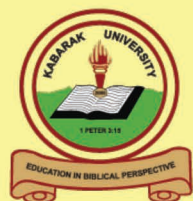


Journal of Law and Ethics

Volume 3, 2018

A peer-reviewed publication of the
Centre for Jurisprudence & Constitutional Studies
Kabarak University School of Law



We, the People of Kenya: The Bonds, Benefits, and Burdens of our Citizenship

Ken Obura*

‘Citizenship in this Nation is a part of a cooperative affair.
Its citizenry is the country, and the country is its citizenry.’¹

Abstract

The 2010 Constitution of Kenya declares in its preamble that it is a product of “We, the people of Kenya” and at Article 1 that the sovereign power rests on the people of Kenya. These provisions imply that there exists a singular identity among the holders of the Kenyan membership and an equality of status in the partaking of the benefits and burdens that accrue to that membership. This understanding resonates well with the very idea of citizenship, which envisages a universality or singularity of identity and equality of status among the citizenship holders within a given state. The question that arises is whether the theoretical idea of citizenship, which is also reflected in the aspiration of the 2010 Constitution, is, indeed, a reality in the Kenyan context or it is merely an illusion. This paper attempts to address this question by critically examining the citizenship framework operationalised under the 2010 Constitution.

* LLB(Nairobi); LLM(Pretoria); LLD(Rhodes); Advocate.

¹ *Afroyim v. Rusk* (1967) US Supreme Court.

1.0. Introduction

Citizenship, which is sometimes used interchangeably with nationality,² is a term used to connote membership to a political community, the state. This membership is characterised by a contractual relationship between the individual and the state, in which the two are bound together by reciprocal rights and obligations.³ This understanding of citizenship as coterminous with the state has withstood criticism from those who argue for recognition of other communities, other than the state, as venues for elaborating citizenship.⁴ The understanding is supported by international law, which recognises states as the entities with the sovereign power to set rules for acquisition, loss and change of citizenship.⁵

The reciprocal contractual relationship between individuals and the state, that forms the content of citizenship, is usually traced to the formation of the initial civilised state. While the social contract theory is not without criticism,⁶ it remains a widely accepted explanation on the formation of the civilised state.⁷ According to the theory, the state was formed by natural men out of the need to escape from the original state of nature, in which life is described as being “solitary, poor, nasty, short and brutish”.⁸ Life is uncertain and insecure in the state of nature because men are forced to compete for limited resources in an

² Both terms identify the legal status of an individual in terms of state membership. But citizenship is largely confined to the domestic dimension, while nationality refers to the international legal dimension in the context of an interstate system. See Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. See also International Court of Justice, *Nottebohm Case (Liechtenstein v. Guatemala)* ICJ Report 1955. For further discussion, see Sassen S “The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics” 2(1) *Globalizations* (2005) 79 at 81-83.

³ Heywood A *Political Ideas and Concepts: An Introduction* New York, Saint Martin’s Press, 1994, 155.

⁴ But see Soysal YN *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994) (discussing “transnational citizenship”, which he describes as a distinct reality superseding the narrow national scope in terms not only of belonging but also of rights and obligations). See also Stewart F “Citizens of Planet Earth”, in Andrews G *Citizenship* (1991) 65-75 (seeking to validate the subnational or sub-state level as an arena of enacting citizenship, which he terms “democratic citizenship” defined by a “common membership of a shared and imminent community”).

⁵ See, for example, Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

⁶ For criticism, see, for example, Pateman C *The problem of political obligation: A critical analysis of liberal theory* New York, John Wiley 1979.

⁷ For a historical account of social contract theory see Ritchie DG “Contribution to the History of the Social Contract Theory” in Ritchie DG (ed) *Darwin and Hegel: and Other Philosophical Essays* London, Swan Sonnenschein, 1893, 196.

⁸ Hobbes T *Leviathan* Indianapolis, (E Curley Ed) Hackett, 1994, 100.

environment full of distrust and lacking in an externally enforceable rule of engagement.⁹

It is this unpredictability of life in the state of nature that motivates natural men to make deals with one another and create a civilised state governed by enforceable common law.¹⁰ In this new civilised state, natural men “collectively and reciprocally” agree to waive the rights they had against one another in the state of nature (the right to self-preservation and the right to punish);¹¹ and to endow some one person or assembly of persons (called the Sovereign/Government) with the authority and power to guarantee the waived rights and to ensure that the waiver in the first contract is not breached (is enforced).¹² In this way, society becomes possible because, whereas in the state of nature there was no authority to control the actions of individuals, now there is a conventionally created Sovereign that can overawe men to cooperate.¹³ The contractual relationship between the individuals and their Sovereign (the body endowed with the authority of the state, also known as the government) in the form of reciprocal rights and obligations is what forms the core of the concept of citizenship.

It is to be noted, however, that not all individuals can relate with the Sovereign within the framework of citizenship. Only those individuals who have gained the status of citizens have this privilege. There is, therefore, an objective dimension of citizenship, which assigns citizenship status to individuals who qualify within a

⁹ Even though, as John Locke points out, nature has provided enough for everybody and despite the fact that natural man is controlled in his actions by natural morality discoverable to human reason, given that this morality is not externally enforced, the self-interest of man can and do often take over thereby creating a state of anxiety in the State of Nature. For a fuller reading of Locke’s argument, see Pogge T *World Poverty and Human Rights* Cambridge, Polity Press, 2008, chap 4. See also Hobbes T *Leviathan* (1994) (characterizing the natural condition of humankind as a mutually unprofitable state of war of every person against every other person).

¹⁰ But see generally Riley P *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* Princeton, Princeton University Press, 1982, (arguing that the bedrock of social contract is voluntary consent and not on any other basis such as necessity, custom, convenience, theocracy, divine right, the natural superiority of one’s betters, or psychological compulsion).

¹¹ Hobbes defines contract as “[t]he mutual transferring of Right”. Hobbes T *Leviathan* (1994) 68.

¹² See Hobbes T *Leviathan* (1994) 89 (“[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants”). For criticism of Hobbes, see Pateman C *The problem of political obligation: A critical analysis of liberal theory* (1979) 53 (arguing that for Hobbes the “bonds of civil life rest on the sword, not on the individual’s social capacities”).

¹³ See Hobbes T *Leviathan* (1994) 82 (noting that the motive for a contract, a mutual transference of rights to a sovereign, is “the security of man’s person, in his life and in the means of so preserving his life as not to be weary of it”).

given state. This objective dimension focuses on the legal bond that an individual has with a state and which entitles the state's sovereign to espouse claims on behalf of that individual and to assign benefits and duties to that individual. This dimension of citizenship is also sometimes referred to as formal or *de jure* citizenship. It not only assigns formal status to individuals but also legitimises the belonging/identity of citizens within a given state.

The objective citizenship, though important, is, however, on its own, inadequate in prescribing full citizenship. There is also a subjective dimension of citizenship, which assures a sense of loyalty and belonging, and which also needs to be fulfilled for full citizenship to be realised. This is because, as Heywood rightly notes, “members of groups that feel alienated from their state, perhaps because of social disadvantage or racial discrimination, cannot properly be thought of as ‘full citizens’, even though they may enjoy a range of formal entitlements”.¹⁴ This subjective dimension of citizenship is also sometimes referred to as empirical or *de facto* citizenship. It is characterised by inclusivity of all citizens in the partaking of the benefits and duties of citizenship.

The interaction between *de jure* and *de facto* citizenship is thus crucial. While the former allocates citizenship status to persons who have the requisite bond with the state, the latter imbues the legal citizen with the acceptance/belonging necessary for accessing the benefits and duties of citizenship. Thus, in analysing the citizenship framework of a given state it is imperative to consider both the *de jure* and *de facto* aspects in order to appreciate the entirety of the relationship between the citizens and the Sovereign implied in the idea of citizenship. Bearing this in mind, this paper explores the legal bonds, benefits and burdens of citizenship in Kenya with the aim of determining whether the citizenship framework meets the aspiration of universality in identity and equality of status for citizenship holders in Kenya.

To facilitate the discussion, the paper is divided into five sections. After this introductory section, the second section will delve into a discussion of the bonds that entitle one to a *de jure* citizenship status in Kenya. The third and fourth sections will analyse the *de facto* benefits and burdens that accrue to citizenship holders, and whether they apply equally to all citizens of Kenya. The fifth section will conclude on whether the current citizenship framework ensures universality in identity and equality of status to all Kenyan citizens. It is to be noted that while the

¹⁴ Heywood A Political Ideas and Concepts: An Introduction (1994) 156.

analysis will mainly focus on the Kenyan law, where necessary effort will be made to make a comparison with the approach in international law.

2.0. The Bonds Entitling *de jure* Citizenship in Kenya

Fundamentally, *de jure* citizenship defines those who are, and who are not, citizens of a given state. Because of the contractual nature of the relationship espoused by citizenship, only those individuals who are privy/parties to the social contract (or those who have subsequently been accepted into the contract) can claim the benefits or be required to perform the obligations of citizenship. Indeed, in its historical context, from the ancient Greeks and Romans, via the Enlightenment, and the American and French Revolutions, citizenship has always been about exclusion and inclusion. For example, with regard to ancient Greece, one commentator has noted:

To be a citizen meant one was an Athenian At the core of Athenian society, one's oikos, (family), determined membership. "A foreigner or non-Athenian could only become an Athenian by being accepted and entering into that descent group--into the oikos, phratry and deme, and tribe."¹⁵

The rigid exclusion in ancient Greek was relaxed in the ancient Rome as citizenship was expanded to include members of the conquered territories. But even in this expanded scope, individuals were still expected to meet certain conditions, including membership to the Roman polity or conquered states, for them to be included in the Roman citizenry. As Sherwin-White notes, "the Romans conferred Roman citizenship as a reward on towns which had supported them in their numerous military battles with rival powers".¹⁶ Thus, despite the expanded membership of the Roman citizenry, in general, citizenship in ancient Greece and Rome (as well as in medieval cities that practiced polis citizenship) was exclusive to some and those who had it, had a much higher status than non-citizens.

This exclusivity of citizenship is still being practiced today. Indeed, international law does recognise states' sovereign power to set rules for acquisition of citizenship status within their territories. The majority of these rules require that an individual must have certain bonds with the concerned state for them to

¹⁵ Lailas E Dewey's *Theory of Citizenship and Community in the Developing American Democracy as seen through the Philosophy of Pragmatism as a Public Administration Model for the Citizen's Role in Public Governance* (1998) at 83.

¹⁶ See Sherwin-White AN *The Roman Citizenship* (1939) 170.

be bestowed with citizenship status.¹⁷ This section discusses the framework for assigning *de jure* citizenship in Kenya in light of the international law entreaty on citizenship allocation.

2.1. *The International Law Entreaty on de jure Citizenship Allocation*

Under international law, the term nationality is used interchangeably for citizenship.¹⁸ Traditionally, international law has regarded the grant of nationality as the exclusive preserve of states, a position affirmed by the Permanent Court of International Justice in the 1923 case of *Tunis and Morocco Nationality Decrees*.¹⁹ However, with time, international human rights law has increasingly asserted limits to the state discretion in this area in order to avoid the danger of statelessness. Multiple legal instruments have been adopted at the international and regional levels to provide for the right to nationality and to place a duty on states to rationalise their citizenship laws to prevent cases of statelessness.

A stateless person is understood as one “who is not considered as a national by any State under the operation of its law”.²⁰ Because they lack nationality, stateless persons are denied formal identity and can find themselves excluded from society. As one Nubian elder in Kenya has aptly noted, “[statelessness] is the worst possible thing to happen to a human being. It means you are a non-entity, you don’t exist, you’re not provided for, you count for nothing.”²¹ Thus, to minimize the risk of statelessness, the discretion of states in relation to their nationality practices, has been considerably restricted by developments in international human rights law.

The formal protection against statelessness can be traced back to the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality

¹⁷ For an overview, see generally Weiss P *Nationality and Statelessness in International Law* (1979).

¹⁸ Both terms identify the legal status of an individual in terms of state membership. But citizenship is largely confined to the domestic dimension, while nationality refers to the international legal dimension in the context of an interstate system. See Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. See also International Court of Justice, *Nottebohm Case (Liechtenstein v. Guatemala)* ICJ Report 1955. For further discussion, see Sassen S “The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics” 2(1) *Globalizations* (2005) 79 at 81-83.

¹⁹ *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco (France v UK and Ireland)* PCIJ Ser.B., No. 4 (1923).

²⁰ See article 1(1), Convention Relating to the Status of Stateless Persons, 6 June 1960, 360 U.N.T.S. 117 (entered into force 6 June 1960).

²¹ Remarks by a Nubian elder in Kenya quoted in UNHCR, ‘Media Backgrounder: Millions Are Stateless, Living in Legal Limbo’, 2011, <http://www.unhcr.org/4e54ec469.html>.

Laws.²² In its preamble, the Convention noted that it was in the interest of the international community to ensure that all countries recognised that “every person should have a nationality.”²³ Consequently, while acknowledging the sovereignty of each state to determine its own citizenship laws, the Convention notes that other states will recognise these laws only insofar as they are consistent with international conventions and customs:

It is for each State to determine under its own laws who are its nationals. this law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.²⁴

Unfortunately the Hague Convention never came into force as it failed to garner the requisite number of ratifications. Still, its vision to protect individuals against statelessness never died and was finally formalised in 1948 with the promulgation of the Universal Declaration of Human Rights (‘UDHR’).²⁵ The UDHR declares that every person shall be entitled to a ‘nationality’. It further prohibits states from arbitrarily depriving any person of his or her nationality or denying such person the right to ‘change’ his or her nationality.²⁶

Subsequent to the UDHR, other international and regional treaties have enacted provisions that seek to promote the realization of the entitlement to nationality. The International Covenant on Civil and Political Rights (ICCPR), for example, recognises the right of “[e]very child ... to acquire a nationality.”²⁷ Similarly, the Convention of the Rights of the Child (CRC) guarantees the right of every child to acquire a nationality and places a duty on the states to respect this right.²⁸ Likewise, the Convention on the rights of Persons with Disabilities (‘CRPD’) calls on States parties to recognize the rights of persons with disabilities

²² Hague Convention on Certain Questions relating to the Conflict of nationality laws, 1930 (entered into force 1937) (Hague Convention).

²³ Preamble, Hague Convention.

²⁴ Article 1, Hague convention.

²⁵ Universal Declaration of Human Rights (‘UDHR’), UNGA Res 217 A, GAOR, 3d Sess., 183 plen. Mtg., art 22 UN Doc. A/810 (1948).

²⁶ Article 15, Universal Declaration of Human Rights.

²⁷ Article 24, International Covenant on Civil and Political Rights (‘every child has the right to a nationality’).

²⁸ Article 7, Convention of the Rights of the Child (children have ‘the right to acquire a nationality. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless’).

to a nationality.²⁹ On their part, the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination against Women (CEDAW) prohibit state members from denying the right to nationality on discriminatory grounds.³⁰ At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) also guarantees every child the right to nationality.³¹

These instruments have identified the right to a nationality to encompass change and retention of nationality as well as its acquisition.³² The human rights instruments do not, however, expressly place a corresponding obligation on a state to grant nationality or a right to receive a nationality of one's choice.³³ Nevertheless, certain obligations to bestow or restore nationality have arisen as a consequence of developments in international human rights law. For example, "own country" under Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right not to "be arbitrarily deprived of the right to enter his own country", has been interpreted by UN Human Rights Committee (HRC) to extend beyond nationals to other people with 'special ties', including long-term residents who are stateless and have been arbitrarily deprived of the right to acquire that state's nationality.³⁴ Similarly, Article 24 of the ICCPR, which guarantees the right of every child to acquire a nationality has been interpreted by the Human Rights Committee to mean that:

States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.³⁵

²⁹ Article 18, Convention on the rights of Persons with Disabilities ("States parties shall recognize the rights of persons with disabilities to ... a nationality ...").

³⁰ Article 9, Convention on the Elimination of Discrimination against Women (CEDAW) ('granting women equal rights with men to acquire, change or retain nationality').

³¹ See article 6, African Charter on the Rights and Welfare of the Child ('every child has the right to acquire a nationality').

³² For example, Article 9, Convention on the Elimination of All Forms of Discrimination Against Women. See also UN Human Rights Council Resolution, A/HRC/20/L.9, 28 June 2012.

³³ See International Law Commission, Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries), 3 April 1999, commentary to Article 1.

³⁴ See Human Rights Committee, General Comment No. 27 (Article 12, Freedom of Movement), 1999, CCPR/C/21/Rev.1/Add.9.

³⁵ CCPR General Comment no. 17: rights of the child (Article 24), 07 April 1989, para 8.

These human rights instruments thus limit state discretion over citizenship, by requiring measures to reduce statelessness, including the grant of nationality to children who would otherwise be stateless, and by prohibiting discrimination in granting citizenship and arbitrary deprivation of citizenship. These principles were confirmed by the Inter-American Court of Human Rights in the 2005 case of *Dilcia Yean and Violeta Bosico v. Dominican Republic* in the following words:

Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states' discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion ... by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness.³⁶

The jurisprudence of the African Commission on Human Rights also supports the qualified discretion of states in determining nationality despite the fact that the African Charter on Human and Peoples Rights (African Charter) fails to expressly provide for the right to nationality. For example, in the *Modise v. Botswana* case, the Commission held that Article 5, which guarantees individuals "the right to the respect of the dignity inherent in a human being and to the recognition of his legal status", applied to instances where a state attempts to denationalise individuals and render them stateless.³⁷ Similarly, in *Amnesty International v. Zambia*, the Commission held that forcing individuals to live as stateless persons under degrading circumstances was a violation of the African Charter, particularly the right to dignity under Article 5.³⁸ The Commission has also held in *Legal Resources Foundation v. Zambia* that a provision in the laws aimed at excluding a category of citizens from political participation was discriminatory. In the case at hand an amendment to the Zambian law, which required that a presidential candidate must prove that both parents were Zambians from birth (an amendment apparently aimed at preventing former president Kenneth Kaunda from running for president again), was found to be discriminatory and an affront to the right to political participation.³⁹

³⁶ *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Inter-American Court of human rights Case no. 12.189, 8 September 2005.

³⁷ Communication 97/93, *Modise v. Botswana* (2000) African Human Rights Law Reports (AhrLr) 30 (AChPr 2000), paragraph 91.

³⁸ Communication no. 212/98, *Amnesty International v. Zambia*, (2000) AhrLr 325 (AChPr 1999), paragraph 50.

³⁹ Communication 211/98, *Legal Resources Foundation v. Zambia* (2001) AhrLr 84 (AChPr 2001).

In addition to these human rights entreaties, the international community has also passed specific instruments to deal with the plight facing stateless persons, in particular the 1954 Stateless Persons Convention and the 1961 Convention on the Reduction of Statelessness.⁴⁰ Regional treaties, including the European Convention on Nationality⁴¹ and Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession,⁴² have also been developed to reinforce protection at the regional level. Collectively, these legal instruments seek to protect stateless persons, prevent new cases from arising and reduce their global population. The 1961 Convention on the Reduction of Statelessness, for example, makes it a duty of states to prevent statelessness in nationality laws and practices. Article 1 mandates that “A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless” while Article 8(1) directs that “A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.”

Whilst Kenya is not party to the 1954 Stateless Persons Convention and the 1961 Convention on the Reduction of Statelessness, it is party to the ACRWC,⁴³ CRC,⁴⁴ ICCPR,⁴⁵ CEDAW⁴⁶ and the African Charter.⁴⁷ The ratification of these treaties is an unequivocal commitment by the State of Kenya to promote and protect fundamental international human rights of its nationals and to rationalise its procedural aspects, particularly those surrounding definition of nationals and acquisition of nationality with international standards.

⁴⁰ Convention on the Reduction of Statelessness, 15 March 2006, C.E.T.S. 200.

⁴¹ European Convention on Nationality, 6 November 1997, CETS No. 166 (entered into force 1 March 2000).

⁴² Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975).

⁴³ Ratified 25 July 2000. See <http://www1.umn.edu/humanrts/instree/afchildratifications.html> on 26 October 2009.

⁴⁴ Ratified 30 July 1990. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en on 25 October 2009.

⁴⁵ Acceded 1 May 1972. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en on 25/10/2009.

⁴⁶ Acceded 9 March 1984. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en on 25 October 2009.

⁴⁷ Ratified 23 January 1992. See <http://www1.umn.edu/humanrts/instree/ratz1afchr.htm> on 26 October 2009.

2.2. *The Bonds Entitling Acquisition of de jure Citizenship under International Law*

As noted above, *de jure* citizenship in law has the legal bond between the state and the individual at the core of its meaning. In this regard, international law, while allowing states to decide the construction of their populations through their nationality and immigration laws, however, requires that there exist a “genuine connection” between a person and the State for the bestowal of citizenship. As noted by the International Court of Justice in the 1955 *Nottebohm* case:

According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.⁴⁸

In general, there are four main bonds or connections recognized under the laws of nations that entitle a person to the membership of a given state: (1) the bond of birth on a state’s territory or the territorial bond (*ius soli*); (2) the bond of ancestry (descent from a citizen parent(s)) or the biological bond (*ius sanguinis*); (3) the bond of residency or the transformative bond; and (4) the bond of marriage. Having one or a mixture of these bonds with a state will assure nationality, depending on the legislation of the state in question. As one author has concluded in his examination of citizenship laws of a number of countries:

The laws governing citizenship in most African countries—as in most countries in the world—reflect a compromise between two basic concepts: *jus soli* (literally, law or right of the soil), whereby an individual obtains citizenship because he or she was born in a particular country; and *jus sanguinis* (law or right of blood), where citizenship is based on descent from parents who themselves are or were citizens. In addition to these two principles based on birth, two other factors are influential in determining citizenship for adults: marital status, in that marriage to a citizen of another country can lead to the acquisition of the spouse’s citizenship, and residence within a country’s borders.⁴⁹

⁴⁸ *Liechtenstein v. Guatemala* ICJ Reports, 1955, 23. Liechtenstein sought a ruling that Guatemala should recognise Friedrich Nottebohm as a Liechtenstein national. See also Batchelor CA, “Statelessness and the Problem of Resolving Nationality Status,” 10 (1)(2) *International Journal of Refugee Law* (1998), 159 -160.

⁴⁹ Manby B, *Citizenship Law in Africa A Comparative Study* (2010) at 2 <http://www.unhcr.org/4cbc60ce6.pdf> on 09 October 2015.

The bond of birth in the territory of the state (*ius soli*) links the individual to the territory in which they are born. The *ius soli* bond can take various forms, depending on the law of the state under consideration. In its pure form, children born in the State concerned become automatically citizens *at* birth. This form is immediate and non-discretionary. In its prospective form, children born in the State concerned become citizens automatically or by declaration *after* birth. In its retrospective form, children born in the State concerned acquire citizenship at birth on the basis of prior parental residence in the country. Finally, in its double form, the acquisition of citizenship at birth is made conditional on parents' birth in the country.⁵⁰ However, despite these various forms, it is to be noted that, unlike the bond of ancestry, the bond of birth is not dependent on the citizenship status of the parent. Thus, even in its most restrictive double form, the only requirement is that the parent should have been born in the state without necessarily requiring that the parent be a citizen of the concerned state.

The bond of ancestry (*ius sanguinis*) assigns citizenship at birth on the basis of blood relation to or inheritance from a citizen parent. In most cases, the birth need not take place in the territory of the concerned state provided that one of the parents is a citizen of the state. Also, in most cases, the parents need not be a citizen by birth for them to transmit citizenship to their children; any form of citizenship would suffice. This bond is usually traced to ancient Greece and Rome, in which children could acquire citizenship at birth only if one of their parents was a citizen.⁵¹

The bond of residency creates a link beyond birth or subsequent to birth that allows a person to claim citizenship of a state. This bond allows a person born a foreigner to apply to become a citizen of the country in which he/she is not born. The claim could arise from residence in the State for a specified period of time, or the establishment of a permanent domicile in the State. The process of acquiring citizenship under this head is described as naturalisation. This process, as noted by the Inter-American Court of Human Rights in its Advisory Opinion on *Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, is based on a "voluntary act aimed at establishing a relationship with any given

⁵⁰ See Waldrauch H, "Methodology for comparing acquisition and loss of nationality," in Bauböck R, Ersbøll E, Groenendijk K and Waldrauch H (ed) *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries, Vol.1: Comparative Analyses* Amsterdam: Amsterdam University Press, 2006.

⁵¹ Spiro PJ, "Interrogating birthright citizenship," in Sarat A (ed) *Who belongs?: immigration, citizenship, and the constitution of legality* Bingley: Emerald, 2013, 31.

political society, its culture, its way of life and its values”.⁵² The bond thus allows foreigners who have been granted entry into a State to apply for, and ultimately attain, that State’s nationality upon fulfilling the prescribed conditions.

The bond of marriage recognises the special nature of the marriage institution, which brings together individuals from different backgrounds to form a single unit called the family. Because of the importance of the family unit in the structure of the state, the community of nations has come to accept the principle of dependent nationality, or the unity of nationality of spouses.⁵³ The initial application of this principle was to ensure that a woman who married a foreigner automatically acquired the nationality of her husband upon marriage at the expense of her own nationality. This was justified on the grounds: firstly, that the family, in most cases, was built in the husband’s abode; secondly, that all members of a family should have the same nationality to ensure unified allegiance; and, thirdly, that important decisions affecting the family should be made by the husband. This patriarchal approach has with time changed in most jurisdictions to allow the wife to also transmit citizenship to the husband in instances where the family is located at the wife’s nation-state. This change has been influenced by the international human rights consensus on women’s rights, which have introduced gender neutrality in many countries. The need for unified allegiance to one state, however, still remains as a justification for acquisition of citizenship under this heading.

The bond of birth and of descent usually assigns automatic citizenship to individuals from birth while the bond of marriage and of habitual residence requires an administrative process after birth such as naturalisation or registration before they can assign citizenship status.

2.3. De jure Citizenship Bonds in Kenya

In Kenya, the legal framework guiding the acquisition of *de jure* citizenship is to be found in the 2010 Constitution and the 2011 Kenyan Citizenship and Immigration Act.⁵⁴ The Kenyan Citizenship and Immigration Act was enacted with a view to synchronising the immigration laws that were in operation before the 2010

⁵² Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-American Court of Human Rights, Advisory Opinion, OC-4/84 of 19 January 1984. Inter-American Court of Human Rights, Series A, No. 4 (1984), para. 35.

⁵³ United Nations, Convention on the Nationality of Married Women: Historical Background and Commentary (United Nations doc. E/CN.6/389), Sales No. 62.IV.3, p. 2.

⁵⁴ Kenya Citizenship and Immigration Act No.12 of 2011.

Constitution with the 2010 Constitution. These statutes (The Kenya Citizenship Act, The Immigration Act and The Aliens Restriction Act) were effectively repealed under by the Kenya Citizenship and Immigration Act.⁵⁵ However, both the new Constitution and the Kenyan Citizenship and Immigration Act still recognise legal status of citizenship acquired under the repealed 1963 Constitutional order.⁵⁶ It is imperative therefore to analyse the framework in the 1963 and 2010 Constitution to have a complete understanding of the bonds to the state that entitle one to acquire *de jure* citizenship status in Kenya.

An examination of these frameworks reveals four bonds by which a person can obtain Kenyan citizenship, that is, the bond of birth in the territory of Kenya, the bond of descent from a Kenyan citizen, the bond of marriage to a Kenyan citizen, and the bond of habitual residence. The bond of birth and of descent assigns citizenship to individuals from birth while the bond of marriage and of habitual residence assigns citizenship after birth following prescribed administrative processes. The requirements of the law with regard to these bonds are discussed in detail below.

2.3.1. The Bond of Birth in the Territory of Kenya

Citizen by birth in the territory of Kenya apply at two levels: (1) to those who were born in Kenya prior to the date Kenya became a republic on 12 December, 1963; and (2) to those who were born in Kenya on or after 12 December, 1963. Those who were born in Kenya before Kenya became a republic are considered automatic citizens by birth while those who were born in Kenya after 12 December, 1963 have to issue from a Kenyan citizen for them to acquire automatic citizenship at birth. This means that citizen by birth in the territory of Kenya, in strict sense, is the preserve of those born in Kenya before Kenya emerged as a new state. As the repealed 1963 Constitution provided, “[e]very person who, having been born in Kenya, is on 11th December, 1963 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Kenya on 12th December, 1963”.⁵⁷

These persons represent those who the social contract theorists call the “original” citizens, that is, those members of the population existing at the time of

⁵⁵ Section 65, Kenya Citizenship and Immigration Act (2011).

⁵⁶ Article 13(1), Constitution of Kenya (2010) (“Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date”).

⁵⁷ Article 87, Constitution of Kenya (1963) (repealed).

the formation of the new state. On 12 December, 1963 Kenya gained the status of a state under international law. Before that it was merely a colony, an extension of the territory of the British Empire. Thus, those members of the population who had been born in Kenya by the time Kenya was gaining its republic status became automatic citizens of Kenya by birth. The only condition required was that at least one of the parents should have been born in Kenya.⁵⁸ In this regard, Kenya recognised the double form of *ius soli* bond where both the candidate for citizenship by birth and the parents (or one of the parents) are born in the territory of the country. However, in addition to the double form, Kenya also recognised the prospective form of *ius soli* as those candidates who were born in Kenya to parents born outside Kenya were given the opportunity to apply for registration as citizens by birth.⁵⁹ This variegated approach to citizenship acquisition at the time of Kenya becoming a republic was explained in the case of *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 Others*⁶⁰ in the following words:

At the time Kenya attained independence, certain category of persons who qualified to acquire Kenyan citizenship, and having the option of retaining British citizenship, were being subtly encouraged to decide whether they desired to be citizens of the newly independent Kenya or be subject of the United Kingdom and colonies.⁶¹

2.3.2 The Bond of Ancestry (Descent from Parents of Kenyan Citizenry)

Unlike the “original” citizens, those born after Kenya became a republic, though born in the territory of Kenya, could not automatically claim citizenship by birth under the repealed 1963 Constitution. They had to prove their descent from a Kenyan citizen to be granted automatic citizenship. This position in the repealed 1963 constitution has been re-enacted under the 2010 Constitution.⁶² In this sense, these post-republic generations of citizens are more accurately identified as “citizens at birth by descent” and not as “citizens by birth” as they are described under the 2010 Constitution. This is because, as opposed to the double form of *ius soli*, which merely requires that at least one of the parents to have been born in Kenya, for post-republic generations born in Kenya, there is

⁵⁸ Article 87(1), Constitution of Kenya (1963) (repealed).

⁵⁹ Article 88(1), Constitution of Kenya (1963) (repealed).

⁶⁰ *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 Others* (2010) eKLR.

⁶¹ *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 Others* (2010) eKLR.

⁶² Articles 13(2) & 14(1), Constitution of Kenya (2010).

a mandatory requirement that at least one of the parents be a Kenyan *citizen*, a condition characteristic of citizenship by descent.

The bond of descent assigns automatic citizenship at birth to children born on or after Kenya gained its republic status on 12 December 1963 to citizens of Kenya, whether the birth takes place within the territory of Kenya or outside Kenya. According to the repealed 1963 Constitution, every person born in Kenya on or after 12 December 1963 became a citizen of Kenya if at the date of his birth one of his parents was a citizen of Kenya.⁶³ Additional requirements existed for those born to foreign fathers. In the first place, the person had to demonstrate that his or her father did not ‘possess immunity from suit of legal process as is accorded to the envoy of a foreign state accredit[ed] to Kenya’.⁶⁴ Additionally, the applicant had to show that his or her father was not a citizen of a country which was at war with Kenya.⁶⁵

As regards the persons born out of the country after independence, the repealed 1963 Constitution declared that only Kenyan fathers could transmit citizenship under this head. According to article 90, a person born outside Kenya on or after 12th December 1963 would become a citizen of Kenya at the date of his birth if at that date his father was a citizen of Kenya.⁶⁶ Similarly, a person born overseas before 12 December 1963 would also become a citizen, provided the person’s fathers became, or would but for his death have become a citizen of Kenya at independence.⁶⁷ This meant that children born to Kenyan mothers overseas were ineligible for Kenyan citizenship at birth by descent.

This anomalous discrimination under the repealed 1963 Constitution has been addressed under the 2010 Constitution. It now matters not the gender of the parent with the Kenyan citizenship, either a Kenyan mother or Kenyan father can transmit citizenship to their child born within or outside Kenya.⁶⁸ This new rule has been made applicable not only to persons born after the new Constitution came into operation but also to persons born before the effective date of the new

⁶³ Section 89, Constitution of Kenya (1963) (repealed) provides that: ‘Every person born in Kenya after 11th December, 1963 shall become a citizen of Kenya if at the date of his birth one of his parents is a citizen of Kenya.’

⁶⁴ Article 89, Constitution of Kenya (1963).

⁶⁵ Article 89, Constitution of Kenya (1963).

⁶⁶ Article 90, Constitution of Kenya (1963).

⁶⁷ Article 87(2), Constitution of Kenya (1963)

⁶⁸ Article 14(1), Constitution of Kenya (2010) (“A person is a citizen by birth if on the day of the person’s birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen”).

Constitution.⁶⁹ It is to be noted, however, that pursuant to Article 14(3) of the Constitution, which empowers parliament to limit the general application of citizenship at birth by descent to descendants born outside Kenya,⁷⁰ parliament enacted the Kenya Citizenship and Immigration Act, which provides that only mothers or fathers who are Kenyan citizens by birth (or by descent) can transmit citizenship to their children born outside Kenya.⁷¹

It is also noteworthy that under the 2010 Constitution, children below the age of 8 years whose nationality is unknown and who are found with the territory of Kenya are presumed to be citizens at birth by descent.⁷² This is in line with international law which require states to amend its 'Constitutional legislation' to give effect to the principle that a child shall acquire the nationality of the state in which he or she is born, if at the time of birth the child is stateless.⁷³

2.3.3 The Bond of Marriage

Foreigners married to Kenyans could register for citizenship under the repealed 1963 Constitution. However, the Constitution placed limits on this mode of gaining citizenship by providing that only women who were married to Kenyan nationals are eligible to apply,⁷⁴ meaning that foreign men married to Kenyan women could not apply for citizenship on this ground.

This discrimination was addressed in the 2010 Constitution. Unlike the repealed 1963 Constitution which only allowed men to pass citizenship to their foreign spouses, under the 2010 Constitution both Kenyan women and men are able to pass citizenship to their foreign spouses. It provides that a person who

⁶⁹ Article 14(2), Constitution of Kenya (2010) ("Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen").

⁷⁰ Article 14(3), Constitution of Kenya (2010) ("Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendants of Kenyan citizens who are born outside Kenya").

⁷¹ Section 7, Kenya Citizenship and Immigration Act (2011) ("A person born outside Kenya shall be a citizen by birth if on the date of birth that person's mother or father was or is a citizen by birth"). Given the use of the term citizen by birth in the Constitution, this term would cover the original citizens by birth and citizen at birth by descent.

⁷² Article 14(4), Constitution of Kenya (2010) read together with Section 9, Kenya Citizenship and Immigration Act (2011).

⁷³ See, for example, Article 6(4) of the African Charter on the Rights of Women and Children, which requires Kenyan to amend its 'Constitutional legislation' to give effect to the principle that a child shall acquire the nationality of the state in which he or she is born, if at the time of birth the child is stateless.

⁷⁴ Article 91, Constitution of Kenya (1963).

has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.⁷⁵ The **Kenya Citizenship and Immigration Act provides for the conditions to be met to be registered as Kenyan citizen out of marriage as: (1) the person must have been married to a Kenyan citizen for at least seven years; (2) the marriage must have been solemnized under a system of law recognised in Kenya; (3) the applicant must not have been declared a prohibited immigrant under any law; (4) the applicant must not have been convicted of an offence and sentenced to a term of three years or longer; (5) the marriage should not have been entered into for purpose of acquiring a status or privilege in relation to immigration or citizenship; and (6) the marriage must be subsisting at the time of the application.**⁷⁶ In interpreting this section, the Constitutional Court noted in *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 others*,⁷⁷ that it requires no more than a literal interpretation, that is, that one can only be granted citizenship on account of marriage to a Kenyan Citizen if he/she meets the conditions inherent in the said section.⁷⁸

It is also interesting to note that under the Constitution citizenship acquired through marriage is not lost upon dissolution of the marriage.⁷⁹ Furthermore, under the Kenya Citizenship and Immigration Act, a widow or widower who was married to a Kenyan citizen and who but for the death of the citizen would have been entitled, after a period of seven years, to be registered out of marriage, shall be deemed to be lawfully present in Kenya for the unexpired portion of the seven years and shall be eligible for registration as a citizen on application in the prescribed manner upon expiry of the seven year period.⁸⁰

⁷⁵ Article 15(1), Constitution of Kenya (2010) (“A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen”).

⁷⁶ Section 11, The Kenya Citizenship and Immigration Act (2011).

⁷⁷ *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 other* [2015] eKLR.

⁷⁸ *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 other* [2015] eKLR.

⁷⁹ Article 13(3), Constitution of Kenya (2010) (“Citizenship is not lost through marriage or the dissolution of marriage”).

⁸⁰ Section 12, The Kenya Citizenship and Immigration Act (2011) (the widower would still be required to meet the conditions set out in s 11 save for condition requiring subsistence of marriage at time of application).

2.3.4 The Bond of Lawful and Habitual Residence

Under the repealed 1963 Constitution, citizenship could be acquired by the bond of lawful and habitual residence. An applicant under this mode had to satisfy the Immigration Minister that he or she: (i) was at least 21 years old; (ii) had been ordinarily and lawfully resident in Kenya for the period of twelve months immediately preceding the lodgement of the application; (iii) has been ordinarily and lawfully resident in Kenya for a period of, or for periods amounting in the aggregate to, not less than four years; (iv) was of good character; (v) had an adequate knowledge of the Swahili language; and (vi) intended, if naturalized as a citizen of Kenya, to continue to reside in the country.⁸¹

These conditions have been incorporated with slight modification under the 2010 Constitutional framework. The Constitution read together with the Kenyan Citizenship and Immigration Act sets out the following conditions to be met by the applicant: (1) must be of majority age; (2) must have been residing in Kenya for not less than seven years under the lawful permit of the relevant authorities; (3) must have resided in Kenya throughout the period of twelve months immediately preceding the date of the application; (4) must have adequate knowledge of the rights and obligations of a Kenyan citizen; (5) must understand and speak Swahili or one local dialect; (6) must understand the nature of the application he is making; (6) must not have been convicted and sentenced for a period of three years or more; (7) must intend to stay in Kenya after registration; (8) must have made or must be capable of making a positive contribution to the development of Kenya; (9) must not be an adjudged bankrupt; and (10) the country in which the applicant is a citizen is not at war with Kenya.⁸²

A child born to non-citizen parents, whose parents or one of the parents eventually acquire citizenship through habitual residence can also apply for citizenship out of habitual residence under the 2010 Constitution. In such cases, the application will be made by the parent or guardian and will be accompanied by: (1) documents conferring Kenyan citizenship to any of the parents; (2) birth certificate; and (3) proof of lawful residence.⁸³ The law does not however set out the duration of lawful residence.

⁸¹ Article 93, Constitution of Kenya (1963).

⁸² Article 15 (2), Constitution of Kenya (2010) and Section 13, Kenya Citizenship and Immigration Act (2011).

⁸³ Section 13(3), Kenya Citizenship and Immigration Act (2011).

With regard to adopted children, the Constitution read together with the Kenyan Citizenship and Immigration Act restricts the registration to children adopted by Kenyan citizens.⁸⁴ The Act also sets out that an application for registration of adopted children must be accompanied by (1) proof of Kenyan citizenship of adopting parent; (2) production of a valid adoption certificate issued in a reciprocating state or other jurisdiction whose orders, decrees are recognized in Kenya; and (3) proof of lawful residence of the child in Kenya.⁸⁵ The law does not, however, expressly set out the duration of residence required.

The new Constitutional framework also allows persons without nationality, the stateless, to apply for registration on the basis of lawful and habitual residence.⁸⁶ Though this avenue is restricted to persons who have resided in Kenya for a continuous period since 12th December, 1963, it does provide such category of persons the opportunity to gain citizenship status.⁸⁷ In addition to being in Kenya for a continuous period since 12th December 1963, the person must also meet the following conditions: a) must have adequate knowledge of Kiswahili or a local dialect; (b) must not have been convicted of an offence and sentenced to imprisonment for a term of three years or longer; (c) must intend upon registration as a citizen to continue to permanently reside in Kenya or to maintain a close and continuing association with Kenya; and (d) must understand the rights and duties of a citizen. The descendants of a registered stateless person or of a stateless person that would have qualified for registration had they been alive can also apply for registration once they attain the age of majority.⁸⁸

Migrants, that is, “those persons who voluntarily migrated into Kenya before the 12th December, 1963, and have been continuously living in Kenya,” are also eligible for registration as citizens under the bond of lawful and habitual residence.⁸⁹ They need to show that they: (a) do not hold a passport or an identification document of any other country; (b) have adequate knowledge of Kiswahili or a local dialect; (c) have not been convicted of an offence and sentenced to imprisonment for a term of three years or longer; (d) intend upon registration as citizen to continue to permanently reside in Kenya or to maintain a close and continuing association with Kenya; and (e) understand the rights and duties of a

⁸⁴ Article 15(3), Constitution of Kenya (2010); Section 14, Kenya Citizenship and Immigration Act (2011)

⁸⁵ Section 14, Kenya Citizenship and Immigration Act (2011).

⁸⁶ Section 15, Kenya Citizenship and Immigration Act (2011).

⁸⁷ Section 15, Kenya Citizenship and Immigration Act (2011).

⁸⁸ Section 17, Kenya Citizenship and Immigration Act (2011).

⁸⁹ Section 16, Kenya Citizenship and Immigration Act (2011).

citizen. The descendants of a registered migrant or of a migrant that would have qualified for registration had they been alive can also apply for registration once they attain the age of majority.⁹⁰

3.0. From *de jure* to *de facto* Citizenship: An Analysis of the Benefits and Burdens of Citizenship in Kenya

Fulfilling the formal requirements established by the law for acquisition of formal (*de jure*) citizenship status entitles every-one who fulfils those requirements to a *de facto* relationship with the state. This relationship is characterised by reciprocal rights and obligations that are not held by non-citizens. Indeed citizenship, as traced from the ancient Greeks and Romans, via the Enlightenment, and the American and French Revolutions, is tied to the emergence of members of a polity with specified benefits and duties. To speak of a *de facto* citizen is thus to speak of individuals with distinct relationships to the state, along with the benefits and obligations these relationships imply.

According to the social contract theory, during the formation of the Nation State, natural men “collectively and reciprocally” agree to, first, waive the rights they had against one another in the State of Nature (the right to self-preservation and the right to punish);⁹¹ and to, second, endow some one person or assembly of persons with the authority and power to ensure that the waiver in the first contract is not breached (is enforced).⁹² To ensure that the sovereign state is able to function, the individuals voluntarily surrender to the sovereign person or assembly of persons the authority necessary to enforce peaceful co-existence among the individuals.⁹³

⁹⁰ Section 17, Kenya Citizenship and Immigration Act (2011).

⁹¹ Two of the rights forfeited upon entering society are the right to do whatever is required for self-preservation and the right to punish violators of crimes committed in the state of nature. See Hobbes T *Leviathan* (1994) 158-59; see also Burke E “Reflections on the Revolution in France” in Burke E (ed) *The work of the right honourable Edmund Burke* (1871) 309 (a fundamental rule of civilized society is “that no man should be judge in his own cause”). But see Montesquieu’s story of the Troglodytes to the import that savage men make no compacts or agreements and do not attach importance to promises. Montesquieu CLB “The Parable of the Troglodytes” in Montesquieu CLB *Persian Letters* (1721).

⁹² See Hobbes *Leviathan* (1994) 89 (“[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants”). For criticism of Hobbes, see Pateman C *The problem of political obligation: A critical analysis of liberal theory* (1979) 53 (arguing that for Hobbes the “bonds of civil life rest on the sword, not on the individual’s social capacities”).

⁹³ Hobbes formulates the covenant by which the sovereign is instituted in these words: “I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.” Hobbes T *Leviathan* (1994) 87.

These include the power to make laws, judge and mete out punishment for breaches of the peaceful co-existence.⁹⁴ The individuals also agree to contribute resources and to give the sovereign control over communal resources to protect and use in the execution of its functions.⁹⁵ In addition, the individuals agree to abide by the decisions of the sovereign and where necessary to assist in effecting the same.⁹⁶ On its part, the sovereign must ensure that it protects and secures the individual members of the society and their individual and common interests in an impartial and just manner and that the resources entrusted in its care is used for the common good.⁹⁷ The individual interests requiring protection encompass those natural rights that remain with individuals at the formation of the sovereign state and that allows them to pursue their natural self-interests - interests that do not breach the common interest – without the interference from the sovereign or other members of the community.⁹⁸ The Constitutional Court has accepted in *Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others* the mutual rights and responsibilities espoused by the social contract as a guiding pillar of the democratic society that is Kenya:

Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with Rousseau's version of the Social Contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'être* of the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Protection of the

⁹⁴ According to Locke, men gain three things in the civil society which they lacked in the State of Nature: laws, judges to adjudicate laws, and the executive power necessary to enforce these laws. Locke J *Second treatise of government* (1980) para 97.

⁹⁵ For Locke, protection of property, including their property in their own bodies, is the primary motivation of the social contract. Locke J *Second treatise of government* (1980), para 124.

⁹⁶ Although Hobbes insists that 'all men equally, are by Nature Free', yet he treats authorization as limiting that freedom. Hobbes T *Leviathan* (1994) 111. He distinguishes two ways in which such a limitation might arise, either "from the expresse words, I Authorise all his Actions 'by which the subject places himself under the sovereign, or "from the Intention of him [the subject] that submitteth himself to his [the sovereign's] Power, (which Intention is to be understood by the End for which he so submitteth . . .)'. And this end, Hobbes goes on to say, is 'the Peace of the Subjects within themselves, and their Defence against a common Enemy'. Hobbes T *Leviathan* (1994) 111.

⁹⁷ As Rousseau urges, it is only on the 'basis of this common interest that society must be governed'. Rousseau JJ *The social contract and the first and second discourses* (2002) 25. According to Hobbes, the motive for a contract is 'the security of man's person, in his life and in the means of so preserving his life as not to be weary of it'. Hobbes T *Leviathan* (1994) chap 14 at 82. See also Locke J *Second treatise of government* (1980) para 97.

⁹⁸ For a discussion of the place of individual right in civil society, see, for example, Brett AS *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (2003).

fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy.⁹⁹

The catalogue of entitlements that an individual derives from being a member of a sovereign state are what constitute the benefits of citizenship while the obligations that the individuals owe to the sovereign state are what constitute the burdens of citizenship. These distinct catalogues of benefits and obligations of citizenship make citizens, unlike noncitizens, to be “full and formal members” of a given state. This section identifies the benefits and burdens whose possession is dependent on one being a citizen and that are not available to non-citizens in Kenya.

3.1. *The Benefits of Citizenship*

The Kenya Citizenship and Immigration Act lists the benefits that every citizen is entitled to. These include the right to enter, exist and remain in the country; the right to register as a voter; the right to vie for an elective post or to be appointed to a public office; the right to own land; and the entitlement to a document of citizenship registration.¹⁰⁰ However, not all these benefits are unique to citizens. For example, the right to exist the country is enjoyed by both citizens and non-citizens. Similarly, the right to own land is enjoyed by both citizens and non-citizens, though the non-citizens’ right is limited to the owning of a leasehold interest in land.¹⁰¹ Furthermore, the list of benefits under the Kenyan Citizenship and Immigration Act is not exhaustive as it leaves out other recognised benefits of citizenship such as the right to diplomatic protection under international law.

In reality, there are four categories of benefits that are intrinsically connected with citizenship: status protection benefits, benefits of entry and abode, benefits of protection, and political benefits. Each of these categories was recognised as fundamental in the very early configurations of the state–citizen relationship.¹⁰² In addition, these categories have not lost relevance over time – their codification as express citizenship rights is very common internationally. These categories of rights are in contrast to most rights, which are not predicated upon possession of citizenship.

⁹⁹ *Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others* Nairobi HCCC (Civil Division) No. 513 of 2011.

¹⁰⁰ Section 22, Kenya Citizenship and Immigration Act (2011).

¹⁰¹ Article 40, Constitution of Kenya (2010).

¹⁰² For a historical description of the rights of citizenship, see, for example, Heater D, *A Brief History of Citizenship* Edinburgh University Press, 2004, 31–2; Kelly GP *A History of Exile in the Roman Republic* Cambridge University Press, 2012, 33.

3.1.1. Status Protection Benefits

Status protection benefits specify those who are entitled to hold the citizenship status and serve as a guarantee that the status will not be stripped from people who hold it. Under the 2010 Constitutional framework, there are two ways in which a person's citizenship may cease: (1) via a successful application to renounce citizenship; and (2) by ministerial revocation where certain criteria are met.

Citizenship by birth or at birth by descent can only be lost upon renunciation by the holder.¹⁰³ However, renunciation will not be accepted where it will render the person stateless or where it is not in the interest of Kenya.¹⁰⁴ The application for renunciation can also only be accepted after the person has been apprised of the implication of renunciation and where the responsible authority is clear on the new residence of the renouncing individual.¹⁰⁵ It is also noteworthy that mere acquisition of citizenship of another state is not enough to strip a citizen by birth or by descent of their citizenship.¹⁰⁶ This is in contrast to the 1963 Constitution which provided that a citizen of Kenya who acquired citizenship of some other country ceased to be a citizen of Kenya unless he renounced his citizenship of the other country and took an oath of allegiance to Kenya.¹⁰⁷

Citizenship by marriage or residence can be lost through either renunciation by the holder or by ministerial revocation in clearly prescribed situations. The prescribed situations for ministerial revocation are listed under the 2010 Constitution as including situations where: (1) the citizenship was acquired by fraud or false representation; (2) the person has assisted an enemy in a war that Kenya was engaged in; (3) within five years after registration the person has been convicted of an offence and sentenced to imprisonment for a term of three years or longer; or (3) the person has, at any time after registration, been convicted of treason, or of an offence for which a penalty of seven or more years may be imposed.¹⁰⁸

It is to be noted, however, that ministerial discretions to revoke citizenship are not broad, and there are statutory protections in place to protect against a loss

¹⁰³ Kenyan Citizenship and Immigration Act, s 19.

¹⁰⁴ Kenyan Citizenship and Immigration Act, s 19(4).

¹⁰⁵ Kenyan Citizenship and Immigration Act, s 19(2).

¹⁰⁶ Constitution of Kenya, 2010, Art 16 ("A citizen by birth does not lose citizenship by acquiring the citizenship of another country").

¹⁰⁷ Constitution of Kenya, 1963, Art 97.

¹⁰⁸ Article 17, Constitution of Kenya (2010).

of citizenship where statelessness would ensue.¹⁰⁹ In addition, under the Kenyan Citizenship and Immigration Act, a person who is aggrieved by the decision of a public officer regarding revocation of citizenship can apply for review or can appeal the decision to the High Court.¹¹⁰

3.1.2 Benefits of Entry and Abode

The broad category of “entry and abode benefits” encompasses two discrete types of rights: the right to come into Kenyan territory, and the right to remain in this territory. Under the 2010 Constitution¹¹¹ and the Kenyan Citizenship and Immigration Act 2011, the right to enter, remain in and reside anywhere in Kenya is inherently vested in Kenya citizens.¹¹² Non-citizens do not enjoy this right. This position has been upheld in the case of *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 others*¹¹³ where the Court noted that: “[Article 39(3) of the Constitution] is deliberate as it grants Kenyan citizens only, the right to enter, remain and to reside anywhere in Kenya. It deliberately denies other persons not citizens of the country that right”.¹¹⁴

A non-citizen’s entry, residence and their act of remaining in Kenya is a privilege which may or may not be granted. As provided under the Kenyan Citizen and Immigration Act, “A person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya, unless she or he has a valid permit or pass”.¹¹⁵ This position has received support in the case of *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another*¹¹⁶ where the court noted that:

[T]he right to enter, remain in and reside in Kenya is restricted to citizens, both by the Constitution and under international law. While Article 39(1) and (2) with regard to freedom of movement and the right to leave Kenya are guaranteed to all persons, the right to enter, remain and reside anywhere in Kenya is the preserve of citizens. Thus, in my view, the petitioner, who has of his own volition come

¹⁰⁹ Section 21, Kenya Citizenship and Immigration Act (2011).

¹¹⁰ Section 21(6), Kenya Citizenship and Immigration Act (2011).

¹¹¹ Article 39(3), Constitution of Kenya (2010) (“Every citizen has the right to enter, remain in and reside anywhere in Kenya”).

¹¹² Section 22(1)(a), Kenya Citizenship and Immigration Act (2011) (“Every citizen is entitled to the rights (a) the right to enter, exit, or remain in and reside anywhere in Kenya”).

¹¹³ *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 others* [2015] eKLR.

¹¹⁴ *Sebasyan Kryvskyy v Criminal Investigations Department Nairobi & 3 others* [2015] eKLR.

¹¹⁵ Section 34, Kenya Citizenship and Immigration Act (2011).

¹¹⁶ *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another* [2013] eKLR.

back from his country of origin, Pakistan, after being deported from Kenya, and been denied entry into Kenya at the airport, cannot demand that he be allowed entry and, upon denial thereof, allege violation of his right under Article 39 or the provisions of the international conventions...¹¹⁷

These provisions of Kenyan law are in accord with the provisions of international law and international human rights instruments. Under international law a person cannot be expelled from his or her country of citizenship, no matter what the destination.¹¹⁸ The UDHR also accords everybody the freedom of movement within the border of a country but limits the right to entry and abode to the citizens of a country.¹¹⁹ Similarly, the ICCPR protects the right of everybody to free movement and egress from a country but limits the protection of ingress and abode to citizens only.¹²⁰ Likewise, the ACHPR recognises every individual's right to free movement and egress from any country including his own but limit the right to return to and abode in a country to citizens only.¹²¹

To facilitate their movement across the borders of the state, citizens have also been given the right to be issued with travel documents such as the passport. According to the 2010 Constitution, every citizen is entitled to "a Kenyan passport and any document of registration or identification issued by the State to citizens".¹²² This has, however, not always been the case. Historically, the British colonialist regarded the grant of travel documentation as a privilege that was within the "crown prerogative". The 1963 Constitution also did not clearly make travel documents an entitlement, resulting in early jurisprudence from the Court holding that its issuance was a privilege. For example, in the 1985 *Mwau* case, the High Court ruled that "in the absence of any statutory provisions ... the issue and withdrawal of passports is the prerogative of the president."¹²³ This ruling was later

¹¹⁷ *Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another* [2013] eKLR, para 29.

¹¹⁸ This prohibition is only excused in instances of extradition of a person to stand trial in another country in accordance with due process of law and on the basis of legal agreements between states.

¹¹⁹ Article 13, Universal Declaration of Human Rights. At Article 13(2), it provides: "Everyone has the right to leave any country, including his own, and *to return to his country*" (emphasis added). See also, Article 12, International Covenant on Civil and Political Rights and Article 12 African Charter on Human and Peoples Rights.

¹²⁰ For example, at Article 12(4), International Covenant on Civil and Political Rights (ICCPR) provides that "No one shall be arbitrarily deprived of the right to enter his own country".

¹²¹ Article 12(2), African Charter on Human and Peoples Rights (Emphasis added) provides: "Every individual shall have the right to leave any country including his own and *to return to his country*" (emphasis added).

¹²² Article 12(1)(b), Constitution of Kenya (2010).

¹²³ In *re application by Mwau*, 1985, IrC (Const) 444.

overturned in the 2007 case of *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others*¹²⁴ where the Court held that in “In Kenya the right of travel is an expressed constitutional right, and its existence does not have to depend on a prerogative, inference or any implied authority.”¹²⁵ This latter position is now firmly and expressly enshrined under the 2010 Constitution.¹²⁶

3.1.3 Benefits of Protection

The phrase ‘benefits of protection’ refers broadly to state duties that may be invoked by citizens in need. There are three common ways in which such benefits are recognised. The first comes in the form of protection - either absolute or qualified - against the extradition of citizens to foreign countries. The second involves the existence of state obligations to extend diplomatic protection to citizens detained overseas or injured by foreign states. The third involves the protection from threats or injury to person or property committed within the territory of the state. This latter benefit is, however, available to non-citizens alike and is as such not an intrinsic citizenship right.

Extradition is understood as the delivery of a person suspected or convicted of a crime, by the state where he has taken refuge or taken asylum, to the state that asserts jurisdiction over him. In the Kenyan context, the extradition protection is not absolute; meaning that citizens who have committed crimes in other countries can be delivered to the jurisdiction of those countries. However, there are stringent conditions for extradition set out under Rendition and Extradition (Contiguous and Foreign Countries) Act¹²⁷ or Extradition (Commonwealth Countries) Act¹²⁸ that must be met before a citizen can be extradited. These conditions include: (1) existence of formal extradition treaty between Kenya and the requesting state; (2) honour of the terms of the extradition treaty by the requesting state; (3) the crime should not be political or religious; (4) existence of prima facie evidence of criminal involvement; (6) speciality rule (the requesting state can only prosecute the person for the crime requested for and not otherwise); and (5) double criminality (the act must be an

¹²⁴ *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others* [2007] eKlR.

¹²⁵ *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others* [2007] eKlR. see also Mwaura P, “Passport is a right for every citizen, not a privilege” *The Nation*, Nairobi, 7 July 2007.

¹²⁶ Article 12(1)(b), Constitution of Kenya (2010) (“Every citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the State to citizens”).

¹²⁷ Rendition and Extradition (Contiguous and Foreign Countries) Act, Chapter 76 of the Laws of Kenya.

¹²⁸ Extradition (Commonwealth Countries) Act, Chapter 77 of the Laws of Kenya.

offence both in Kenya and the requesting state). These conditions are in line with international law principles on extradition and can only be determined by a court of law, meaning that extradition can only be executed pursuant to a court order.

Diplomatic protection is an international law concept, which describes the protection states accord to their nationals for injuries occasioned by foreign states.¹²⁹ The basis of this protection arises from the limited standing individuals have under international law and the responsibility of states to protect their citizens from injuries attributable to other sovereign states. As noted by the Permanent Court of International Justice (PCIJ) in the *Panevezys-Saldutiskis Railways Case*: “In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on its behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law.”¹³⁰ This protection is only available to citizens of the state exercising diplomatic protection.¹³¹

3.1.4 Political Benefits

The sovereign power of the state rests with the citizens. This power is exercisable either directly or through political representatives and is protected under the category of political rights, which is only enjoyed by citizens. As Rubenstein has rightly noted, “membership of the political community is... determined by citizenship status”.¹³² The political rights are made up of two main components: the right to vote and the right to be voted or to be appointed into the state/public office. These two rights connect the citizens with the sovereign (the state) by clothing the citizens with the power to determine those who are to exercise the state power over them and the right to present themselves for election or appointment to state offices. As such, the category of political rights provides perhaps the strongest indication of the existence of reciprocal rights and obligations that flow from citizenship.

The 2010 Constitution protects political rights of citizens in Kenya.¹³³ It enshrines the right of every citizen to make free political choices including the right

¹²⁹ See ILC adopted Draft Articles on Diplomatic Protection, at Art 1.

¹³⁰ *Panevezys-Saldutiskis Railways Case* PCIJ Reports, Series A/B No 76 (1939) 4 at 16.

¹³¹ See *Panevezys-Saldutiskis Railways Case* PCIJ Reports, Series A/B No 76 (1939); *Liechtenstein v. Guatemala* ICJ Reports, 1955.

¹³² Rubenstein K, “The Lottery of Citizenship: The Changing Significance of Birthplace, Territory and Residence to the Australian Membership Prize” 22(2) *Law in Context* (2004) 45.

¹³³ Article 38, Constitution of Kenya (2010).

to form, participate in, and campaign for political parties.¹³⁴ It also entitles every citizen to contest in a free, fair, and regular election to any elective state office or political party in which they belong.¹³⁵ It further protects the right of every citizen to be registered as a voter and the right to vote in a free and fair election.¹³⁶ The elections are to be conducted under the principle of universal suffrage where each vote has equal weight.

It is to be noted, however, that not every class of citizens can enjoy the political rights. Citizens below the age of majority are, for example, precluded from voting or being voted into an elective public office.¹³⁷ Similarly, persons who have been citizens for a period of less than 10 years (targeting citizenship acquired by registration or naturalisation) cannot contest in a parliamentary election.¹³⁸ This provision was litigated and upheld in *Esposito Franco v Independent Electoral Boundaries Commission & Another*.¹³⁹ Furthermore, persons holding dual citizenship are precluded from holding state office.¹⁴⁰ The Court of Appeal has interpreted this provision in the case of *Donald Kisaka Mwawasi v Attorney General & 2 Others*¹⁴¹ to mean that “a dual citizen is eligible to stand for election (for elective state offices) but upon election he cannot hold office unless and until he voluntarily and officially renounces citizenship of the other country according to the law”.¹⁴² This decision overturned the High Court reasoning that limitation on dual citizenship disqualifies the holder from not only holding but also from contesting in an elective public office.¹⁴³ The limitation on dual citizenship does not, however, apply: (1) to judges and members of commissions; and (2) to “any person who has been made a citizen of another country by operation of that country’s law, without ability to opt out”.¹⁴⁴

¹³⁴ Article 38(1), Constitution of Kenya (2010).

¹³⁵ Article 38(2), Constitution of Kenya (2010).

¹³⁶ Article 38(3), Constitution of Kenya (2010).

¹³⁷ Article 83(1)(a), Constitution of Kenya (2010) read together with Art 99(1)(a), Constitution of Kenya (2010).

¹³⁸ Article 99(2), Constitution of Kenya (2010).

¹³⁹ *Esposito Franco v Independent Electoral Boundaries Commission & Another* Nairobi Petition No. 78 of 2012 (Unreported).

¹⁴⁰ Article 78(2), Constitution of Kenya (2010) (“A State officer or a member of the defence forces shall not hold dual citizenship”). The same limitation applies with regard to the presidency and deputy presidency. See Articles 137 & 138, Constitution of Kenya (2010).

¹⁴¹ *Donald Kisaka Mwawasi v Attorney General & 2 Others* [2014] eKLR.

¹⁴² *Donald Kisaka Mwawasi v Attorney General & 2 Others* [2014] eKLR para 14.

¹⁴³ *Donald Kisaka Mwawasi v Attorney General & 2 Others* [2013] eKLR para 24.

¹⁴⁴ Article 78(3), Constitution of Kenya (1963) (repealed).

It is also noteworthy that the 2010 Constitution limits the candidature for presidency to citizens by birth or citizens by descent.¹⁴⁵ It goes further to provide that a person is not qualified for nomination as presidential candidate if the person, among other things, “owes allegiance to a foreign state”.¹⁴⁶ This means that in addition to being a citizen by birth or citizen at birth by descent, a prospective candidate for the presidency must also not hold dual citizenship, otherwise they will be disqualified from contesting for the presidency. A similar limitation is placed on the office of the vice-presidency.¹⁴⁷

The fact that political rights do not apply to all categories of citizens might make one to question the capacity to describe political rights as ‘citizenship rights’. However, these differentiations should only be seen as confirming that in the realm of political rights - as in other arenas - not all citizens are equal. The differentiations do not detract from the fact that political rights are rights of citizens. This position is affirmed by the express use of the word “citizen” with respect to these rights in the 2010 Constitution.¹⁴⁸ The Court in the case of *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others*¹⁴⁹ has also reiterated that these rights are not available to non-citizens.¹⁵⁰

In addition to the traditional political rights, there are also other facilitative rights such as the right of access to information and the freedom of (expression, assembly, association, religion) which are necessary for the enjoyment of political rights. As noted by the Court in the *Famy Care Limited* case,¹⁵¹ the right of access to information is ‘essential for the purpose of organising a democratic state’.¹⁵² Similarly the freedom of (expression, assembly, association, religion) has been identified as the hallmark of a democratic state by the courts.¹⁵³ The freedom of (expression, assembly, association, religion) is enjoyed by all individuals including

¹⁴⁵ Art 137, Constitution of Kenya (2010).

¹⁴⁶ Art 137(2), Constitution of Kenya (2010).

¹⁴⁷ Art 148, Constitution of Kenya (2010).

¹⁴⁸ See, for example, Art 38, Constitution of Kenya (2010).

¹⁴⁹ *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR.

¹⁵⁰ *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR para 24.

¹⁵¹ *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR.

¹⁵² *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR para 25.

¹⁵³ See, for example, *Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others* Nairobi HCCC (Civil Division) No. 513 of 2011.

citizens and non-citizens.¹⁵⁴ However, the right of access to information is limited to citizens. The 2010 Constitution provides that ‘*Every citizen* has the right of access to: (a) information held by the State; and (b) information held by another person....’¹⁵⁵ In interpreting this provision the Court in the *Famy Care Limited* case affirmed that ‘[t]he clear intent manifested (in the use of “Every citizen”) is that the right of access to information under Article 35(1) is limited by reference to citizen.’¹⁵⁶

3.2. *Burdens of Citizenship*

The Citizenship and Immigration Act lists the responsibilities of a citizen as: to obey the laws of Kenya; owe full allegiance to Kenya and the Constitution; pay taxes; protect and conserve the environment and ensure sustainable use of natural resources; cooperate with the state to ensure enforcement of the law; respect and promote the dignity and rights of others; respect and promote national unity and peaceful co-existence; promote the values and principles prescribed in the constitution.¹⁵⁷ However, not all these obligation are uniquely held by citizens. For example, all persons within Kenya are bound to obey Kenyan law, and a lack of citizenship does not protect a person against being asked to cooperate in the enforcement of the law. Payment of taxes, conservation of environment, respecting the rights of others, and promoting national unity is also the duty of all persons within Kenya, including non-citizens.

Thus, with the exception of allegiance to state and constitution, citizenship imposes no additional societal burdens not also shouldered by noncitizen residents. However, though some of these duties are shared by non-citizens, partaking in all the burdens is important as it helps ensure that the nation has good governance and that citizens continue to enjoy their rights. Allegiance is of particular importance to the well-being of the nation state. It requires citizens to support and defend the values, principles and provisions of the Constitution against all enemies, foreign and domestic; and to bear true faith and obedience to the same in all their dealings within and outside the country. In defending the Constitution, the individual can act indirectly through the institutions established in the Constitution or

¹⁵⁴ Art 33, Constitution of Kenya (2010).

¹⁵⁵ Article 35(1), Constitution of Kenya (2010) (Emphasis mine).

¹⁵⁶ *Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others* [2012] eKLR para 25.

¹⁵⁷ Section 23, Kenya Citizenship and Immigration Act (2012).

directly outside these institutions, depending on the direness of the offence on the Constitution. The intra-institutional defence would involve the invocation of the Court's jurisdiction or other constitutional mechanisms to challenge an offending action by the Sovereign or individuals. The extra-institutional defence is of last resort and can only be resorted to if the normal mechanisms set out for resolving disputes in the Constitution have ceased to operate or have been rendered inoperable. These actions are supported by the Constitution, which places the ultimate sovereign authority on the people of Kenya.¹⁵⁸

To address the challenge to allegiance that is wrought by dual citizenship, the Immigration and Citizenship Act provides that a dual citizen shall owe allegiance to Kenya and be subject to the laws of Kenya.¹⁵⁹ In fact, the Act emphasizes that the duty of allegiance is the duty of every holder of Kenyan citizenship.¹⁶⁰ This new approach repeals the past practice where the challenge to allegiance was dealt with by requiring the dual citizen to opt for one or the other citizenship.¹⁶¹

4.0. Conclusion

The preceding analysis lends itself to mixed conclusions. Firstly, while most rights and benefits in the Kenyan Constitution are not made contingent upon citizenship, in the four categories examined in this chapter, the benefits of citizens are materially different from those of non-citizens. Arguably, this gives some credence to the assertion that citizenship assigns "full and formal" membership status to those who hold it. But secondly, while the unique categories of benefits and duties discussed are largely a preserve of citizens, the analysis reveals that the extent of enjoyment of the range of benefits and duties of citizenship (*de facto* citizenship) is not uniform and is determined by the bond that assigns citizenship to the individual. In this regard, the assertion that citizenship implies a singular identity with equal status among its holders is at best dubious in the Kenyan context. This study confirms that the extent of enjoyment of the range of benefits and duties of citizenship (*de facto* citizenship) is determined by classes of citizenship, some of which are better protected than others. These findings suggest that the image painted by the Preamble and Article 1 of the Constitution of Kenyan citizenship as

¹⁵⁸ See, for example, Article 1, Constitution of Kenya, (2010).

¹⁵⁹ Section 8(7), Kenya Immigration and Citizenship Act, (2012).

¹⁶⁰ Section 23, Kenyan Immigration and Citizenship Act, (2012).

¹⁶¹ Article 97, Constitution of Kenya (1963) (repealed).

a gateway to full and equal community membership, may well be illusory, at least in legal terms.

In addition to the legal barriers to the equal enjoyment of *de facto* citizenship, it is to be noted that there are other extra-legal factors that would determine the extent of enjoyment of citizenship. For example, even though the constitution is now gender neutral on the acquisition of citizenship and enjoyment of the rights and benefits that accrue to citizenship, in a largely patrilineal society like Kenya, it is not uncommon to find women still facing social barriers in accessing the benefits of citizenship. A case in point is *Mary Mwaki Masinde v County Government of Vihiga & Another*,¹⁶² where a woman married to a man from another county was denied a chance to represent her people in her county of birth on the basis of her new marital status. Even though the Court overturned the decision of the county assembly, the case is illustrative of the social discrimination many women go through in attempting to access the benefits of their citizenship, despite the formal equality enacted in the law.

Studies have also revealed that the process of acquiring identity cards that enable citizens to access the benefits of citizenships have been mired by corruption and ethnic profiling thereby denying many *de jure* citizens their rightful share of membership to the Kenyan community.¹⁶³ The ethnic profiling obstacle to the acquisition of benefits of citizenship was litigated before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on behalf of Nubian children in Kenya in the case of *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative v Government of Kenya*,¹⁶⁴ where the ACERWC concluded that such practice was rampant in Kenya with respect to the Nubian community thereby denying the Nubian children the right to nationality protected under the African Charter on the Rights and Welfare of the Child.¹⁶⁵

Uneven distribution of resources is another factor that would restrict the capacity of the marginalised to fully exercise their rights and duties of citizenship. As rightly noted by Graeme Gill in the context of democratic rights, '[t]he poor,

¹⁶² *Mary Mwaki Masinde v County Government of Vihiga & another* (2015) eKLR.

¹⁶³ See, for example, Kenya National Commission on Human Rights and United Nations Commission on Refugees, *Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, Kenya National Commission on Human Rights, 2010.

¹⁶⁴ *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative v Government of Kenya* Communication Number com/002/2009.

¹⁶⁵ *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative v Government of Kenya* Communication Number com/002/2009, para 36 – 54 (citing Article 6 of the African Charter on the Rights and Welfare of the Child).

totally preoccupied with the task of survival, neither become members of a civil society nor citizens, though formally they enjoy membership of both spheres.¹⁶⁶ While this chapter was limited to analysing the legal framework in Kenya, the illustrated factors point to the need to also consider the extra-legal framework in order to fully answer the question whether the Kenyan citizenship guarantees the holders the universality of identity and equality of status envisaged in the idea of citizenship. However, even in its limited analysis, this chapter reveals that citizenship in Kenya, though assigning “full and formal” membership status to those who hold it, does not legally guarantee equality of status among its holders. More thus still need to be done both in the law and practice to guarantee the aspirations of equality of status of citizenship in Kenya.

¹⁶⁶ Gill G, *The Dynamics of Democratization: Elites, Civil Society and the Transition Process*, New York, MacMillan, 2000, 67.