonial history almost guaranteed that the independence leaders would flip over the discrimination the 'natives' previously faced, as part of the process of sealing their own legitimacy. In the phase immediately after independence, denial of access to or recognition of nationality was a way of clipping the wings of those whose economic and political power had been unfairly increased by the colonial regime.

Algeria is perhaps the paradigm example. During the colonial period, only around ten thousand of five million Muslim Algerians had achieved full French citizenship rights, and at the cost of renouncing their Muslim personal status. Jewish Algerians, meanwhile, were admitted to French citizenship *en bloc*, with the same status as immigrants to Algeria from metropolitan France. As the liberation war ended and independence approached, the mass exodus of the *pieds noirs* confirmed the suspicion of the new government that the former masters could not be trusted with equal legal status in the new era. The new nationality code, though non-discriminatory at first glance, defined 'Algerian' as a person of Muslim religion whose father and father's father was born in Algeria; later changes to the law reinforced this understanding, removing an already limited double *jus soli* provision. The law was the tool to ensure that neither Christian nor Jewish Algerians would be fully regarded as part of the new national community (Chapters 3.2 and 4.3).

In Côte d'Ivoire, the nationality law was never amended to create explicit discriminatory provisions, but amendments to the constitution, to the electoral code, to the laws on identification and civil registration, and to the implementing decrees for the nationality law itself, were diligently enacted to achieve particular effects. Even during the decade of crisis after 2000, each successive requirement for proof of citizenship was carefully set out in a new presidential order, decree or *arrêté* (Chapter 7.4). In (North) Sudan, the exclusion of presumed South Sudanese from ongoing citizenship following the division of the country in 2011 was enabled by very specific amendments to the citizenship law, combined with the roll-out of new identification systems (Chapter 8.2). Even in the Democratic Republic of Congo, a far less legalistic State – a far less State-like State – amendments to the law

were important markers for the relative inclusion or exclusion of the Banyarwanda at any one historical moment. Implementing regulations have kept access difficult even where surface changes appeared to liberalise the law (Chapter 7.5). In Rwanda, the nationality law did not discriminate, but the ethnicity-specific identity cards first introduced by the Belgians played a notorious role in the 1994 genocide.[6]

In Zimbabwe, it was the provisions on dual nationality that became a tool of disenfranchisement. The incoming government in 1980 had been forced to accept the possibility of dual nationality in the new law that would come into effect on majority rule, alone among all the Commonwealth countries whose independence constitutions were negotiated in this way. This was changed before long, but the prohibition on dual citizenship was implemented in a straightforward manner to start off with. When the government's hold on power started to look shaky at the turn of the millennium, a 'legal' method was found to shore up its control – and also to bolster support among 'indigenous' Zimbabweans – by applying highly formalist interpretations to foreign laws in relation to the attribution of nationality to children born outside those countries. Potential voters for the first opposition party to challenge the independence leadership's hegemony could be made to vanish at the stroke of the registrar-general's pen. At each step, detailed changes to the citizenship law marked repeated efforts to close loopholes exposed in court (Chapter 7.1).

The expulsion of Ugandan Asians by Idi Amin, meanwhile, was not a simple matter of force, intimidation and arbitrariness (though it was all those things): it depended on changes to the law, the issue of new decrees, the cancellation of residence permits, and a process of 'verification' that those who had chosen to be Ugandan had correctly completed the formalities. In this way, the supposedly non-discretionary right of those born and resident in the territory at independence to register as citizens was 'legally' undermined (Chapter 7.3). In Sierra Leone and Liberia, the law was modified or designed from the outset to restrict access to citizenship for 'non-Africans', aimed – similarly to the case of Uganda – at the economically powerful communities of Lebanese and European descent, ensuring that they could not have access to political power. In Sierra Leone, one of the main targets was John Akar, a half-Lebanese active opponent of the first post-independence government (Chapter 7.2). In Mauritania, amendments to the law in 2010 were designed to make it significantly harder for those of black African ancestry to obtain recognition of Mauritanian nationality (Chapter 7.6).

In all these cases, there was much going on that was outside the framework of the law; but changes in the law have been and remain a key enabling factor for systematic policies of exclusion, even in States where formal institutions are quite weak.

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[6] Timothy Longman, 'Identity Cards, Ethnic Self-Perception and Genocide in Rwanda' in Jane Caplan and John Torpey (eds), *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton University Press 2001).

10.5. The Unintended Consequences of the Initial Frameworks for Nationality Law

It is more challenging to make the case that nationality law itself is an independent variable that has had an effect beyond the deliberate intentions of those who drafted it. Yet there is evidence that this is the case. For example, let us take a comparison between two francophone West African countries for an indication of how provisions in the law can make a difference in their own right: Côte d'Ivoire, the subject of extended treatment in this book (Chapter 7.4); and Senegal, as a counter-example. Though both fall within the same French legal tradition in terms of the way the laws and procedures were drafted, the substantive differences in the law were significant, and in unexpected ways. The law helps to frame an understanding of what is 'normal'; in Africa as elsewhere.

In Senegal, the nationality code provided and provides in its first article that any person born in Senegal (before or after independence) of one parent also born there is Senegalese (no further conditions); and that a person who has always been treated as Senegalese (is in *possession d'état de sénégalais*) is regarded as fulfilling this requirement and can go to court to obtain a certificate of nationality in case of any doubt.[7] Initially, and until 2013, the law discriminated on the basis of sex: only the child of a Senegalese father was Senegalese by descent, while only a man could transmit nationality to his spouse.

By contrast, in Côte d'Ivoire, the law gave 'nationality of origin' to every person born in Côte d'Ivoire unless both of his or her parents were foreigners (*étrangers*). There was, however, no definition of *étranger,* and a great deal of uncertainty about whom that term encompassed, given the incorporation of a large part of what is now Burkina Faso into Côte d'Ivoire for some of the colonial period and the fact that prior to independence most immigrants to Côte d'Ivoire were French nationals (and thus arguably not 'foreign'). There was no discrimination on the basis of sex in relation to transmission of nationality by descent, though discrimination on the basis of birth in or out of wedlock was introduced in 1973 (requiring additional proof of descent if out of wedlock). The gaps in the Ivorian law created a lack of clarity on who was Ivorian and who was not, that both built up resentment against those 'of doubtful nationality', and also created the possibility of suddenly denying rights to people who had been born and brought up in the country, and who had

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[7] Loi No. 61-70 du 7 mars 1961 déterminant la nationalité sénégalaise, Article premier: « Est Sénégalais tout individu né au Sénégal d'un ascendant au premier degré qui y est lui-même né. Est censé remplir ces deux conditions celui qui a sa résidence habituelle sur le territoire de la République du Sénégal et qui a eu de tout temps la possession d'état de Sénégalais. La possession d'état dans le sens du paragraphe précédent consiste dans le fait pour celui qui s'en prévaut: 1°) De s'être continuellement et publiquement comporté comme un Sénégalais; 2°) D'avoir été continuellement et publiquement traité comme tel par la population et les autorités sénégalaises. » Foundlings and children of parents who are stateless or of unknown nationality are also Senegalese; though gender discrimination applied to the children of Senegalese mothers. Ibid. Articles 3 and 5. Gender discrimination was removed in 2013.

since independence been treated as Ivorian. Ultimately, those excluded in this way took to arms to defend their position.

Both in Senegal and in Côte d'Ivoire transitional provisions at independence created an additional right to opt for nationality to various categories of person during a transitional period.[8] While these provisions were accessed by some of the elites, and *fonctionnaires* who had roles within the French administration, many of those who could in theory have used these rights to register as nationals of the new States would have been completely unaware of their existence or importance. Very few did so in practice. These non-automatic provisions were not at all effective to provide for a largely illiterate population whose understanding of what was at stake would have been close to zero. In terms of impact on subsequent politics, they can be discounted.

But which differences explain the different trajectories of the two countries in terms of national identity? Côte d'Ivoire already had a large immigrant population at independence, so that the omission of the double *jus soli* rule could be argued to be the result rather than the cause of problems of integration. However, contemporary commentators at independence regarded the Ivorian code as being fundamentally *more* liberal than the double *jus soli* principle, and foresaw no such problems, even though they noted definitional issues.[9] This interpretation drew support from the pan-Africanist rhetoric and immigration-supportive policies of Félix Houphouët-Boigny that provided extremely liberal access for foreigners to the rights of Ivorian nationals. But the very lack of clarity on who was or was not a foreigner was part of the reason or opportunity for a serious backlash to these policies from the 1990s, the removal of any rights not based on descent, and highly discriminatory application of the existing law.

Senegal, which had been the administrative centre of AOF, also had a large immigrant stock: many had come from across the region for training and higher education; as well as labour for plantations in the Senegal river valley and the building of the Dakar-Bamako railroad. Many refugees fled to Senegal from Guinea during the repressive years of Sékou Touré's rule, and from Guinea-Bissau during that country's war of independence in the early 1970s. Yet the UN figures for foreigners as a percentage of the population were 1.6% for Senegal in 2010, against 12.5% for Côte d'Ivoire.[10] In Côte d'Ivoire itself, the decennial census indicated

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[8] eg, in Senegal, Arts 28–31. Article 29 : 'Peut opter pour la nationalité sénégalaise: 1°) Toute personne originaire de l'un des Etats issus des anciens groupes de territoires d'Afrique occidentale française et d'Afrique équatoriale francaise, du Togo, du Cameroun et de Madagascar qui, à la date d'entrée en vigueur de la présente loi, a sa résidence habituelle au Sénégal;(Loi du 7 mars 1961). 2°) Toute personne mariée à une Sénégalaise depuis 5 ans. La même option est ouverte aux originaires des territoires limitrophes du Sénégal.'

[9] Decottignies and de Biéville, *Les nationalités africaines*, pp.178–181 ; Zatzepine, *Le droit de la nationalité*, pp.12–13 and 39–41. Also Procès-verbal de la séance du mercredi 8 novembre 1961, Commission des Affaires Générales et Institutionnelles, Assemblée Nationale.

[10] 'Trends in International Migrant Stock: The 2013 Revision' (UN Department of Economic and Social Affairs 2013) POP/DB/MIG/Stock/Rev.2013, table 3. The notes to the tables indicate that the

that the 'foreign' population formed more than one-quarter of all residents – yet almost half of those had been born in the country (see Chapter 7.4). Despite its own separatist movement in southern Casamance, Senegal has been one of the most stable African countries since the 1960s; nor is there the sense of a subterranean issue ready for exploitation in bad economic times.

As of 2013, 77% of Senegalese believed that a person born in the country of two non-citizen parents should have the right to nationality; 79% of Ivorians thought such a person should not.[11] It is surely plausible that at least one of the significant variables in this difference was the influence of the existing law and its implementation on popular attitudes.

Is Mali a counter-factual to this comparison? Mali's nationality law has since independence provided for the double *jus soli* rule, and for a person born in Mali to be able to opt for Malian nationality if still resident there at majority; yet Mali has also seen repeated rebellions from its Tuareg population in the vast northern regions, a rebellion that from 2011 has threatened the very existence of the State. There are many other variables at play here, including the threat to livelihoods from drought and desertification, and the collapse of the Libyan State to the north. But it is also the case that the double *jus soli* rule, devised in Europe among settled populations, does not work to integrate those following a nomadic lifestyle: the rule depends on two generations being born in the country before nationality is automatic. Moreover, the French civil code system required registration of birth to prove the facts related to nationality (something not accessible to the vast majority of Tuaregs), or rather costly alternative systems of proof through witness testimony to a court hearing. The initial version of the double jus soli rule in Mali also required the two generations to be 'of African origin': this obviously excluded those of European or Lebanese descent, but it was not clear how it applied to those of mixed race or, indeed, the (relatively fair-skinned) Tuareg (see Chapter 5.1.2). There is research to be done into the impact on the Malian conflict of the interpretation of these restrictions over time.

The clearest example of later problems being generated by a failure to create a comprehensive and clear legal transition at independence itself is perhaps that of the Democratic Republic of Congo (Chapter 7.5). In Congo, the extreme predatory nature of the colonial State and the rapidity and unplanned nature of the Belgian departure meant that there was no proper clarification of the legal status of those tens, probably hundreds, of thousands of people of Rwandan or Burundian origin imported to the country as labour on the plantations established for export crops. There was no detailed agreement on nationality and only a hastily adopted law on who could vote in the independence elections. The citizenship status of the

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data sources for Côte d'Ivoire encompass both foreign-born persons and foreign nationals; whereas those for Senegal include only foreign-born persons and refugees recorded by UNHCR. Even so, the UN figure is roughly half the percentage reported by the Ivorian census.

[11] Afrobarometer online data analysis tool, Round 5 (2011/13), 'Right to be citizen: born in country with two non-citizen parents', http://afrobarometer.org/online-data-analysis/analyse-online.

Banyarwanda brought to Congo by the Belgians was complicated by the fact that Ruanda-Urundi had been mandated to Belgian administration by the League of Nations, and thus Belgium was expressly disallowed from conferring its nationality on the inhabitants of those territories (who, when brought to Congo, were therefore given different identity cards from the existing populations and other immigrants). Yet their children could also be argued to have obtained nationality automatically on a *jus soli* basis under an expansive 1892 law aimed at bringing as many as possible within Belgian jurisdiction; though Belgium itself had a descent-based law. The uncertainty surrounding their status during the panicky simultaneous withdrawal of Belgium from Congo, Rwanda and Burundi, amid an outbreak of violence in Rwanda that drove refugees into Congo at the critical moment of independence, left the issue open as a running sore in DRC till today.

The decision of the Belgian administration in the Congo to allow all Banyarwanda to vote in pre-independence elections, thus implying – without resolving in law – that they held the nationality of the soon-to-be-recognised State, did not address the concerns of those who might hope to hold positions of authority in that new State as to who would have the right to hold them to account. In the absence of any sensible regulation of this point, the new State then adopted ethnic identity as the basis for recognition of membership, requiring an ancestor who 'was or had been a member of a tribe or part of a tribe established in the Congo'. This focus on 'tribe' (later 'ethnic group' or 'nationality'), meant that forever afterwards the political discussion was necessarily about the date of arrival of some pristine forebear, rather than more practical questions about documentation of place of birth and parentage or length of residence of specific individuals. Again, there are many other variables – above all the rules on land ownership and usage, and the role of Congo's neighbours in the conflict – but the impact of the League of Nations mandate and the failure to create a reasonable framework for attribution of nationality at independence appear to have had the unintended consequence of making it impossible for the Banyarwanda simply to disappear into the Congolese population, as many other colonial-era immigrants did.

10.6. The Impact of Changes in Nationality Laws

It is perhaps even harder to determine the big picture impact of the amendments to nationality laws since independence on national cohesion; especially those that have been undertaken to expand rather than restrict access to nationality. But the trajectories of some countries are suggestive. The impact on individuals who have benefited from liberalisation of access is easier to document.

Ghana, whose political economy is in many ways similar to that of Côte d'Ivoire – mining and plantation-based, dependent on migrants from the north of the country and neighbouring States – at one time looked as though it might follow the same self-destructive path as its neighbour (see box in Chapter 5). The transitional provisions of the 1957 Ghana Nationality and Citizenship Act adopted the

framework that became standard for other West African Commonwealth countries gaining independence, attributing citizenship automatically at the date of independence to those born in the country also had a parent or grandparent born in the country (East Africa restricted this to only a parent), and providing the right to register as citizens to many of those who did not qualify for automatic citizenship; *jus soli* was initially enacted for those born on the territory moving forward. Within a year or two of independence, politicians amended the citizenship laws to limit *jus soli* access to citizenship for those born after independence, and to facilitate deportations (aimed at 'foreigners' involved in opposition parties). Soon after, all 'aliens' were required to obtain residence permits, the government adopted official policies to promote economic advancement of 'indigenous' businesses, and by the late 1960s the position of migrant populations had become precarious: more than 200,000 people were expelled from the country in 1969–1970, most of them migrants from other West African countries.

But the policy changed. Politicians started to mobilise the votes of the descendants of foreign migrants, rather than to incite violence against them; the 'stranger' populations themselves organised to engage in politics, and were permitted to do so. The 1979 constitution relaxed the citizenship provisions to expand the category of persons automatically attributed nationality to those with a grandparent as well as a parent who is or was a citizen; and since 1996 Ghana has accepted dual citizenship, meaning that those who are also potentially nationals of another West African State can no longer ipso facto be presumed not to be Ghanaian.

Ghana is certainly not free of ethnic tensions, nor from politicians seeking to use an appeal to xenophobia, and nor is its law as inclusive as it might be (since there are no rights based on birth in Ghana). Perhaps, also, some may argue that it's just a question of timing: Ghana had a flare-up of its identity crisis earlier than Côte d'Ivoire, and that is all; the same issues could return in both countries. But it seems plausible to suggest that at least part of the contrast with Côte d'Ivoire is explained by the initial framework and later decisions to change the citizenship law: not just changes in political rhetoric, but changes in law. Ghana's very early abandonment of *jus soli* citizenship as politically unacceptable forced the discussion on what rules on belonging would, in fact, obtain consensus support. Meanwhile, the vagueness of the original formula in Côte d'Ivoire created an inclusive environment for many years, but meant that there was a dangerous level of ambiguity when the combined effects of commodity price falls and structural adjustment began to bite in the 1990s. This argument on the difference made by State institutions is supported by the illuminating research of Lauren MacLean on informal institutions and citizenship across the Ghana-Côte d'Ivoire border.[12] Though she does not address the content of citizenship laws directly, similar ethnographic research would surely reveal similarly interesting contrasts on questions related

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[12] Lauren M MacLean, *Informal Institutions and Citizenship in Rural Africa: Risk and Reciprocity in Ghana and Côte d'Ivoire* (Cambridge University Press 2010).

to nationality law and identification. There is a 30% differential between Ghana and Côte d'Ivoire in support for the right to citizenship for a person born in the country of two non-citizen parents; not quite as large as that between Senegal and Côte d'Ivoire, but still substantial.[13]

Nigeria is an interesting example of infrastructure that has built up around citizenship and identification in the *absence* of formal law – but which is still fundamentally framed by legal scaffolding. Since 1974, the rules on citizenship in Nigeria have been found only in the constitution, with no implementing law; and since 1979, the constitution has provided for a presumption of citizenship founded in the concept of belonging to a 'community indigenous to Nigeria' (though also for naturalisation and for the children of naturalised citizens to be attributed citizenship at birth regardless of ethnicity). Part of the ambition of this reform was inclusive, to provide access to Nigerian citizenship for members of those ethnic groups divided by colonial borders. The simultaneous introduction of the concept of 'federal character' requiring an equitable distribution of government posts across the country, also had inclusive intentions. But in the absence of further statutory definition, these two concepts have combined to create a requirement of proof of 'indigeneity' for any official transaction, including a national passport. The decision on who qualifies as an 'indigene' of a particular area is both entirely decentralised to that area, without any legislative guidance, and also determinative of the national body of citizens (see Chapter 7.7). This may well create an openness in some cases (since it allows some to 'naturalise' at local level), but it also creates the potential to exacerbate the ethnification of competition over resources that many have been highlighted. Nigeria is also by some way the country with the weakest popular identification with national (rather than ethnic) identity among those surveyed by Afrobarometer – followed by Uganda, which also has an ethnic definition of citizenship.[14]

The importance of changes in the law can perhaps also be discerned where amendments have not taken place. In Côte d'Ivoire and Tanzania in particular, the pan-Africanist rhetoric of the post-independence leaders, Presidents Houphouët-Boigny and Nyerere, created a political welcome for immigrants, which many considered sufficient to accredit them as nationals. The lack of legal and procedural steps to put the rhetoric into practice became important much later, when the political welcome was no longer guaranteed.

The removal of gender discrimination in the great majority of African countries has enabled many thousands to obtain recognition of nationality that they

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[13] Afrobarometer online data analysis tool, Round 5 (2011/13), 'Right to be citizen: born in country with two non-citizen parents', http://afrobarometer.org/online-data-analysis/analyse-online.

[14] Only 5% in Nigeria and 12% in Uganda stated to pollsters that they felt only Nigerian or Ugandan (compared to 62% in both South Africa and Tanzania; 66% in Guinea; and 71% in Burundi); though in both countries a substantial majority (60 and 69%) stated that they identified equally with both ethnic group and country. In all countries less than 10% stated that they identified only with their ethnic group. Afrobarometer online data analysis tool, Round 5 (2011/13), 'Ethnic or national identity', http://afrobarometer.org/online-data-analysis/analyse-online.

previously did not have; but because the impact of such changes is more diffuse these changes have had less obvious impact on political dynamics. Governments also keep no statistics on how many have therefore gained access to nationality who could not previously do so. But an end to gender discrimination has very important effects on the rights of individuals. Law reform may seem far from the day to day concerns of ordinary people, and respect in practice can remain a struggle, but these changes represent real gains in the daily lives of women; an insight well-understood by feminist legal scholars and activists.[15] Those opposed to equal rights have come to the same conclusion: in Mali, for example, gains in nationality law reform have been compromised in other legal battles (Chapter 5.2).

In many cases, the jury is still out on the influence of legal reforms, both for lack of full implementation of changes to the substantive law and for lack of research. Kenya's 2010 constitution created the possibility of improved access to nationality for some historically excluded groups, including both the children of unknown parents and the descendants of those who migrated to Kenya before independence who had never been documented, as well as for the children of Kenyan mothers born abroad. Only at the end of 2016 were the first efforts made to register qualifying individuals under these rules (Chapter 7.3).

Perhaps the strongest evidence of the relevance of nationality law and identity documentation to politics in the minds of the protagonists themselves is the appearance of such questions at the top of the list of questions to be resolved in peace agreements. This is true not only of the obvious cases such as the 2003 Linas-Marcoussis Accord and 2007 Ouagadougou Political Agreement between the Ivorian political opponents; the 2002 peace agreements and 2003 transitional constitution for the DRC; the adoption of a new constitution in Zimbabwe; or the end of the apartheid regime in South Africa. It is also true of less prominent agreements such as the August 2006 Togolese Global Political Accord (also signed in Ouagadougou) which envisaged the issue of identity cards along with electoral cards.[16] Citizenship also features in unsuccessful attempts to reach agreement: it was one of the five issues preventing an amicable settlement of the Sudan-South Sudan separation (Chapter 8.2).

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[15] See, eg, Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Pub 2005); Kafui Adjamagbo-Johnson, 'Les Lois, Une Expression « officielle » Des Rapports de Genre' in Thérèse Locoh and Koffi N'Guessan (eds), *Genre, population et développement en Afrique de l'Ouest* (ENSEA, FNUAP 1999); Celestine Nyamu-Musembi, 'Addressing Formal and Substantive Citizenship: Gender Justice in Sub-Saharan Africa' in Maitrayee Mukhopadhyay and Navsharan Singh (eds), *Gender justice, citizenship and development* (Zubaan, an imprint of Kali for Women; International Development Research Centre 2007). See also the research and publications of Women and Law in Southern Africa (WLSA) or Women in Law and Development in Africa (WILDAF). For a critique of such 'legal centralism', see Ambreena S Manji, 'Imagining Women's "Legal World": Towards a Feminist Theory of Legal Pluralism in Africa' (1999) 8 Social & Legal Studies 435.

[16] Clause 1.2.5 Accord Politique Global, Ouagadougou, 20 August 2006.

10.7. Marginal Citizens: The Buffer Zone

The Nigerian case is illustrative of the reasons why nationality laws may not have received as much attention as perhaps they deserve. When a very large percentage of the population have no document attesting to their nationality, and no identification document is required by law, or where the rules for gaining access to documents are largely informalised, the difference between those who are nationals and those who are not is less obvious.

One characteristic of the policy debates around citizenship and statelessness in non-African contexts is that it is usually assumed that a State knows who is its national and who is not; that the line between citizen and alien is clear – even if there is also an intermediate category of legal resident, while naturalised citizenship may be a less secure status, and there may be some anomalous cases at the margins (for whom the category of Stateless person has been created).[17] There are major debates in citizenship studies about the citizenship behaviours of undocumented migrants in Europe or North America, and the ways in which the undocumented seek to create participatory spaces and exert rights within the civic space of the countries where they now live.[18] Even texts that seek to move away from 'binary categories of 'legal' and 'illegal', 'documented' and 'undocumented' assume that the categorisation at least is for the most part known both by the authorities and the individuals affected.[19]

In most if not all African countries, however, there is a large number of people whose legal status is simply not clear, even though they have never moved from where they and their parents were born and grew up, believe themselves to be nationals, and may, in fact, be nationals. It is only when an application is made for paperwork at the lowest administrative levels – a national identity card or other document, even a birth certificate – that a person may first become aware that his or her nationality is seen as doubtful. This lack of clarity is not just because the law is being misapplied or implemented in a discriminatory way or muddied by corruption (though all may be true), but inherent in the legal and administrative framework of the citizenship law. While this category of 'marginal citizens' exists in other regions around the world, the number of people with an unclear status, often marginal in geography but also marginal in terms of participation in the broader rights of citizenship, may be highest in the African continent.

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[17] Bronwen Manby, 'The Human Right to Citizenship: A Slippery Concept by Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (Review)' (2016) 38 Human Rights Quarterly 526.

[18] eg, Parts I and II in Engin F Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014); Anne McNevin, 'Undocumented Citizens? Shifting Grounds of Citizenship in Los Angeles' in Peter Nyers and Kim Rygiel (eds), *Citizenship, migrant activism and the politics of movement* (Routledge 2012); Mae M Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University Press 2014).

[19] Roberto G Gonzales and Nando Sigona, 'Mapping the Soft Borders of Citizenship: An Introduction' in Roberto G Gonzales and Nando Sigona (eds), *Within and beyond citizenship: borders, membership and belonging* (Routledge 2017).

Lack of documentation is in part just one symptom of more general weaknesses in the State. A very large number of people in Africa have no documents because they don't see the point of having documents, and because they are costly in time and money to obtain. The first point of need is often when a child should enter school or needs to take an exam, but if schools are inaccessible or worthless, then what need for birth registration? If you remain entirely in the informal sector, a peasant farmer or transhumant pastoralist, then identity documents are not always required; if the police demand money when you cross a border or an internal checkpoint whether or not you have the right documents, then a passport or identity card does not serve even its most basic use of proving your right to be present or to travel. If your strongest allegiance is not to a State but rather to an ethnic group, why obtain documents of such little emotional value? If, in addition, obtaining documentation requires a journey to the nearest administrative centre, a long wait to be seen, a mixture of official and unofficial fees, and several days' lost income, the cost-benefit analysis looks untempting.

Thus, many people exist in a blurred zone in relation to legal nationality. It may be the case that some members of a community have some (but not all) documents related to nationality where they live (just a birth certificate, just an electoral card – but were rejected or never applied for a national ID card or passport); whereas some were never registered at birth and applications for all other documents have been rejected; some have obtained documents by paying bribes to intermediaries; and others have travelled to a different 'home' country to obtain documents there because they cannot get them where they currently live (or because they prefer to keep that affiliation). Equally, there are many who are, under the law, undoubtedly citizens, but they cannot prove it to the satisfaction of administrative requirements based on European models that assumed universal birth registration and movement of labour within a formal economy. This is especially the case because the detailed rules on nationality and its procedural requirements in neighbouring States can vary according to the colonial luck of the draw in ways that have little local resonance and must seem very perplexing to those on the ground.

This lack of clarity complicates the debate and leaves dangerous loopholes for the politically unscrupulous, since it is always possible for a government or political party to claim that there is no problem in principle with the right to nationality of a particular individual or group, while denying access to citizenship in practice through the deployment of administrative obstacles. Or for a politician to say that of course second generation children born in the country have the right to nationality under the law – but to assert at the same time that the documents members of a particular ethnic group produce to show this is the case have been fraudulently acquired.

But the lack of clarity also provides a grey zone that creates a protection against the impacts of the worst citizenship laws. If it is possible to acquire whatever identity document is needed through a combination of connections and cash then under some circumstances (especially of shared language and culture) a population of foreigners will over time simply dissolve into the existing body of citizens.

This effect should not be exaggerated. The informal does not always trump the formal requirements even in weak States; and in some countries and some circumstances rarely if ever does so.

10.8. The Importance of Recognised Nationality and the Impact of Statelessness

High profile cases such as those of Kaunda and Ouattara, and the targeting of those of European descent in Zimbabwe or Algeria, Asians in Uganda, or Lebanese in Sierra Leone, have encouraged a view that challenges related to denial of formal legal citizenship in Africa are fundamentally a problem of the elites, divorced from 'ordinary people'.

Similarly, the campaigns in many countries to amend the law to allow dual nationality have come from the diasporas of African countries now living in Europe or North America, rather than from those with a parent from a neighbouring country. Thus the tenor of those opposing the increasing liberalisation of rules on dual nationality is that those who are impacted by restrictions on dual nationality are individuals with political ambitions, international businessmen and the super-rich of probably dubious moral and social worth, and members of the increasingly numerous African diaspora who betrayed their own country to gain access to new passports but want the best of both worlds and wield their economic power to get it.[20]

For ordinary people, the argument goes, nationality is – except in extreme cases of manipulation of the law, and in States with relatively strong formal institutions, such as Côte d'Ivoire or Zimbabwe – an abstract concept of little relevance to day-to-day life; if indeed it is a concept recognised at all by those living in a peasant or pastoralist economy far from the reach of the modern State. Both officials and those nationals whose own membership of the State is unproblematic will frequently say that Nigerians or South Sudanese or Angolans or Senegalese 'know who they are' at the level of ethnic group, and so there is no real problem with legal categories. Alternatively, it is argued that individuals can assert rights of citizenship by their actions and even gain recognition of legal national citizenship through local acceptance of their status, even if of immigrant origin.

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[20] For just one example, quotes from discussion in the Constituent Assembly debating a new constitution for Tanzania: 'Mr Louis Majaliwa proposed total deletion of dual citizenship in the constitution, saying "They (Tanzanians in Diaspora) insulted us and we don't need them either."' Masato Masato, 'Kadhi Court, Union, Citizenship Debate Rock CA', *Tanzania Daily News*, 10 September 2014. 'Dr Mary Mwanjelwa said single citizenship was the key indicator of a person's trust, patriotism and obedience to their country. "The issue here should not be dual citizenship but why people denounced their Tanzanian nationality in the first place".' Masato Masato, 'Katiba Debate Nears Finishing Line', *Tanzania Daily News*, 11 September 2014. The same discussion takes place in other countries yet to legalise dual citizenship.

At the same time, there are genuine concerns about the unwanted imposition of nationality and its requirements of registration and documentation. There may be very good reasons for not wanting to be recognised as a citizen of a particular State, or of any State at all. These have always existed, and indeed frame some of the oldest rules established by national citizenship laws, such as a ban on the capacity of a man to renounce citizenship during the period in which he could be called for military service. People living in the margins of the States who receive little benefit from public services, and only feel the weight of taxation or security harassment, may have good reason not to seek official recognition of their membership of that polity. Contemporary concerns around data protection, privacy, and ever-strengthening capabilities for surveillance create other reasons to opt out. The very meaning of nationality as a legal status is arguably empty when it is of a failed State such as Somalia or the Central African Republic.

But this is an underestimate of the extent to which lack of nationality impacts all but the most isolated communities – and, even more, the degree to which a lack of documents proving nationality is due to the provisions of the law (or lack of them) rather than simple prejudice, corruption, or administrative ineptitude at the level of the individual civil servants responsible for processing applications.

Most obviously, identity documents and proof of nationality are needed for those crossing borders or internal checkpoints. There is testimony in every human rights report investigating a national state of emergency anywhere in the world about the arbitrary use of identity documents in selecting individuals for 'taxation' or, in the worst case, death. Africa is no exception. Some of this relates, of course, to the name shown on the card and what it says about ethnicity or religion; but it is not only so. The distinction between national and foreigner recorded on a card may be just as relevant. Even in less critical moments, the lack of a national identity document can be an excuse for any State official to extract money or refuse access to rights. An identity document was the most immediate need expressed in a survey of 172 migrants by UNHCR and IOM in 2013 in Niger and Togo – 60% mentioning documentation as a more urgent requirement than transport, food, health care, shelter and other needs.[21]

Identification documents are, as others have noted, a tool of empowerment as well as of control, and also much-understudied as a basis for the consolidation or fragmentation of identities.[22] The laws on which the identity documents are based – especially the citizenship laws, but also related laws such as those on national identity cards or civil registration – are perhaps even more understudied by scholars (especially, of course, by those outside the legal field).

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[21] Silvère Konan and Harouna Mounkaila, 'Migrants en détresse: Analyse de situation et cadre de protection: Le cas du Niger et du Togo' (UNHCR and IOM 2013).

[22] Edward Higgs, *The Information State in England: The Central Collection of Information on Citizens since 1500* (Palgrave Macmillan 2004); Jane Caplan and John Torpey (eds), *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton University Press 2001); Keith Breckenridge and Simon Szreter (eds), *Registration and Recognition: Documenting the Person in World History* (Published for the British Academy by Oxford University Press 2012).

The narratives throughout this book show just how important citizenship law is for 'ordinary people' as they seek to access services and opportunities in even the most dysfunctional of States. For Sierra Leonean and Liberian former refugees in Guinea (Chapter 9.1), Nubian and Somali Kenyans (Chapter 7.3), people of South Sudanese origin denied Sudanese nationality (Chapter 8.2), Tuareg or Fulani nomads (or ex-nomads) in West Africa (box in Chapter 6.5), those affected by changes in borders (Chapter 8.5), and many others, inability to access nationality documents has daily consequences for themselves and their children.

Gender discrimination, whether enshrined in law or simply the norm in practice, ensures that those affected are not confined to particular geographies and members of specific ethnic groups, but spread throughout the population among the descendants of those who have rejected primordial attachments by 'marrying out' (Chapter 5.2). Again, this is not just a question of elite women with non-African husbands – though, thanks to their means, these are the cases that have mostly reached the courts – but just as much of the 'market women' crossing African borders on foot on a daily basis.[23] Perhaps worst affected are children separated from their parents, or whose parents are dead or unknown.

Everywhere across Africa, offices issuing identity cards are besieged with people trying to obtain proof that they belong. It is paradoxically often easier to register to vote than it is to obtain whatever document is required for national identity – even though voting is supposed to be restricted to nationals. Those who do not qualify find that many paths are blocked: that they are unable to get a position in the civil service (from school teacher to customs official to magistrate) or a job in the formal economy, to open a bank account, to buy a mobile phone or real property; or, of course, to organise politically and stand for office. For a young child, recognition of nationality may not be needed to access public services – childhood immunisations, primary school education and the like – but just as soon as there is question of government scholarships or fee-waivers for secondary school or university, or purchase of land, or travel within or without the country, papers proving nationality start to become necessary.

It is of course possible to cross a border or exist in a remote rural area or live in an urban slum without paperwork, and it is certainly possible to resolve some problems of paperwork with money[24]; but only so much can be achieved through bribing officials. Those applying the law are in the end charged with policing the boundaries of the system and ensuring that those who do not qualify do not get

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[23] AP Cheater and Rudo Gaidzanwa, 'Transcending the State? Gender and Borderline Constructions of Citizenship in Zimbabwe' in Thomas M Wilson and Hastings Donnan (eds), *Border Identities: Nation and State at International Frontiers* (Cambridge University Press 1998); AP Cheater and RB Gaidzanwa, 'Citizenship in Neo-Patrilineal States: Gender and Mobility in Southern Africa' (1996) 22 Journal of Southern African Studies 189; Rudo Gaidzanwa, 'Citizenship, Nationality, Gender, and Class in Southern Africa' (1993) 18 Alternatives: Global, Local, Political 39.

[24] For a discussion of this issue in the Asian context, see Kamal Sadiq, *Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries* (Oxford University Press 2009).

papers. If officials transgress too far beyond the limits of the law, they are likely in most places eventually to be found out. In particular, they may face difficulties if they go beyond simply taking money as an unofficial fee to issue a document that should be free, to supplying documents to those who are not nationals within the law. Money may not be enough to overcome the risk of exposure in situations where such questions are critical; and many officials either want to do their job properly or have limits to the extent to which they will bend the rules, even for money (certainly, the amounts of money that poor people have to offer). This is true especially in the civil law system where the final adjudicators on nationality matters are judges; but it is also true of ordinary police officers, consular officials, and immigration ministry clerks.

Corruption in nationality administration may, paradoxically, both ease problems of statelessness and create them. The ability to 'negotiate' the acquisition of a birth certificate, identity card or whatever document has local currency may enable a person to function effectively for most purposes. However, the sense that the system is not reliable may also mean that the mere possession of documents will not convince others that the person concerned is indeed a 'real' national, even if they fulfil all the conditions for nationality from birth or have completed all the procedures for naturalisation. If documents are known to be obtained corruptly, they are mistrusted; and, if a person becomes prominent in some way – or is faced with hostile armed men at a roadblock in a moment of national crisis – will not be believed as proof of nationality. In any event, if a document is revealed as a fraud, those who obtained them will have to start again. Even in South Africa, a far more functional State than many, corruption at the Department of Home Affairs has meant that official documents are not trusted as proof that a person has in fact the right to be in South Africa, or to be South African (Chapter 9.3).

So people take the measures they need to exist, and a situation of doubtful nationality may simply mean the payment of a bigger bribe to obtain the documents required or to pass without documents, but the more difficult it becomes to get round such problems, the greater the level of exclusion. At the extreme ends of such practices, individuals find themselves dismissed from their jobs or driven from their homes; or just left in limbo, unable to progress with their plans for their lives.

Of course, this is not just a matter of legal drafting and State capacity; access to nationality goes to the heart of political and economic power. Recognition as a national (or member of a sub-national unit) is tied up with access to property, especially land, and with economic power more generally, as well as the right to vote and participate in public affairs. In times of economic and political insecurity, the 'stranger' is always likely to be suspect. Politicians around the world have found other means than citizenship law to stir up identity-based violence. Yet law matters, even in some of the most dysfunctional States; and it matters more the greater the State's level of functionality – and for positive reasons of access to services and the political space reserved to citizens, not just because the State's ability to exert control over those who have papers is stronger.