

Strathmore University
Law School

**THE APPLICATION OF JUS SANGUINIS DURING POST-COLONIAL STATE
SUCCESSION AND THE CREATION OF STATELESSNESS: A COMPARATIVE
STUDY OF KENYA AND TANZANIA.**

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Table of Contents

Acknowledgement	iv
Declaration	v
Abstract	1
CHAPTER ONE: INTRODUCTION TO THE STUDY	2
1.1 Background	2
1.2 Statement of the Problem	3
1.4 Statement of Objectives	4
1.5 Research Questions	4
1.7 Theoretical Framework	5
1.8 Assumptions	6
1.9 Research Methodology	6
CHAPTER TWO: MWALIMU JULIUS NYERERE'S IDEAL AFRICAN STATE: THE MAKING OF TANZANIA	7
2.1 Introduction	7
2.2 An African Ethos of Citizenship	8
2.3 Nation-building in Tanzania	10
2.4 Nyerere's grounds for inclusive Nation-Building	11
2.4.1 Rejecting Racism	11
2.4.2 Nationalism	12
2.4.3 Pan-Africanism	13
2.4.4 Self-Determination	13
2.5 Conclusion	14
CHAPTER THREE: UNRIDDLING JUS SOLI AND JUS SANGUINIS	15
3.1 Introduction	15
3.2 The Origins of the Law of the Soil and the Law of Descent	15
3.3 Legal Manifestation of the Law of the Soil and the Law of Descent	16
3.4 The Right to Nationality as a matter of International Law	18
3.4.1 Post First World War	18
3.4.2 Nationality in International Law post 1945	19
3.4.3 The Right to a Nationality	20
3.4.4 The Right to a Nationality in practice	20
3.4.5 Africa: The Deviation?	22
CHAPTER FOUR: WHICH CRITERION WORKS? A COMPARATIVE STUDY OF KENYA AND TANZANIA	27
4.1 Introduction	27
4.2 Salient features of Kenya's Citizenship Laws	28
4.2.1 Analysing Kenya's Citizenship Law	29
4.2.2 Kenya's Pattern of Exclusion	32

4.3 Tanzania; Glitter or Gold?	33
CHAPTER FIVE: FINDINGS, RECOMMENDATIONS and CONCLUSION	37
5.1 Findings.....	37
5.2 Recommendations	39


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I dedicate this paper to the 10 million people across the globe who have been rendered stateless, may you one day belong to a nation.


Declaration

I, GICHUHI TABITHA MUMBI, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: Monday, 28th May, 2018.

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  30 May 2018

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THE APPLICATION OF JUS SANGUINIS DURING POST-COLONIAL STATE CREATION AND THE INCEPTION OF STATELESSNESS: A COMPARATIVE STUDY OF KENYA AND TANZANIA.

Abstract

Among the reasons why Africans are left without a nationality is the colonial history of their respective states. Following the attainment of independence, these newly independent African states had to grapple with the formulation of citizenship laws that would apply to political units comprising of people from different cultures, religions and languages. In a bid to achieve this, governments had to decide whether to grant citizenship on the basis of the law of descent (jus sanguinis) or the law of the soil (jus soli).

The general objective of this paper is to investigate the motivations that would lead a state to choose either mode of granting citizenship as well as its resultant effect on the creation of statelessness. It will additionally look into the nation-building processes of Kenya and Tanzania, which apply jus sanguinis and jus soli respectively, as well as their citizenship policies before and after the attainment of independence. This examination hopes to eventually determine whether these policies, from the point of state succession, have lived up to the obligation to grant nationality to persons within their territories and prevent the occurrence of statelessness.

CHAPTER 1

INTRODUCTION TO THE STUDY

1.1 Background

A stateless person is a person who is not considered a national by any state under the operation of its law.¹ Statelessness has been deemed a by-product of nation-building in Europe in the 19th century². After the First and Second World War, the nation-building process defined the state as a homogenous entity. Therefore, being part of a state meant possessing the correct nationality that was additionally verifiable through proper documentation. Those who had been displaced as a result of the war, deportation or other means during the two wars subsequently lost their formal state affiliation.³

In Africa particularly, statelessness came about as a result of the creation of states after the attainment of independence. African leaders had to work through the nation-building agenda in political units comprising of people from different cultures, religions and languages. The registration of births and documentation of population was therefore discriminatory.⁴ Anyone who did not belong to the same societal structure as his or her counterparts was denied nationality. Additionally, state succession laws with respect to citizenship left behind by the colonial powers were quite unclear in some regions. For instance, the French left the whole process up to the new governments with no guidance or documentation to aid the process.⁵ This rudimentary form of nation-building led to the occurrence of populations without a nationality.

The right to nationality has been described as a person's basic right; it is nothing less than the right to have rights.⁶ Statelessness can therefore be seen as a violation of this right⁷ and a failure on the part of states to meet their obligation to grant nationality to persons within their territories and prevent the occurrence of statelessness.⁸ It is additionally a prerequisite to the exposure to human rights abuses. Even in the poorest countries, a passport or identity card

¹ Article 1, *Convention relating to the Status of Stateless Persons*, 28 September 1954, vol. 360, UNTS 117.

² Rurup M, *Lives in Limbo: Statelessness after two World Wars*, German Historical Institute, 2013, 113.

³ Rurup M, *Lives in Limbo*, 113.

⁴ Manby B, *Statelessness in Africa: The scale of the challenge and the opportunities for leadership* <http://www.statelessness.eu/blog/statelessness-africa-scale-challenge-and-opportunities-leadership> accessed on 13th January, 2017.

⁵ Manby B, *Statelessness in Africa*: <http://www.statelessness.eu/blog/statelessness-africa-scale-challenge-and-opportunities-leadership> accessed on 13th January, 2017.

⁶ Weissbrodt D and Collins C, 'The human rights of stateless persons' 28 *Human Rights Quarterly* (2006) 248

⁷ Article 15, *Universal Declaration of Human Rights*, 1948.

⁸ Article 1 & 2, *the Convention on the Reduction of Statelessness*, 30 August 1961.

does not just provide the right to travel but forms the basis of the right to almost everything else.”⁹ Persons not tied to a particular state are unable to access healthcare, enrol their children in schools, own property, vote or even work for the government. Stateless communities are among the world’s most vulnerable populations and the study of the creation and possible alleviation of this phenomenon is vital.

1.2 Statement of the Problem

The extent to which the world is blighted by statelessness is an indication that it is a problem worthy of detailed research. The United Nations High Commissioner for Refugees estimates that there are over 10 million stateless persons in the world.¹⁰ Having established that states have an obligation to grant nationality to persons legally deserving of it and that there is an expressly provided right to nationality that is recognised internationally, there is evidently a magnificent inconsistency between the law and practice.

Most importantly, it is evident that the laws and practices that governed citizenship in many African countries at the point of state succession, effectively left hundreds of thousands of people without a nationality.¹¹ This paper seeks to investigate the probable causes of this defect by studying the application of the *jus soli* and *jus sanguinis* modes of granting citizenship and the motivations that lead states to adopt either. There is an overwhelming need to understand *why* African states adopted and are continuing to adopt either of the two modes as well as the impact of the same on statelessness.

1.3 Research Hypothesis

Countries that grant citizenship through the application of the law of the soil have less issues of statelessness as compared to those that grant citizenship through the application of the law of descent.

⁹ Bronwen Manby, *Citizenship the most important right of all*, <http://africanarguments.org/2009/10/12/citizenship-the-most-important-right-of-all/> on August 15, 2017.

¹⁰ This is an estimated figure. Due to gaps in the collection of data by governments, the UN and civil society, a full breakdown of this figure is beyond reach. Van Waas L and Chickera D, *The World’s Stateless: a new report on why size does and doesn’t matter*. <http://www.statelessness.eu/blog/world%E2%80%99s-stateless-new-report-why-size-does-and-doesn%E2%80%99t-matter> accessed on 14th January, 2017.

¹¹ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 1.

1.4 Statement of Objectives

This paper seeks to meet the following objectives:

1. To analyse the concept of nationality in Africa pre-independence, during and post-independence.
2. To find out the historical, political or legal motivations that lead Kenya and Tanzania adopt the *jus sanguinis* or *jus soli* modes of granting citizenship respectively.
3. To analyse the intensity of statelessness in countries with the *jus sanguinis* principle as against those with the *jus soli* principle; a comparative study of Kenya and Tanzania.
4. To critique the recent recognition of the Makonde and Kenyan-Asians by the Kenyan government and Burundian refugees in Tanzania.
5. To highlight the possible solutions or policy changes that would be best suited for a country plagued with statelessness because of its operation of the law of descent or law of the soil.

1.5 Research Questions

1. What was the nature and scope of a state's obligation to grant nationality to persons residing within its territory at the point of state creation?
2. What factors would influence a state's decision on whether to abolish the application of *jus soli* in their citizenship laws despite the fact that it may be the primary mode of eradicating statelessness?
3. Has Tanzania successfully dealt with the problem of statelessness by virtue of applying *jus soli* and is there an effective legal course of action to deal with cases of statelessness if and when they arise?
4. Based on the observations made in research questions (3) and (4), how can the situation in Kenya be critiqued?

1.6 Justification of the Study

The findings of this study will highlight the post-colonial transition of African states particularly, Kenya and Tanzania, from their colonial authorities and the legal problems that arose in determining the content of their national laws on citizenship.

It will also shed light on the creation of statelessness in Africa as linked to colonial history and eventual enactment and application of citizenship laws by the newly formed and independent governments.

Additionally, it will provide a complete understanding of the nature and content of the positive obligations of states when it comes to the reduction of statelessness. One such obligation being policy changes under citizenship law. Given that this paper concentrates largely on statelessness brought about by the technicalities of citizenship laws, it may inform the possible policy changes that may be applicable to the reduction of statelessness while still maintaining the reserved domain of the states on nationality matters.¹²

This paper seeks to prove the suitability of introducing a change in citizenship laws in Africa by looking at Kenya and Tanzania who apply *jus sanguinis* and *jus soli* respectively. It will in turn compare the extent of statelessness in both countries as well as the legal and political environment in respect of remedies for the stateless and its eventual alleviation. This will serve as concrete evidence of the proposed changes.

1.7 Theoretical Framework

This research will integrate the ethics of African Citizenship and the theory of the ideal African state according to Mwalimu Julius Nyerere. It will look into his nation-building approach after Tanganyika attained independence in order to substantiate the need for granting stateless persons a right to a nationality. Statelessness has often been linked to political restructuring following state succession¹³ which was the case for most African countries after they gained their independence. These former colonial territories had to grapple with the task of determining who would make up the human capital of their states by enacting national laws that would clarify and determine citizenship.¹⁴ Tanzania however followed a different historical path when it came to nation-building. At a time when hatred for foreigners was at its peak, Julius Nyerere rejected Africanization and racially- based citizenship and pushed for inclusive citizenship policies.¹⁵ This is evident, for example, in the treatment of Asians in Kenya as against those in Tanzania. Despite a lot of hatred towards the Asians, the independent

¹²The Permanent Court of International Justice described the grant of nationality being within the “reserved domain of the states” which was later upheld in the *Nottebohm case*. The court in this instance described nationality as being within the domestic jurisdiction of the state which settles, by its own legislation, the rules relating to the acquisition of its nationality. *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice, 7 February 1923; *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, International Court of Justice (ICJ), 6 April 1955.

¹³ Blitz B. and Lynch M, *Statelessness and citizenship: A comparative study on the benefits of nationality*, Edward Elgar Publishing Limited, 2011, 3.

¹⁴ African Commission on Human and Peoples’ Rights, *The Right to Nationality in Africa*, published by the African Commission on Human and Peoples’ Rights, 2015, 8.

¹⁵ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, Cambridge University Press, 2013, 18.

states did not produce the same patterns of exclusion. Tanzania made it possible, through the enactment of inclusive citizenship laws, for foreigners that had been residents of Tanzania to obtain citizenship. The Asians in Kenya on the other hand were rendered stateless by law.¹⁶ In addition to the discussion of the ideal state according to Nyerere, this paper will assess how Tanganyika transitioned into Tanzania as well as the progression of their citizenship laws. Finally, this theory will argue out whether the Nyererian approach could have been the most effective mode of state creation with regards to initial prevention and eventual reduction of statelessness.

1.8 Assumptions

That there will be no fundamental change in the citizenship laws of both countries prior to the completion of the study.

For the purposes of this study, citizenship and nationality shall be used interchangeably as in contemporary usage to refer to the legal relationship between an individual and a state, in which the state recognises and guarantees the individual's rights.¹⁷

1.9 Research Methodology

The primary source of information was the available literature on the topic. This included: relevant legislation, authoritative publications, principles of common law, case law, news sources, the Hansards of Kenya and Tanzania, commission reports and text books.

¹⁶ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 115.

¹⁷ Manby B., *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, ix.

CHAPTER 2

MWALIMU JULIUS NYERERE'S IDEAL AFRICAN STATE: THE MAKING OF TANZANIA

2.1 Introduction

*'Start the story with the failure of the African state, and not with the colonial creation of the African state, and you have an entirely different story.'*¹⁸

The reasons why Africans are left without a nationality are often linked to: the colonial history of their respective states, state borders, population migrations on the continent, structural discrimination in African societies and difficulties affecting the movements of cross-border and nomadic populations.¹⁹ This paper seeks to particularly interrogate statelessness as a result of state succession and the formation of new citizenship laws after the attainment of independence. Africa's colonial history resulted in the rules governing the transition to independence particularly sensitive in the context of citizenship law. Most cases of individuals or groups deprived of citizenship relate to the status of those who were recognised as colonial subjects but whose presence was resented by the original inhabitants of the regions whose borders were altered during the colonial period. These cases also include the determination of the status of persons whose parents came from another part of a common colonial territory and migrated as part of colonial policy.²⁰ This chapter will theorise in particular, the making of independent Tanzania as was spearheaded by Mwalimu Julius Nyerere.

Following the attainment of independence, African states were charged with the duty to determine the content of national laws on citizenship. This was necessary for the purpose of catering for the mixed populations that were present due to the large-scale migrations and arbitrary border delineation that had taken place during the colonial period and providing a legal process that would determine the nationality of persons born after independence.²¹ The legal problems that consequently arose included a determination of who would make up the human capital of the successor states and the recognition of persons who lacked a nationality

¹⁸Adichie C., *The danger of a single story* TED Talk at http://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story.html on 30 January 2018.

¹⁹African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa*, African Commission on Human and Peoples' Rights, 2015, 5.

²⁰Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 21.

²¹ ACmHPR, *The Right to Nationality in Africa*, 21.

prior to colonial annexation.²² National legislation was therefore necessary to cater for the new realities that followed the accession of African states to international sovereignty.

Statelessness in Africa can be attributed to the political restructuring that independent African states were taking part in, in the form of new citizenship laws and administrative processes.²³ These transitional rules, in practice, granted nationality automatically to some people, and created rights to opt for others, but omitted to create a right to nationality for some categories of people altogether.²⁴ Certain pieces of legislation were also discriminatory on the grounds of ethnic origins, race, descent and colour and thus made it difficult for certain groups of people to acquire the nationality of a certain country despite having strong ties to it.²⁵ Manby notes for instance, the extreme examples of Liberia and Sierra Leone who despite being formed by freed slaves, take the position that only those of “negro descent” can acquire citizenship from birth.²⁶ It is important to note, however, that not all African states went down this path, an example being the case of Tanzania and the exceptional approach taken by Julius Nyerere.

2.2 An African Ethos of Citizenship

Oche Onazi argues that the legal, social and political composition or institutions of any society (especially its concept of citizenship) should be reflective of its traditional moral values and that there is a concept of citizenship with distinct African characteristics that ought to have informed the creation of citizenship laws following the attainment of independence and state succession.²⁷ Onazi also affirms that the inherited notions of citizenship from the former colonial masters is what prevents all Africans from truly belonging, except in geographical locations where they can unproblematically trace their tribal or ethnic origins.²⁸ Legislation stemming from such thinking only further concretizes and preserves this colonial legacy²⁹

²² ACmHPR, *The Right to Nationality in Africa*, 21.

²³ Blitz B. and Lynch M, *Statelessness and citizenship: A comparative study on the benefits of nationality*, 2011, 21.

²⁴ ACmHPR, *The Right to Nationality in Africa*, 21.

²⁵ ACMHPR, *The Right to Nationality in Africa*, 21. See also, the importance of genuine and effective links whether in the form of habitual residence, family ties, participation in public life or the attachment to a country in considering whether or not to grant citizenship as emphasized in the *Nottebohm Case (Liechtenstein v. Guatemala)*; *Second Phase*, International Court of Justice (ICJ), 6 April 1955.

²⁶ Manby B, *Citizenship law in Africa*, 3.

²⁷ Oche O, *Beyond Rights and Responsibilities: An African Ethos of Citizenship*, in *African Legal Theory and Contemporary Problems: Critical Essays*, Springer, volume 29, 2014, 169.

²⁸ Oche O, *An African Ethos of Citizenship*, 2014, 169.

²⁹ Mamood Mamdani described the indigene and settler dichotomy as one of the continuing colonial legacies in Africa. For him, the indigene and settler dichotomy cannot be sufficiently grasped and resolved without

instead of refashioning the idea of citizenship to one that is suitable to Africa contextually. What then did it mean to be a citizen or to truly belong in precolonial Africa?

Oche postulates that there is a type of ethical life implied in being a citizen over and above it being about rights and responsibilities. Citizenship is additionally about a set of moral values required in order to act responsibly in relation to others and that it provides an appropriate context for encouraging societal connectedness, collective flourishing and belonging.³⁰ However, citizenship has been reduced largely to the extension of rights to members of a political community without looking to the resultant responsibilities. Rights are more about claims and what is owed to you by another as opposed to responsibilities which spark some sort of interpersonal relationship between persons.³¹ Citizenship should therefore be viewed as a right as well as a responsibility to persons in community. It is evident that for Oche, the African notion of citizenship is centred around the human being as an individual as well as a person in community and that these two need not be mutually exclusive.

Oche then goes on to delineate five distinct characteristics³² of an African inspired concept of citizenship founded on African jurisprudence as follows:

The focus on all dimensions of human relationships by African jurisprudence thus underscoring the importance of societal moral values. Humans are relational beings and this implies a certain moral disposition as part of the process of societal living.³³

The focus on all dimensions of human relationships which implies that, all human beings, regardless of territorial boundaries, culture, ethnicity or religion, are morally responsible to each other. Such an understanding provides us with an opportunity to learn to transcend national, local, ethnic, religious and other group loyalties.³⁴

The African jurisprudential concept of citizenship does not only focus on humanity in all of its glory and perfection but also, vulnerability and suffering. This concept

historicising it. See Mamdani M, *Beyond settler and native as political identities: overcoming the political legacy of colonialism*, *Comp Stud Soc Hist*, 2001, 43(4) 651–664.

³⁰ Oche O, *An African Ethos of Citizenship*, 169.

³¹ Oche O, *An African Ethos of Citizenship*, 169.

³² Oche O, *An African Ethos of Citizenship*, 166 – 168.

³³ Oche O, *An African Ethos of Citizenship*, 167.

³⁴ Oche O, *An African Ethos of Citizenship*, 167.

appreciates that all human beings, including the most powerful, are vulnerable to suffering.³⁵

The idea of responsibilities, and how they are pivotal to nurturing the kind of moral values that are important for collective flourishing. Responsibilities from an African jurisprudential point of view implies the proper grasp of human responsibilities and not only makes citizenship moral, but also socialises it by aligning all human beings within a given community together. Citizenship then becomes dependent on community as opposed to statehood.³⁶

Citizenship is dependent on and can only be cultivated through daily relationships, interactions and encounters between human beings. The ethical life implied by being an African citizen is gauged by asking what it means to be good to others?³⁷ Bénézet Bujo noted that it is exactly the community which enables the self-realisation of the individual. It is therefore not possible to achieve the ethical ideal individually or as a strictly personal achievement.³⁸

2.3 Nation-building in Tanzania

As was earlier mentioned, Tanzania followed a different path when it came to nation-building with respect to citizenship laws. The approach taken by Tanzania at the time was the thoroughfare less travelled and Oche's ethos of African citizenship, in retrospect, seems to have been inspired by Nyerere's ideals. It can be argued that Nyerere's contribution and the failure of the rest of the African leaders, was to build Tanzania as the ethical community. Even today, affinity to your tribe is strong. Nyerere simply constructed Tanzania as a tribe and insisted that all cohesive forces applied to one's tribe be applied to all people in Tanzania as members of one new ethnicity. In 1959, shortly before independence, leaders of the Tanganyika African National Union (TANU), the dominant political party under the leadership of Mwalimu Julius Nyerere, expressed the desire to use citizenship legislation to make a definitive break with racist colonial policies, unite the country around a common identity, and promote

³⁵ Oche O, *An African Ethos of Citizenship*, 167.

³⁶ Oche O, *An African Ethos of Citizenship*, 167.

³⁷ Oche O, *An African Ethos of Citizenship*, 167.

³⁸ Metz T., 'Ethics in Africa and in Aristotle: some points of contrast', volume 13, *University of Johannesburg, Department of Philosophy Journal* (2012), 100.

pan-Africanism.³⁹ The preceding British citizenship policies were highly discriminatory on the grounds of race with immigration laws that established border control based on race that would control the entry of Europeans, Asians and sometimes Arabs, into Tanzanian territory.⁴⁰ Nyerere therefore proceeded to vouch for the building of a nation that would strive to institutionalise a practice among citizens and non-citizens-alike that encourages them to treat each other with dignity and respect, for no other reason other than for the fact of their humanity. This chapter will attempt to theorize the motivations that inspired Nyerere to go against the grain.

2.4 Nyerere's grounds for inclusive Nation-Building

Nyerere was a firm believer in the common and indivisible nature of humankind and his vision of Tanganyika was consistent with his opposition to all forms of discrimination anywhere in the world by virtue of the common nature of humanity the world over.⁴¹ Human rights are common and universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. Inalienable because people's rights can never be taken away.⁴² The following are instances of how Nyerere committed to promoting inclusion based on humanity.

2.4.1 Rejecting Racism

British colonial officials recognised Europeans as citizens of European states and the so-called natives (Africans) as subjects, and eventually Protected Persons (BPPs), of Britain.⁴³ Native inhabitants referred to those that lost any German nationality they had prior to the war⁴⁴, without gaining the nationality of the British powers thus making the native of Tanganyika a Stateless person and without a nationality. These natives were however accorded the opportunity of obtaining British naturalisation.⁴⁵ This alleged opportunity for naturalisation

³⁹ Miller Lee C., *Who are the "permanent inhabitants" of the state? Citizenship policies and border controls in Tanzania, 1920-1980*. PhD (Doctor of Philosophy) thesis, University of Iowa, 2011, 90.

⁴⁰ Miller Lee C., *Who are the "permanent inhabitants" of the state?* 90.

⁴¹ Speech by Mwalimu Julius Nyerere, *The Common and Indivisible Humanity of all Mankind*, available in *Freedom and Liberation: A selection of speeches from 1974 to 1999 by Julius K. Nyerere*, OUP Dar es Salaam, 2011, 155.

⁴² United Nations Populations Fund, *Human Rights Principles*, <https://www.unfpa.org/resources/human-rights-principles> on 28 March 2018.

⁴³ Miller Lee C., *Who are the "permanent inhabitants" of the state?* 95.

⁴⁴ The war here refers to the Maji-Maji revolt that took place from 1905 to 1907 and was a resistance against German colonial rule in Tanganyika. See, *The Maji Maji Revolt in Tanzania 1905-1907*, <http://www.globalblackhistory.com/2016/06/maji-maji-revolt-tanzania-1905-1907.html> on 6 September 2017.

⁴⁵ Miller Lee C., "Who are the "permanent inhabitants" of the state? Citizenship policies and border controls in Tanzania, 1920-1980," 95.

was very expensive and restrictive for most Africans. The British were highly dependent on the notions of race and subjecthood and thus hindered all efforts by non-white subjects to gain British citizenship. They would subject them to rigorous procedures such as literacy and English tests and administer exorbitant immigrant poll taxes.⁴⁶ In 1959, he eliminated racial exclusion by explicitly stating that Tanganyika would be a non-racial society where people of all races would be entitled to citizenship and equal treatment under the law. He thus reassured Asians, Europeans and Arabs present at the time that they were free to live in Tanganyika after independence without fear of being expelled by the new government.⁴⁷

The years 1959 to 1961 were characterised by a budding hostility towards foreigners thus necessitating the 1961 Parliamentary debate on Citizenship whose main aim was to rid the country of a racially diverse group of foreign investors, refugees and naturalised Tanganyikan citizens who had not renounced their former nations.⁴⁸ Certain leaders within TANU opposed Nyerere's move to welcome all races into Tanzania indiscriminately stating that he failed to take into account years of accumulated privilege accrued to Europeans and Asians as members of racial groups.⁴⁹ Nyerere however remained loyal to inclusion and repeatedly emphasized, "What we want is a society where the individual matters, not the colour of his skin or the shape of his nose."⁵⁰ Race, for Mwalimu Nyerere had the potential to be the most divisive social attribute and he went on to emphatically proclaim that the race issue was a matter of principle that could not be compromised and that citizenship was to be based solely on loyalty to a nation and not on race or any other criterion. Anything to the contrary was deemed a potential threat to national unity.⁵¹

2.4.2 Nationalism

Nyerere acknowledged that nationhood prior to independence was defined by artificial borders imposed by the colonial powers.⁵² These boundaries enclosed Africans within different ethno-linguistic groups⁵³ and as Oche observes, true belonging was only possible in geographical

⁴⁶ Paul K., *Whitewashing Britain: Race and Citizenship in the Postwar Era* Cornell University Press 2013, 13.

⁴⁷ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, Cambridge University Press, 2013, 321.

⁴⁸ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa*, 321.

⁴⁹ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa*, 117.

⁵⁰ Mwakikagile G., *Nyerere and Africa: End of an Era*, New Africa Press, 2007, 118.

⁵¹ Mwakikagile G., *The Union of Tanganyika and Zanzibar: Product of the Cold War*, New Africa Press, 2015, 30.

⁵² Soyinka, Amin, Selassie, Múgo, Mkandawire, *Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere Lecture Series 2009 – 3013*, 'Mkuki na Nyota, Dar es Salaam, 2015, 129.

⁵³ Soyinka, Amin, Selassie, Múgo, Mkandawire, *Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere Lecture Series 2009 – 3013*, 'Mkuki na Nyota, Dar es Salaam, 2015, 129.

areas where the inhabitants could trace their tribal or ethnic origins effortlessly.⁵⁴ For Nyerere, this process of nation-building meant breaking away from colonial precedent and creating new nations that would be void of the history of common oppression within the delineated boundaries put up by the colonial governments.⁵⁵ If this was not the case, citizenship would continue to discriminate against those indigenous groups that could not clearly prove their ties to a particular area.

2.4.3 Pan-Africanism

Pan-Africanism is a philosophy and movement aimed at unifying all native Africans and people of African heritage. It sets aside cultural differences in the struggle against slavery, racism, and colonialism and shares a common goal of promoting equal rights, self-government, and a recognition of shared experiences.⁵⁶ Having been rooted in crisis and the suffering of Africans under colonial rule as well as the transatlantic slave trade, pan-africanism is a call for unity.⁵⁷ Speaking on pan-Africanism in his book 'Africa Must Unite', Kwame Nkrumah described this call for unity with the following remark, "If we are to remain free, if we are to enjoy the full benefits of Africa's rich resources, we must unite to plan for our total defence and the full exploitation of our material and human means, in the full interests of all our peoples. 'To go it alone' will limit our horizons, curtail our expectations, and threaten our liberty."⁵⁸ Nyerere's desire was for this unity to begin with citizenship because the welcoming of all indigenous African communities residing in Tanzania albeit not originally from there, was pivotal in contributing to continental unity.⁵⁹

2.4.4 Self-Determination

All peoples have a right to self-determination and citizenship matters are not an exception. Echoing the Nationality Decrees Advisory Opinion, the question of nationality is in principle, a matter of domestic concern unless it involves the interpretation of international instruments

⁵⁴ Oche O, *Beyond Rights and Responsibilities: An African Ethos of Citizenship*, 2014, 169.

⁵⁵ Soyinka, Amin, Selassie, Múgo, Mkandawire, *Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere Lecture Series 2009 – 3013*, ' 129.

⁵⁶ Definition of Pan-africanism available at <https://www.chegg.com/homework-help/definitions/pan-africanism-47> on 30 January, 2018.

⁵⁷ Soyinka, Amin, Selassie, Múgo, Mkandawire, *Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere Lecture Series 2009 – 3013*, ' 120.

⁵⁸ Nkrumah K., *Africa Must Unite*, Frederick A. Praeger, Inc., New York, 1963, pg xvii.

⁵⁹ Soyinka, Amin, Selassie, Múgo, Mkandawire, *Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere Lecture Series 2009 – 3013*, ' Mkuki na Nyota, Dar es Salaam, 2015, 129.

on nationality that give rise to international obligations.⁶⁰ On the face of it, self-determination appears to be contrary to the spirit of pan-africanism because with it comes the right to exclude. At the point of state creation, self-determination may be exclusionary in determining who constitutes the new state. However, it has the potential to be inclusive if it is viewed from an internal perspective and as a central pillar of nation building. This is the view of self-determination that Nyerere possessed, one that intentionally guaranteed equal rights and opportunities particularly in multi-ethnic nations. Therefore, self-determination meant that African nations ought to choose from the onset, to place the humanity of Africans over and above independence.⁶¹

2.5 Conclusion

The kind of inclusiveness that was sought after by the Nyererian mode of state creation is an indication as to why there would be a leaning towards the enactment of citizenship laws based on the *jus soli* principle of granting citizenship at birth. The *jus soli* rule recognises the right of each person born within the physical jurisdiction of a given state to acquire full and equal membership of that state.⁶² It is evident that Nyerere did not want to leave any openings for denial of Tanzanian citizenship to persons of a different race, religion, ethnic belonging or origins.

⁶⁰*Nationality Decrees in Tunis and Morocco*, Advisory Opinion, Permanent Court of International Justice, 7th February, 1923.

⁶¹ Soyinka, Amin, Selassie, Múgo, Mkandawire, 'Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere Lecture Series 2009 – 3013,' 132.

⁶² Ellen van Waas L., 'Nationality Matters: Statelessness under International Law', volume 29, School of Human Rights Research Series, 49.

CHAPTER 3

UNRIDDLING JUS SOLI AND JUS SANGUINIS

3.1 Introduction

Most African countries like most countries in the world apply a compromise in their laws governing citizenship between the two basic concepts known as *jus soli*, whereby an individual obtains citizenship because he or she was born in a particular country, and *jus sanguinis*, where citizenship is based on descent from parents who themselves were citizens.⁶³ As was seen in Chapter 3, the choice of either in Africa has been influenced mostly by the continent's colonial history and the subsequent process of state succession following independence.⁶⁴ This chapter will therefore provide a deeper analysis of the two concepts.

3.2 The Origins of the Law of the Soil and the Law of Descent

The *jus soli* rule is a criterion for allocating or withholding birth right to any person born on territory over which a particular state maintains sovereignty.⁶⁵ It is usually applied with an exception for the children of diplomats or other state representatives.⁶⁶ It recognises the right of each person born within the physical jurisdiction of a given state to acquire full and equal membership of that state.⁶⁷

The principle of *jus soli* is a common law principle and can be traced back to the Roman empire where everyone on Roman territory would be granted citizenship save for the those that took up arms against the empire.⁶⁸ In its purest form, the principle is blind to any other considerations but the place of birth. Any child born under the jurisdiction of a given polity must therefore automatically acquire citizenship – regardless of the circumstances of the parents' entry into the country, their legal (or illegal) residence, the child's length of stay in the state or effective ties to the state. The only relevant factor is the question as to whether the person was born within the territory over which the state maintains, has maintained or wishes to extend, its sovereignty.⁶⁹

⁶³ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 26.

⁶⁴ Manby B, *Citizenship law in Africa*, 26

⁶⁵ Shachar A., '*Children of a lesser State: Sustaining Global Inequality through citizenship laws*', New York University Law School, 2003, 9.

⁶⁶ Ellen van Waas L., '*Nationality Matters: Statelessness under International Law*', volume 29, School of Human Rights Research Series, 49.

⁶⁷ Ellen van Waas L., '*Nationality Matters: Statelessness under International Law*', 49.

⁶⁸ <https://www.ancient.eu/article/859/roman-citizenship/> on 25 September 2017.

⁶⁹ Shachar A., '*Children of a lesser state: Sustaining global inequality through citizenship laws*', 9.

Jus Sanguinis on the other hand, is a mode of granting citizenship based on parentage and family links.⁷⁰ It ensures that the children of the current members of a given polity are guaranteed citizenship in future. A law based on it will therefore tend to exclude from citizenship descendants of individuals who are migrants.⁷¹ The inception of *jus sanguinis* can be tied to the Post French-Revolution Civil Code.⁷² The 1804 Napoleonic Code held that citizens, in particular, fathers, had the right to transfer their status of political membership to their offspring at birth, regardless of whether the child was born in France or abroad. In contrast to *jus soli*, *jus sanguinis* linked citizens to each other and created a class of persons enjoying common rights, bounded by common obligations, formally equal before the law.⁷³ The nineteenth century subsequently saw the adoption of the *jus sanguinis* principle by many other European countries, including Austria, Belgium, Spain, Prussia, Italy, Russia, the Netherlands, Norway, and Sweden.⁷⁴ European colonial expansion further spread the *jus sanguinis* principle to countries outside Europe in a bid to keep the metropole “pure”.⁷⁵ These two principles essentially form the main criteria used by the law to grant citizenship and have had a part to play in the eradication or creation of statelessness.

3.3 Legal Manifestation of the Law of the Soil and the Law of Descent

The legal discourse on the right to nationality as well as these two modes of granting citizenship can be traced back to the Permanent Court of International Justice (PCIJ). The advisory opinion on the Nationality Decrees in Tunis and Morocco⁷⁶ in 1923 set the ball rolling on matters nationality following the First World War. Both states had put forth decrees stating that any person born in Tunisia and the French Zone in Morocco to at least one parent also born there, would acquire the Tunisian and French nationalities respectively. This solicited protests from the British government concerning the application of such decrees to British subjects living in the area who were automatically entitled to British citizenship. The Court then held that the question of nationality is in principle, a matter of domestic concern unless it involves the interpretation of

⁷⁰ Shachar A., 'Children of a lesser state: Sustaining global inequality through citizenship laws', 12.

⁷¹ Ellen van Waas L., 'Nationality matters: Statelessness under international law', 49.

⁷² Shachar A., 'Children of a lesser state: Sustaining global inequality through citizenship laws', 12.

⁷³ Brubaker R., 'Citizenship and Nationhood in France and Germany', Cambridge, MA: Harvard University Press, 1992, p.39.

⁷⁴ Weil P., 'Access to Citizenship: A comparison of twenty-five nationality laws', 21.

⁷⁵ Various countries outside Europe sought legislative advice from leading continental countries. This process was referred to as legal imitation and is considered one of the main sources for Japan's current use of the principle of *jus sanguinis*. See Kashiwazaki C., 'Citizenship in Japan: Legal Practice and Contemporary Development,' Washington DC: Brookings Institution Press, 2000, 434-471 and at 437-439.

⁷⁶ *Nationality Decrees in Tunis and Morocco*, Advisory Opinion, Permanent Court of International Justice, 7th February, 1923.

international instruments on nationality that give rise to international obligations.⁷⁷ This was a leaning towards the principle of *jus sanguinis* by Tunisia and Morocco that was upheld by the PCIJ in its efforts to ensure that the grant of nationality remains within the reserved domain of states. This was later upheld in the *Nottebohm* case in 1955.⁷⁸

In September of 1923, an advisory opinion on the *Acquisition of Polish Nationality*⁷⁹ was issued in response to uncertainties arising from the Treaty of Minorities with Poland.⁸⁰ The treaty's Article 4 stated verbatim;

“Poland admits and declares to be Polish nationals, ipso facto and without the requirement of any formality, persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there.”⁸¹

Poland however, went ahead and failed to recognize as Polish nationals, certain persons who were formerly German nationals, if their parents were not habitually resident in the territory which is now part of Poland.⁸² The Court was therefore tasked with determining what the effect of the transfer of territory would be on the nationality of inhabitants and subsequently an interpretation of the conditions for acquiring nationality guaranteed by the aforementioned article. The PCIJ held that Poland had an obligation under the treaty to protect the inhabitants of Poland without distinction of nationality and therefore, anyone whose nationality was in dispute could claim the guarantee provided for minorities under the Treaty.⁸³ The PCIJ went on to state that conditions for acquiring Polish nationality according to the article in dispute were birth in the territory that formed part of Poland habitual residence of parents during the time of birth;⁸⁴ a leaning towards *jus soli*.

⁷⁷ *Nationality Decrees in Tunis and Morocco*, 19.

⁷⁸ See *Nottebohm Case (Liechtenstein v. Guatemala), Second Phase*, International Court of Justice (ICJ), 6 April 1955

⁷⁹ *Acquisition of Polish Nationality*, Advisory Opinion, Permanent Court of International Justice, 15th September 1923.

⁸⁰ Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Poland: Germans*, 2008

⁸¹ Article 4, Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Poland: Germans*, 2008.

⁸² *Nationality Decrees in Tunis and Morocco*, 19.

⁸³ *Nationality Decrees in Tunis and Morocco*, 19.

⁸⁴ *Acquisition of Polish Nationality*, 33.

3.4 The Right to Nationality as a matter of International Law

3.4.1 Post First World War

The Nationality Decrees case acknowledged that while the right to nationality could be limited by international obligations, regulating access to nationality fell entirely within the reserved domain of states and was not subject to any rules of international law.⁸⁵ It was until the September of 1924 that the Assembly of the League of Nations adopted a resolution⁸⁶ establishing a Committee of Experts to prepare a provisional list of the subjects of international law whose regulation by international agreement seemed most desirable and realisable then. Ultimately, the question of nationality formed one of the three main agendas of The Hague Codification Conference in 1930 which was convened by the Assembly of the League of Nations to codify international rules on the same. Out of this conference came the Convention on Certain Questions relating to the Conflict of Nationality Laws.⁸⁷ The aim of the said convention was to have a general document with international responsibilities attaching to all states.⁸⁸ Under the convention, all states that were in agreement were to ensure that all its inhabitants possessed a nationality and work towards abolishing all cases of statelessness.⁸⁹

In addition to the Convention on Certain Questions relating to the Conflict of Nationality Laws, was the Protocol relating to a certain case of Statelessness.⁹⁰ This protocol was specifically responding to the cases of statelessness arising from exhibited emigration patterns at the time following the aftermath of the War of 1914 to 1919 and was aimed at checking the alarming rate of statelessness.⁹¹ In this regard therefore, the Protocol conferred upon states that had not adopted *jus soli*, the obligation to grant nationality to a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality;⁹² an evident preference for the mode of *jus soli*.

⁸⁵ *Nationality Decrees in Tunis and Morocco*, 19.

⁸⁶ Van Waas L, *A 100-year (Hi)Story of Statelessness*, Peace Palace Library blog on 25th August 2016 https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17 December 2017.

⁸⁷ Van Waas L, *A 100-year (Hi)Story of Statelessness*, Peace Palace Library blog on 25th August 2016 https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17 December 2017.

⁸⁸ Remarks by Mr. M. Guerrero, Rapporteur. See League of Nations, *Acts of The Conference for the Codification of International Law*, Plenary Meetings, Geneva, August 19th, 1930.

⁸⁹ League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, 179 LNTS 4137.

⁹⁰ League of Nations, *Protocol Relating to a Certain Case of Statelessness*, 12 April 1930, 179 LNTS 115.

⁹¹ League of Nations, *Protocol Relating to a Certain Case of Statelessness*, preamble.

⁹² Article I, League of Nations, *Protocol Relating to a Certain Case of Statelessness*, 12 April 1930, 179 LNTS 115.

3.4.2 Nationality in International Law post 1945

The end of the 1939 – 1945 War, brought along challenges of large-scale displacement and denationalisation of people. The United Nations Economic and Social Council (ECOSOC) requested the Secretary-General to undertake a study of this problem, in order to understand whether further international law on the matter was required.⁹³ This study was of course informed by the acknowledgement of everyone's right to a nationality as enshrined in Article 15 of the Universal Declaration of Human Rights and the fact that this nationality should not be arbitrarily deprived of nor the change of nationality denied.⁹⁴

The study, published in 1949, observed that although statelessness was a phenomenon as old as the concept of nationality it had slowly assumed unprecedented proportions.⁹⁵ The findings of the study eventually prompted the creation of two conventions. The first being the 1954 Convention Relating to the Status of Stateless Persons⁹⁶ which set out to deal with the treatment of those who had been forced to flee their country due to a well-founded fear of persecution and who may or may not also have been denationalised.⁹⁷ This was in response to the fact that only those stateless persons who were additionally refugees were covered by the 1951 Convention relating to the Status of Refugees leaving out a large number of unrecognised stateless persons.⁹⁸ The second instrument was the 1961 Convention on the Reduction of Statelessness⁹⁹ which aimed to reduce the occurrences of persons being born stateless.¹⁰⁰ It prescribes safeguards aimed at avoiding statelessness. It therefore places an obligation on contracting parties to grant nationality to persons born in their territories who would otherwise be stateless. Such nationality shall be granted either at birth by operation of law or following an application to the relevant national authorities made by or on behalf of the affected person.¹⁰¹

⁹³ Laura van Waas, *A 100-year (Hi)Story of Statelessness*, https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17th December 2017.

⁹⁴ Article 15, Universal Declaration of Human Rights, 1948

⁹⁵ United Nations, *A Study of Statelessness*, Lake Success – New York, 1949, 4.

⁹⁶ *Convention Relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117.

⁹⁷ Laura van Waas, *A 100-year (Hi)Story of Statelessness*, https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17th December 2017.

⁹⁸ Laura van Waas, *A 100-year (Hi)Story of Statelessness*, https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17th December 2017.

⁹⁹ *Convention on the Reduction of Statelessness*, 30th August 1961, 989 UNTS 175

¹⁰⁰ Preamble, *Convention on the Reduction of Statelessness*, 30th August 1961, 989 UNTS 175.

¹⁰¹ Article 1, *Convention on the Reduction of Statelessness*, 30th August 1961, 989 UNTS 175.

3.4.3 The Right to a Nationality

Following the 1948 Declaration of Human Rights' introduction of the right to nationality, a multitude of regional human rights conventions dealt with matters pertaining to this right as well as reaffirming it. The International Covenant on Civil and Political Rights¹⁰² in tandem with the Convention on the Rights of the Child¹⁰³ protect the right of every person and child respectively, to acquire a nationality upon birth. The American Convention on Human Rights also reiterates the right of individuals to the nationality of the state in whose territory they were born if they do not have the right to any other nationality as well as adding that no one shall be arbitrarily deprived of his nationality or the right to change it.¹⁰⁴ Discrimination in the enjoyment of the right to a nationality, on the grounds of race or ethnicity, or sex, or disability, is also prohibited under the 1965 Convention on the Elimination of All Forms of Racial Discrimination¹⁰⁵, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women¹⁰⁶ and the 2007 Convention on the Rights of Persons with Disabilities.¹⁰⁷ The European Convention on Human Rights is glaringly silent on the right to nationality. However, the region has enacted a convention wholly dedicated to nationality; The European Convention on Nationality¹⁰⁸ proving its dedication to the fight against statelessness as well as discriminatory national policies.¹⁰⁹ The above legal response to the issue of statelessness over the course of the second half of the 20th century is evidence that the issue of statelessness was also one of human rights; statelessness being a severe form of violation of the right to a nationality.¹¹⁰

3.4.4 The Right to a Nationality in practice

The Yean and Bosico Girls¹¹¹ was the first case on the American convention's right to nationality. This was a case of two children, born in the Dominican Republic, from a Dominican mother of Haitian descent and a Haitian father, who had been denied Dominican nationality due to a late

¹⁰² Article 24, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

¹⁰³ Article 7, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

¹⁰⁴ Article 20, American Convention on Human Rights, 22 November 1969.

¹⁰⁵ Article 5, Convention on the Elimination of All Forms of Racial Discrimination, 1249 UNTS 13.

¹⁰⁶ Article 9, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13.

¹⁰⁷ Article 18, Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106.

¹⁰⁸ The European Convention on Nationality, Council of Europe (1997).

¹⁰⁹ Laura van Waas, *A 100-year (Hi)Story of Statelessness*, https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17th December 2017.

¹¹⁰ Laura van Waas, *A 100-year (Hi)Story of Statelessness*, https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17th December 2017.

¹¹¹ *Girls Yean and Bosico v. Dominican Republic*, IACtHR, Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations, and Costs), 2.

application for birth certificates. The process for such an application required funds that the girls' mother did not have at the time. The girls were resultantly left stateless for over four years and prevented from attending school. The Inter-American Court on Human Rights held that states have the obligation not to adopt practices or laws concerning the granting of nationality if their application fosters an increase in the number of stateless persons.¹¹²

At the heart of the European Convention on Nationality, lies three general principles that inform its implementation; states are free to determine who their nationals are within the limits set by international law,¹¹³ statelessness shall be avoided,¹¹⁴ rules relating to nationality may not be discriminatory.¹¹⁵ Although faced with jurisdictional issues¹¹⁶ at its onset, the convention has successfully been upheld at the European Court of Human Rights with cases such as *Genovese v Malta* reaffirming that although the right to nationality is absent in the European Convention on Human Rights, citizenship is an aspect of a person's social identity which is protected under the right to private life in the convention.¹¹⁷ The European Court of Justice has also played its part in the implementation of the convention on nationality in its leading *Rottman*¹¹⁸ case where the court dwelt on the legitimacy of revoking a person's nationality where it would result in statelessness. *Rottman* had obtained German nationality using deceptive means which under the convention is a sufficient ground for the revocation of nationality. However, loss of German nationality for *Rottman* would additionally leave him out of the European Union and eventually stateless.¹¹⁹ The court therefore recognised that although devising citizenship rules was in principle a sovereign matter for each state, European Union member states should have due regard to community law, in this case the European Union law on prevention of discrimination, when laying down the conditions for the acquisition and loss of nationality.¹²⁰ These rulings are

¹¹² *Girls Yean and Bosico v. Dominican Republic*, IACtHR, Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations, and Costs), 2.

¹¹³ Article 3, The European Convention on Nationality, Council of Europe (1997).

¹¹⁴ Article 4 (a) and (b), The European Convention on Nationality, Council of Europe (1997).

¹¹⁵ Article 4 (c), The European Convention on Nationality, Council of Europe (1997).

¹¹⁶ The European Convention on Nationality had trouble with admissibility of cases at the European Court of human Rights and European Court of Justice mainly because it did not list either of the bodies as the court with jurisdiction. It was up until the right to nationality was deemed to be intricately connected to the fundamental rights in the European Convention of Human Rights that litigation became possible. See, Laura van Waas, *Fighting statelessness and discriminatory nationality law in Europe*, *European Journal of Migration and Law*, 2012, 243-260.

¹¹⁷ Laura van Waas, *A 100-year (Hi)Story of Statelessness*, https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17th December 2017.

¹¹⁸ *Rottmann v Freistaat Bayern*, Court of Justice of the European Union, 2 March 2010, case C-135/08.

¹¹⁹ *Rottmann v Freistaat Bayern*, Court of Justice of the European Union, 2 March 2010, case C-135/08

¹²⁰ *Rottmann v Freistaat Bayern*, Court of Justice of the European Union, 2 March 2010, case C-135/08.

an indication of the recognition of the right to a nationality as being inherent to one's identity as well as the general need to avoid statelessness.¹²¹

3.4.5 Africa: The Deviation?

Much like the European Convention on Human Rights, the African Charter on Human and Peoples Rights has no express mention of the right to nationality. However, unlike the European region, Africa has no instrument dedicated to matters pertaining to nationality. The existing African treaties are also restrictive in terms of the right to nationality.¹²² The African Charter on the Rights and Welfare of the Child, for instance, which has been ratified by about forty African States, provides for the right to a name at birth and the right to acquire a nationality,¹²³ but not the right to a nationality at birth.¹²⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa goes, contrary to pre-established international norms, does not mention the right of women to transmit their nationality to their spouses, and by providing for the primacy of national laws over the provisions of treaties on non-discrimination in granting nationality to children.¹²⁵

The litigation on nationality and the massive expulsions of aliens on the continent reported by the African Commission on Human and Peoples' Rights,¹²⁶ subsequently speaks to the heights to which problems related to statelessness and the right to nationality have scaled. In a case against Rwanda,¹²⁷ the commission also held that the expulsion of Burundian nationals who had been refugees in Rwanda for years for being a national risk was illegal especially because they were not allowed to defend themselves in court. The expulsion was additionally in contravention of the prohibition in the Banjul Charter on expelling persons on grounds of either their nationality, race or ethnic background without a decision taken in accordance with the law.¹²⁸ *Amnesty International v. Zambia*, provided further deliberations on the question of deportations and expulsions while considering the deportations of William Banda and John Chinula from

¹²¹ Laura van Waas, *A 100-year (Hi)Story of Statelessness*, https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 on 17th December 2017.

¹²² Department of Political Affairs in the African Union, 'The African Union approach to the right to nationality in Africa: Statelessness Impact on Africa's Development and the Need for its Eradication', 2016.

¹²³ Article 6, African Charter on the Rights and Welfare of the Child, 11th July, 1990.

¹²⁴ Department of Political Affairs in the African Union, 'The African Union approach to the right to nationality in Africa: Statelessness Impact on Africa's Development and the Need for its Eradication', 2016.

¹²⁵ Department of Political Affairs in the African Union, 'The African Union approach to the right to nationality in Africa: Statelessness Impact on Africa's Development and the Need for its Eradication', 2016.

¹²⁶ African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa*, published by the African Commission on Human and Peoples' Rights, 2015, 7.

¹²⁷ *Organisation Mondiale Contre La Torture and Others v. Rwanda*, ACmHPR Comm. Nos. 27/89, 46/91, 49/91 and 99/93 (1996).

¹²⁸ Article 12(4) and (5), African Charter on Human and Peoples' Rights, 27th June 1981.

Zambia to Malawi and held that by forcing the complainants to live as stateless persons under degrading conditions, the Zambian government had violated Article 5 of the Charter on the dignity of a human being.¹²⁹ Additionally, the Commission held that the right to an appeal to competent national organs¹³⁰ includes both the initial right to take a matter to court, as well as the right to appeal from a first instance decision to higher tribunals. In several cases relating to deportations or denial of citizenship, the Commission has held that the fact that someone is not a citizen by itself does not justify his deportation; there must be a right to challenge expulsion on an individual basis.¹³¹

The African Commission has additionally found that even without the express mention of the right to nationality, Article 5 on every individual's right to the respect of the dignity inherent in a human being and to the recognition of his legal status applies specifically to attempts to denationalise individuals and render them stateless.¹³² This was applied in the long-running case of *John Modise v Botswana*, who spent years confined either to the South African "homeland" of Bophuthatswana or the no-man's land between South Africa and Botswana because of the Botswanan government's refusal to recognise his nationality. The Commission found against the Botswanan government and ruled, among other conclusions, that Modise's "personal suffering and indignity" violated Article 5 of the Banjul Charter.¹³³

The case of the nationality of the former president of Zambia, Kenneth Kaunda also influenced greatly the continent's decision to take more seriously, this fundamental right. Zambia, in its amended constitution of 1996 provided that anyone running for the office of the president needed to provide proof that both his or her parents are/were Zambian by birth or descent.¹³⁴ The government was hoping to preserve this office for Zambians with a traceable descent. However, this provision not only prevented Mr. Kaunda from contesting the elections but also disenfranchised 35% of the Zambian electorate.¹³⁵ The commission strongly disapproved of such a discriminatory national policy on the basis that it was discriminatory on the grounds of nationality which was forbidden by the African Charter on Human and Peoples' Rights.¹³⁶

¹²⁹ Communication No. 212/98, *Amnesty International v. Zambia*, (2000) AHRLR 325 (ACHPR 1999), paragraph 50.

¹³⁰ Article 7(1a), African Charter on Human and Peoples' Rights, 27th June 1981.

¹³¹ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 25

¹³² Manby B, *Citizenship law in Africa*, 25

¹³³ Communication 97/93, *Modise v. Botswana* (2000) *African Human Rights Law Reports* (AHRLR) 30 (ACHPR 2000), paragraph 91.

¹³⁴ Manby B, *Citizenship law in Africa*, 27.

¹³⁵ Legal Resources Foundation v Zambia, ACmHPR communication 211/98 (2001).

¹³⁶ Articles 2, 3 and 13, African Charter on Human and Peoples' Rights, 27th June 1981.

The African Commission on Human and Peoples' Rights in the *Nubians v Kenya*¹³⁷ case asked of the government of Kenya to establish objective, transparent and non-discriminatory criteria and procedures for determining Kenyan citizenship. This was after a group of Nubians who are descendants of ex-Sudanese individuals were treated differently in the search of identification cards because of their ethnicity and religion. The commission also reiterated that such a tenuous citizenship status was placing the Nubians in a dangerous situation as it opened an avenue for a violation of other rights intricately linked to citizenship.¹³⁸

In light of the aforementioned events which are just but a few instances where the right to nationality has been brought to litigation, the African Commission on Human and Peoples' Rights passed a resolution¹³⁹ in furtherance of its mandate to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations.¹⁴⁰ The 2013 resolution expressed its concern at the arbitrary denial or deprivation of the nationality of persons or groups of persons by African states, especially as a result of discrimination as well as regretting the failure of African states to ensure that all children are registered at birth. It also re-emphasized that it is in the general interest of the people of Africa for all African States to recognise, guarantee and facilitate the right to nationality of every person on the continent and to ensure that no one is exposed to statelessness and called upon states to adopt and implement provisions in their constitutions and other legislations with a view of preventing and reducing statelessness. It also added that it was necessary to carry out a research on issues relating to the right to nationality and consequently assigned the task to the special rapporteur on refugees, asylum seekers; displaced and migrants in Africa.¹⁴¹

The following year, the commission passed yet another resolution¹⁴² that tasked the special rapporteur on refugees, asylum seekers; displaced and migrants in Africa, with the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa in a bid to respond to the absence of the right in the charter. The resolution was cognizant of the fact that there was a pressing need to identify, prevent and reduce statelessness and protect the right to nationality.¹⁴³

¹³⁷ *The Nubian Community in Kenya vs The Republic of Kenya*, ACmHPR communication 317 / 2006.

¹³⁸ *The Nubian Community in Kenya vs The Republic of Kenya*, ACmHPR, paragraphs 167 and 171.

¹³⁹ ACmHPR, Resolution 234 (2013), Resolution on the Right to Nationality.

¹⁴⁰ Article 45(1)(b), African Charter on Human and Peoples' Rights, 27th June 1981.

¹⁴¹ ACmHPR Resolution 234 (2013), Resolution on the Right to Nationality.

¹⁴² ACmHPR Resolution 277 (2014), Resolution on the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa.

¹⁴³ ACmHPR Resolution 277 (2014), Resolution on the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa.

Following the introduction of the right to nationality into international law, there has been a considerable amount of attention on the obligation upon states to adopt practices or laws with respect to the granting of nationality that would reduce the number of stateless persons.¹⁴⁴ Such an interest was bound to have a resulting effect on citizenship laws across the continent. What would it mean for countries that had in operation the *jus sanguinis* or *jus soli* mode of granting nationality and their obligation to ensure the prevention and reduction of statelessness?

3.5 Law of the Soil or the Law of Descent?

The question of nationality under international law as discussed earlier on in this chapter has exhibited a transitory pattern from being not only an issue of the application of either *jus soli* or *jus sanguinis* but more of laws that are objective, transparent and non-discriminatory in nature as well as encompassing the general obligation on the avoidance and reduction of statelessness.¹⁴⁵ As a consequence of the autonomy of states to stipulate their own nationality regulations,¹⁴⁶ statelessness is the unintentional result of a conflict between the existence of the two contradicting principles on which to base the attribution of nationality to a child at birth.¹⁴⁷ From the onset, applying *jus soli* in its purest form seems to be the solution for statelessness the world over. From a global welfare perspective, its over-inclusiveness ensures that everyone on a certain territory belongs to that territory and owes allegiance and faithful obedience to the sovereign¹⁴⁸ that makes this possible, from birth. However, the pure and unrestricted application of *jus soli* may be problematic. It presents an opportunity for abuse in the form of illegal immigration as well as undermining the notion of citizenship which is one of a mutual relationship between a state and an individual. It may also present issues of overpopulation.¹⁴⁹ The Dominican Republic, which is a perfect example, made the shift from *jus soli* to *jus sanguinis*

¹⁴⁴ *Girls Yean and Bosico v. Dominican Republic*, IACtHR, 2.

¹⁴⁵ *The Nubian Community in Kenya vs The Republic of Kenya*, ACmHPR communication 317 / 2006.

¹⁴⁶ The Permanent Court of International Justice described the grant of nationality being within the “reserved domain of the states” which was later upheld in the *Nottebohm case*, see, *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase, International Court of Justice (ICJ)*, 6 April 1955. The court in this instance described nationality as being within the domestic jurisdiction of the state which settles, by its own legislation, the rules relating to the acquisition of its nationality. *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice, 7 February 1923.

¹⁴⁷ In 1949, the International Law Commission placed on the list of subjects tentatively selected for codification one of them being nationality, including statelessness. This report was very instrumental as it not only highlighted the causes of statelessness but also demonstrated the necessity of having conventions created on matters statelessness that came in the subsequent years. See, *Report on Nationality, Including Statelessness* by Mr. Manley O. Hudson, Special Rapporteur, 1952, 17.

¹⁴⁸ Lord Coke in this case employed the concept of allegiance to demonstrate the mutual relationship that exists for life between a monarch and all subjects born in the king’s dominion. See, *Calvin’s Case*, 77 Eng. Rep. 377 (K.B. 1608).

¹⁴⁹ *Congress debates jus soli* <https://migration.ucdavis.edu/mm/more.php?id=844> on 28 March, 2018.

due to widespread migration of persons from Haiti which resulted in overpopulation.¹⁵⁰ In pursuance of this move, in 2013, the constitutional court of the Dominican Republic retroactively stripped more than 200,000 persons of Haitian descent of their Dominican nationality.¹⁵¹ The problem however was that the judgment contained a risk of statelessness for hundreds of thousands of persons, as the Dominican Republic had not proven that those affected could revert to their Haitian nationality.¹⁵²

It would seem therefore, as evidenced by the Dominican Republic's move, shifting to a purely descent-oriented regime would result in increased statelessness but does that make it mandatory for states to abide by *jus soli* given their obligation to avoid statelessness? *Jus soli*, as aforementioned is cognisant of the aspect of global welfare. It additionally ensures that the rights of the child are promoted and protected. A child has the express right to a name and nationality¹⁵³ and an application of *jus soli* ensures this indiscriminately. Pure *jus soli* however would be detrimental as it will be unable to guarantee citizenship for parents who are national of a state but happen to be in a different territory at the time of bearing their offspring. All proper *jus soli* systems must therefore have elements of *jus sanguinis* subsequently.

Jus sanguinis has demonstrated over time that it ensures nationality for children of nationals of a state and as such, their descendants can never be rendered stateless. However, it cannot exist on its own and prevent statelessness. A good example will be at the point of state creation where a pure *jus sanguinis* regime would result in the statelessness of persons who have been lawfully resident in a particular territory.

In conclusion, it is evident that these technicalities need to be refashioned if at all statelessness is to be remedied such that a choice of either does not automatically exclude large populations of persons tied to a particular territory. There is also a pressing need for countries to enact citizenship laws and policies that would be unique to their populations and developmental history as opposed to running with foreign legislation such as those passed down from colonialism.¹⁵⁴

¹⁵⁰ http://www.huffingtonpost.com/entry/birthright-citizenship-other-countries_us_55df2a82e4b08dc0948699f3

¹⁵¹ <http://stories.minorityrights.org/dominican-republic/chapter/legal-section/> on 28th December 2017.

¹⁵² *Expelled Dominicans and Haitians v. Dominican Republic*, IACtHR Judgement of August 28th 2014 (Preliminary Objections, Merits, Reparations and Costs, Judgment), para. 261.

¹⁵³ Article 7, UNGA, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

¹⁵⁴ See chapter 2 on the impact of colonialism on Kenyan nationality laws post-independence.

CHAPTER 4

WHICH CRITERION WORKS? A COMPARATIVE STUDY OF KENYA AND TANZANIA.

4.1 Introduction

The Permanent Court of International Justice, as discussed in the previous chapter, opined that the question of nationality is in principle, a matter of domestic concern unless it involves the interpretation of international instruments on nationality that give rise to international obligations.¹⁵⁵ Following the inculcation of the right to nationality into international law, there has been a considerable amount of attention on the obligation upon states to adopt practices or laws with respect to the granting of nationality that would reduce the number of stateless persons.¹⁵⁶ This need was re-emphasized by the African Commission on Human and Peoples Rights in its call for African States to recognise, guarantee and facilitate the right to nationality of every person on the continent and to ensure that no one is exposed to statelessness and called upon states to adopt and implement provisions in their constitutions and other legislations with a view of preventing and reducing statelessness.¹⁵⁷

One such way of meeting this obligation is having to deal with the question on whether a particular state's citizenship laws applying at birth will be driven by either the *jus soli* or *jus sanguinis* principle as well as the resultant effect of such a move on statelessness. As was stated in chapter 3, as a consequence of the autonomy of states to stipulate their own nationality regulations,¹⁵⁸ statelessness may be the unintentional result of a conflict between the existence of the two contradicting principles on which to base the attribution of nationality to a child at birth.¹⁵⁹ This chapter will grapple with the application of *jus sanguinis* and *jus soli* in Kenya and Tanzania respectively and compare the extent to which both states have interacted with, reduced or effectively dealt with the issue of statelessness as a result of the application of their citizenship laws.

¹⁵⁵ *Nationality Decrees in Tunis and Morocco*, PCIJ report 19.

¹⁵⁶ *Girls Yean and Bosico v. Dominican Republic*, IACtHR, 2.

¹⁵⁷ ACmHPR Resolution 234 (2013), Resolution on the Right to Nationality.

¹⁵⁸ *The Nottebohm Case (Liechtenstein v. Guatemala)*; Second Phase, International Court of Justice (ICJ), 6 April 1955.

¹⁵⁹ See, *Report on Nationality, Including Statelessness* by Mr. Manley O. Hudson, Special Rapporteur, 1952, 17.

4.2 Salient features of Kenya's Citizenship Laws

The regulation of citizenship in Kenya dates back to 1963, following the attainment of independence with the first pieces of legislation being the Independence Constitution and the Citizenship Act of 1963. These laws regarding citizenship post-colonialism were fundamentally similar to the British order which was not only exclusionary in nature but also very difficult to implement particularly for a new self-governing state.¹⁶⁰ According to the British laws, which were replicated in the Independence Constitution of Kenya, one could only automatically upon attain Kenyan citizenship after meeting one of the following criteria¹⁶¹:

- Being born in Kenya on 11th December, 1963 and is a citizen of the United Kingdom and Colonies or a British Protected Person (BPP),¹⁶²
- Being born outside Kenya, and is a citizen of the United Kingdom and Colonies or a British protected person shall, if his father becomes, or would but for his death have become, a citizen of Kenya by virtue of the aforementioned provision,
- Being born into a family that has spent 2 generations in Kenya prior to 1963 while still meeting the *jus soli* requirement of being born in the territory.

The Independence Constitution was additionally express on its *jus sanguinis* stance in stating that person shall not become a citizen of Kenya by virtue of the aforementioned section of law if neither of his parents was born in Kenya.¹⁶³ Automatic citizenship was therefore only granted to persons that met the above requirements and this in turn made it very difficult for non-indigenous groups to gain citizenship.¹⁶⁴ The Kenyan-Asians are an example of persons who despite the long-standing presence in Kenya, could not gain Kenyan citizenship following the attainment of independence. The Asian community in Kenya did not fit the definition of a tribe, given their diverse religious, socio-cultural, linguistic and ancestral homelands and thus had no claim to Kenyan citizenship based on descent.¹⁶⁵

Years later, with the promulgation of the 2010 Constitution, came a change in the laws on citizenship as well as the enactment of the Immigration and Citizenship Act of 2011. Although the constitution scraped off most of the provisions protecting foreigners i.e. the British, it still

¹⁶⁰ Blitz B. and Lynch M, *Statelessness and citizenship: A comparative study on the benefits of nationality*, 2011, 47.

¹⁶¹ Section 87, Repealed Constitution of Kenya, 1963.

¹⁶² [https://www.whatpassport.com/countries/UnitedKingdom/Passport_%26_Nationality/British_Protected_Person_\(BPP\)](https://www.whatpassport.com/countries/UnitedKingdom/Passport_%26_Nationality/British_Protected_Person_(BPP))

¹⁶³ Section 87, Repealed Constitution of Kenya, 1963.

¹⁶⁴ Blitz B. and Lynch M, *Statelessness and citizenship: A comparative study on the benefits of nationality*, 2011, 46.

¹⁶⁵ <https://qz.com/1037595/adding-asians-to-kenyas-list-of-tribes-shows-an-unhealthy-obsession-with-tribal-purity/>

relies heavily on proof of descent to grant Kenyan citizenship upon birth. A person is only a Kenyan citizen by birth if either the father or mother is a Kenyan citizen.¹⁶⁶ However, it provides for the granting of citizenship by birth to children found in Kenya who are, or appear to be, less than eight years of age, and whose nationality and parents are not known; a core component of the reduction of statelessness.¹⁶⁷ It additionally provides for citizenship through registration under the tenets of marriage, lawful residence or adoption¹⁶⁸ and allows for dual citizenship¹⁶⁹ albeit this will not be necessary for this study since *jus sanguinis* and *jus soli* are modes of granting citizenship on account of birth.

Not only are these sentiments regarding citizenship by birth¹⁷⁰ and the limitation as to descent¹⁷¹ echoed in the Immigration and Citizenship Act of 2011, but the Act also goes ahead to provide for stateless persons which is a pertinent provision for this study. Section 15 allows for a person who does not have an enforceable claim to the citizenship of any recognized state and has been living in Kenya for a continuous period since independence, to be deemed to have been lawfully resident. Such a person may on application, in the prescribed manner, be eligible to be registered as a citizen of Kenya if the following onerous grounds are proved: adequate knowledge of Kiswahili or a local dialect, lack of a conviction and imprisonment sentence for a term of three years or longer, the intention to continue to permanently reside in Kenya or to maintain a close and continuing association with Kenya upon registration as a citizen; and an understanding of the rights and duties of a Kenyan citizen.¹⁷² It also attaches the manifestation of *jus sanguinis* to the descendants of stateless persons who upon attaining the age of majority have parents or if deceased, had parents who were eligible to be registered under the Act as long as they meet the same section 15 requirements.¹⁷³

4.2.1 Analysing Kenya's Citizenship Law

From the analysis above, it is crystal that Kenya has been and continues to be a nation that heavily relies on lineage when granting citizenship by birth to persons on the territory. It is important to note, however, that the recourse provided for stateless persons under section 15 of the Citizenship and Immigration Act of 2011 is through registration and does not guarantee

¹⁶⁶ Article 14, Constitution of Kenya, 2010.

¹⁶⁷ Article 14 (4), Constitution of Kenya, 2010.

¹⁶⁸ Article 15, Constitution of Kenya, 2010.

¹⁶⁹ Article 16 Constitution of Kenya, 2010.

¹⁷⁰ Section 6, Kenya Citizenship and Immigration Act, of 2011.

¹⁷¹ Section 7, Kenya Citizenship and Immigration Act, of 2011.

¹⁷² Section 15, Kenya Citizenship and Immigration Act, of 2011.

¹⁷³ Section 17, Kenya Citizenship and Immigration Act, of 2011.

citizenship to such persons at birth which is what *jus soli* or *jus sanguinis* is concerned with. Kenya has also ratified the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness which places obligations that the aforementioned section 15 may have been trying to address. The same obligations have also been enforced against Kenya in the Nubian cases at the African Court of Human and Peoples Rights and are precisely speaking to section 15 of the Citizenship and Immigration Act, of 2011. The African Commission on Human and Peoples' Rights in the *Nubians v Kenya*¹⁷⁴ case asked of the government of Kenya to establish objective, transparent and non-discriminatory criteria and procedures for determining Kenyan citizenship.

Has the application of *jus sanguinis* furthered the achievement of this obligation or has it been a contributing factor to the growing number of stateless individuals across the continent? Is the requirement to apply for citizenship through registration the intended effect for a *jus sanguinis* regime with respect of statelessness persons and if so, can such a citizen pass on citizenship to his or her descendants? This section will highlight the application of *jus sanguinis* in Kenya *vis a vis* the creation of statelessness with respect to the Kenyan – Asians, Nubians and Makonde communities in Kenya.

The statelessness of the *Kenyan – Asians* was sanctioned by law. Donald Rothschild, observes that at the time East Africa Protectorate was declared a colony in 1920, there was a tiered social and economic structure drawn on racial lines. The Europeans held all of the prominent places in the public and private sectors of the economy. The Asians predominated in the middle-level positions as artisans, clerks, professionals, merchants and tradesmen with Africans occupying the lowest level and formed an unskilled labour pool on the farms, homes and factories. With racial tensions intensified, Africans expressed their unwillingness to permit other races to maintain their privileged status.¹⁷⁵ In contrast to Tanzania, Kenyans, upon independence demanded to expel all immigrants from Kenya and this could be deemed as the reason for a *jus sanguinis* regime. The treatment of Asians in Kenya was therefore a result of the refusal of the post-colonial government of Kenya to include, as Kenyans, communities that had established long-standing ties and attachments to the territory. There was a lot of hatred towards the Asians and foreigners in general following the attainment of independence and in a bid to exclude the,

¹⁷⁴ The Nubian Community in Kenya vs The Republic of Kenya, ACmHPR communication 317 / 2006.

¹⁷⁵ Rothschild D., '*Citizenship and national integration: the non-African crisis in Kenya*,' University of Denver, Volume 1, 1970, 40.

the Asians in Kenya were rendered stateless by law.¹⁷⁶ A *jus sanguinis* regime only sweetened the deal; the Asians present at the time could not prove their descent from a Kenyan.

The Nubians in Kenya descended from the Nuba mountains found in what is current day central Sudan and had been conscripted into the colonial British army without being granted British citizenship. Their demands to return to Sudan were also not met and no resettlement scheme was provided for them in Kenya.¹⁷⁷ In a case brought before the African Court on Human and People's Rights on behalf of Nubian children, it was noted that the main difficulty in granting nationality is the requirement on proof of descent. For instance, the fact that many of these parents lack valid identity documents, having been stripped of them by the colonial government, further complicates their efforts to register their children's births. It was further alleged that the Kenyan government does not recognize birth registration documents as proof of citizenship¹⁷⁸ thus denying the Nubian children born in the country the right to a name and nationality.¹⁷⁹ Not only did the application of *jus sanguinis* make it impossible for the Nubian children to acquire citizenship, but their parents also found it difficult to obtain citizenship in the country.

In yet another case, the African Committee of Experts on the Rights and Welfare of the Child held that it is rightly said that birth registration is the State's first official acknowledgment of a child's existence, and a child who is not registered at birth is in danger of being shut out of society and thus denied the right to an official identity, a recognized name and a nationality.¹⁸⁰ The Complainants allege that the treatment of children of Nubian descent violates their right to be registered at the time of their birth, because some parents have difficulty having their children registered especially since many public hospital officials refuse to issue birth certificates to children of Nubian descent.¹⁸¹ The Nubians recently had their land rights in Kibra recognised after a lengthy struggle. However, The Nubians continue to face significant obstacles in their efforts to secure national identity documentation and are the only non-border minority whose are subject to special vetting procedures when applying for their national identity card at age 18. This is in spite of the introduction of section 15 of the Citizenship and Immigration Act of 2011 which would automatically grant them citizenship on account of their

¹⁷⁶ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 115.

¹⁷⁷ *The Nubian Community in Kenya vs The Republic of Kenya*, ACmHPR communication 317 / 2006.

¹⁷⁸ *The Nubian Community in Kenya vs The Republic of Kenya*, ACmHPR communication 317 / 2006.

¹⁷⁹ Article 6, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

¹⁸⁰ Article 6, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

¹⁸¹ *The Nubian Community in Kenya vs The Republic of Kenya*, ACmHPR communication 317 / 2006.

presence in the country since independence and the fact that they have no enforceable claim to the citizenship of any other recognized state.¹⁸²

The Makonde are a Bantu speaking community that originated from the Northern part of the Republic of Mozambique mainly Mwenje district of Cabb Derogado province. The Kenyan Makonde are estimated to be 4000 people and they started streaming into Kenya as early as 1948 and have remained in the country since.¹⁸³ The Kenyan Makonde consists of descendants of exiled freedom fighters, refugees fleeing civil war, labourers who were recruited by the British during the colonial period to work in sisal farms and sugar plantations across Kenya's coastal province in Kwale, Kilifi and Taita Taveta. After Kenya's independence, they were neither repatriated nor given Kenyan identification.¹⁸⁴ The Makonde however, are not recognised as being among the tribes of Kenya. In fact, they have been rendered stateless during their period of residence in the country despite no longer identifying as Mozambicans or the fact that majority of their children were born in Kenya. Their children even on attaining the age of majority, cannot apply for identification cards and the birth of every child in their community is not recognized by the issuance of birth certificates.¹⁸⁵ The Makonde Community had no claim, at the first instance, under the mode of birth as a form of acquiring citizenship in Kenya. This is probably because their origin has successfully been traced back to Mozambique making it difficult for them to prove ties to Kenya through descent. However, by virtue of Section 15 of the Immigration and Citizenship Act, the subsequent generations that have continued to reside in Kenya¹⁸⁶ since their arrival ought to have been granted citizenship in order for their children to be deemed to have been born of Kenyan parents.

4.2.2 Kenya's Pattern of Exclusion

The three groups are similar in that they have all been present in the country since before the attainment of independence and have consequently established long-standing ties and attachments to the country. Their non-recognition is proof of the exclusionary method of state succession taken up by Kenyan leaders post colonialism. In contrast to Tanzania, Kenyans, upon independence demanded to expel all immigrants from Kenya and this could be deemed

¹⁸² Section 15, Kenya Citizenship and Immigration Act, of 2011.

¹⁸³ <https://qz.com/910868/kenyas-makonde-people-originally-from-mozambique-had-not-been-recognized-as-citizens-till-now/> on 28 March 2018.

¹⁸⁴ UNHCR online publication, *The Makonde of Kenya – The struggle to belong*, <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/05/The-Makonde-of-Kenya-The-Struggle-To-Belong1.pdf> on 15th January, 2018.

¹⁸⁵ <https://www.enca.com/africa/stateless-kenyas-makonde-people> accessed on 27th January, 2018.

¹⁸⁶ Section 15, Kenya Citizenship and Immigration Act, of 2011.

as the reason for a *jus sanguinis* regime. It can be concluded that the exclusionary nature of the Kenyan laws may have made way for the creation of statelessness especially with regard to the African communities present in the country before and after the attainment of independence. These laws were not an appropriate legal framework, specific to African and colonial Kenya's history in particular.

In the transition from being a colony to an independent state, the application of the *jus soli* principle would have been more preferred in order to accommodate the Kenyan-Asians, the Nubians and the Makonde and prevent the continual infringement of their human rights on account of their statelessness. The subsequent application of *jus sanguinis* would have in turn ensured protection for the descendants of these communities going forward thus justifying the argument put forward in chapter 3 that all proper *jus soli* systems include or ought to include an element of *jus sanguinis* subsequently.

Needless to say, the reluctance of the Kenyan government, despite having international obligations and provisions on statelessness under domestic law has been attributed to traces of discrimination and lack of adherence to laws as well as numerous delays at the immigration department.¹⁸⁷ Even the recent recognition of the Makonde came six months before the 2017 general elections with the president, also a candidate for re-election, on record for demanding the speedy issuance of identity cards to the Makonde community allowing them to vote.¹⁸⁸ Political expediency or renewed fidelity to the law and international obligations?

4.3 Tanzania; Glitter or Gold?

Mwalimu Julius Nyerere's push for racial inclusion in 1959 offset the initial enactment and subsequent development of Tanzania's citizenship laws.¹⁸⁹ From 1920 to 1980, British colonial authorities and post-colonial Tanzanian leaders struggled with African mobility and identities. Border-crossers, including labour migrants, refugees, immigrants, and smugglers, were therefore viewed as problematic. As the state transitioned to independence, nationalist leaders

¹⁸⁷ 'Makonde granted Kenyan citizenship', Daily Nation, 1st February 2017, <https://www.nation.co.ke/counties/kwale/makonde-granted-Kenyan-citizenship/3444918-3796210-xx1iiw/index.html> on 29th January, 2018.

¹⁸⁸ 'Makonde granted Kenyan citizenship', Daily Nation, 1st February 2017, <https://www.nation.co.ke/counties/kwale/makonde-granted-Kenyan-citizenship/3444918-3796210-xx1iiw/index.html> on 29th January, 2018.

¹⁸⁹ Miller Lee C., "Who are the "permanent inhabitants" of the state? Citizenship policies and border controls in Tanzania, 1920-1980." PhD (Doctor of Philosophy) thesis, University of Iowa, 2011, 90.

created Tanzanian citizenship and claimed to embrace trans-border African mobility in order to reject colonial racist views and promote Pan-Africanism.¹⁹⁰

Following the attainment of independence in 1961, there was a parliamentary debate set aside to discuss the issue of citizenship. This debate was made necessary by increasing concerns about security, political opposition, land-use, and a strained economy resulting from the move to assimilate all persons under Tanzanian territory as citizens. These reasons contributed to some of the state officials to want to state harden borders.¹⁹¹ The parliamentary debate birthed the 1961 Citizenship Ordinance of Tanganyika. The ordinance had traces of *jus sanguinis* as it only allowed citizenship by birth to those born in or out of Tanganyika on condition that they were either a citizen of the United Kingdom and its Colonies or a British Protected Person born of at least one parent born in Tanganyika or possessing Tanganyikan citizenship.¹⁹²

The Tanzania Citizenship Act of 1995¹⁹³ was the definitive break from granting citizenship by application of the law of descent making Tanzania one of the 30 countries that apply unrestricted *jus soli*.¹⁹⁴ From the face of it, the application of unrestricted *jus soli* is as inclusive as it gets for any state. As was stated in the previous chapter, the principle is blind to any other considerations but the place of birth. Therefore, any child born under the jurisdiction of Tanzania automatically acquires citizenship – regardless of the circumstances of the parents' entry into the country, their legal (or illegal) residence, the child's length of stay in the state or effective ties to the state. The relevant factor is the question as to whether the child was born within the territory over which the state maintains, has maintained or wishes to extend, its sovereignty.¹⁹⁵ For adults, in addition to proving birth in Tanzania, there is the additional requirement of naturalization and renouncing their former citizenship, if any.¹⁹⁶

One would expect therefore that with the application of *jus soli*, issues of granting citizenship to foreigners living in Tanzania would be non-existent as long as the *jus soli* requirement is met sufficiently. It was therefore very astonishing when, following the 1995 Act, Tanzanian state officials began using citizenship as a political weapon. Oscar Kambona, a prominent

¹⁹⁰ Miller Lee C., "Who are the "permanent inhabitants" of the state? Citizenship policies and border controls in Tanzania, 1920-1980," 90.

¹⁹¹ Miller Lee C., "Who are the "permanent inhabitants" of the state? Citizenship policies and border controls in Tanzania, 1920-1980," prologue.

¹⁹² Section 1(1) and (2), Tanganyika Citizenship Act, 1961.

¹⁹³ *Tanzania Citizenship Act*, 10 October 1995.

¹⁹⁴ 'In which countries do you automatically get a passport and citizenship if you are born there, regardless of the nationality of child's parents?' <https://www.quora.com/In-which-countries-do-you-automatically-get-a-passport-and-citizenship-if-you-are-born-there-regardless-of-the-nationality-of-childs-parents> on 29th January, 2018.

¹⁹⁵ Shachar A., 'Children of a lesser state: Sustaining global inequality through citizenship laws', 9.

¹⁹⁶ Tanzania National Assembly, Hansard, April 18 – 24, 1995, 78.

politician in Tanzania, was prevented from returning to Tanzania from a period of seeking political refuge in Britain on the grounds that he was not a citizen despite having been born in Kenya of parents from Malawi.¹⁹⁷ Vocal opposition to the government also led to ruling party leaders persuading the government to strip a number of influential figures of their citizenship status. In 2001, for instance, the former Tanzanian ambassador to Nigeria and Ethiopia, Timothy Bandora, Anatoli Amani, Kagera regional CCM¹⁹⁸ chairman and Mouldine Castico, a National Executive Committee Member lost their citizenship even after the government acknowledged that they were indeed born in Tanzania, only to foreign parents.¹⁹⁹

The crisis of about 200000 Burundian refugees²⁰⁰ in Tanzania in 1995 became the ultimate test of Tanzania's jus soli regime and its effectiveness. In response to their arrival, the Tanzanian government, contrary to global expectations, created policies to close down the borders with Burundi and initiated elaborate plans to repatriate the refugees back to Burundi²⁰¹ because repatriation is typically favoured over local integration as the most desired "durable solution".²⁰² However, the refugees, having fled Burundi in 1972, had lost all connections with the state and had established ties to Tanzania with many Tanzanians living in proximity to the former refugees wanting them to be allowed to stay as they had become a vital part of the local economy.²⁰³ The government however continued to deny their applications to be naturalized as Tanzanian citizens and their offspring were denied citizenship on account of their birth in Tanzania. This led to some form of protracted exile with the refugees facing an imminent threat in becoming stateless.²⁰⁴ It was in 2008 that the Tanzanian government yielded to the refugees' pleas and promised them citizenship in a move that lauded the world over as the move that would avert a growing crisis that had led to those caught up in its midst effectively stateless.²⁰⁵

¹⁹⁷ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, Cambridge University Press, 2013, 304.

¹⁹⁸ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 304.

¹⁹⁹ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 304

²⁰⁰ <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²⁰¹ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 306.

²⁰² Hovil L., 'Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship', October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²⁰³ Hovil L., 'Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship', October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²⁰⁴ Hovil L., 'Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship', October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²⁰⁵ Hovil L., 'Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship', October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

Implementation of the same has however been elusive. The Tanzanian government began to see how much their 'open-door' policy was proving to be cumbersome with issues of overpopulation and insecurity emanating from the application of unrestricted *jus soli* hence the reluctance to award citizenship.²⁰⁶ The generous principle was therefore becoming increasingly caught up in *realpolitik*.²⁰⁷ The process itself, therefore, has revealed a huge gap between the idea of citizenship and its realisation. In practice, these former refugees, have been required to renounce their Burundian nationality which they no longer possessed and have spent the past few years being told that the process is incomplete coupled with refusal of certificates confirming their new status. As a result, neither the status "refugee" nor "citizen" could be applied seamlessly to this group, leaving their legal status highly ambiguous.²⁰⁸ Their eventual recognition came in 2014 after decades of struggle and legal limbo.²⁰⁹

Tanzania's story is evidence of the lack of allegiance to legislation in as much as they accorded citizenship to the Burundian refugees. The strict application of *jus soli* would have presented a different pattern of execution. It also clarifies that the use of unrestricted *jus soli* is slowly becoming undesirable due to its over-inclusiveness²¹⁰ and warrants a remodeling of the same to prevent issues of overpopulation and abuse. *Jus soli*, as aforementioned is cognizant of the aspect of global welfare.²¹¹ It additionally ensures that the rights of the child are promoted and protected. A child has the express right to a name and nationality²¹² and an application of *jus soli* ensures this indiscriminately. However, a pure *jus soli* regime presents additional challenges for the same citizens when they bear children away from home. Their children are denied Tanzanian citizenship on account of their being born outside the territory; an anomaly that a *jus sanguinis* regime would have sufficiently addressed. In as much as *jus soli* may effectively contribute to the aversion of statelessness, its lack of restriction necessitates its review so as to not only protect the rights of these vulnerable populations but also to respect the autonomy of states in controlling the constituents of their nations.

²⁰⁶ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 306.

²⁰⁷ Realpolitik is a German term which denotes politics based on real and practical factors and not on moral ideas. It supports realism. See <https://definitions.uslegal.com/r/realpolitik/> on 31st January, 2018.

²⁰⁸ Hovil L., 'Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship', October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²⁰⁹ UNHCR online publication, <http://www.unhcr.org/afr/news/latest/2014/10/5441246f6/tanzania-grants-citizenship-162000-burundian-refugees-historic-decision.html> on 29th January, 2018.

²¹⁰ Manby B., 'Statelessness in South Africa', 14

²¹¹ <http://visionlaunch.com/birthright-citizenship-pros-and-cons/#> on 25th September 2017.

²¹² Article 7, UNGA, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577.

CHAPTER 5

FINDINGS, RECOMMENDATIONS and CONCLUSION

It is evident throughout this study that state creation in Africa after the attainment of independence by former colonies played a great role in the creation of statelessness. African leaders had to work through the nation-building agenda in political units comprising of people from different cultures, religions and languages. The rules of state succession therefore were particularly sensitive in the context of citizenship law.²¹³ An examination of the patterns of state creation exhibited by Tanzania and Kenya serves as proof of the sensitivities and motivations that lead a country to develop citizenship laws in a manner they deem fit for their situation.

Subsequently, the laws governing citizenship in most African countries developed along the lines of a compromise between two concepts; *jus soli* whereby an individual obtains citizenship because he or she was born in a particular country and *jus sanguinis* where citizenship is based on descent from parents who themselves are or were citizens.²¹⁴

This paper set out to determine whether the application of *jus sanguinis* by African states has contributed significantly to the creation and continuance of stateless on the continent and whether the application of its antithesis would be the remedy to the long-standing problem of statelessness.

The research was largely guided by the hypothesis that countries that grant citizenship through the application of the law of the soil have less issues of statelessness as compared to those that grant citizenship through the application of the law of descent.

5.1 Findings

It is indeed true that countries that employ *jus soli* instead of *jus sanguinis* have less incidences of statelessness. However, this phenomenon is conditional on the finding that *jus soli* cannot exist and therefore effectively remedy statelessness without the aid of *jus sanguinis*. At the point of state creation, a *jus soli* regime ensures that all the persons born on a particular territory acquire its citizenship and thus caters for persons who have been lawfully resident in the area and established long and effective ties with the polity. However, a pure *jus soli* regime following state creation could also create statelessness particularly in instances where citizens

²¹³ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 21.

²¹⁴ Manby B, *Citizenship law in Africa*, 25.

happen to give birth outside the state. The *jus soli* principle is an ideal that may not always work in practice. At first instance, in a bid to meet the international obligation to avoid statelessness, the law of the soil may appear to be the perfect remedy. However, the study of Tanzania proves that it may be harder to implement this in practice. For instance, despite having a robust legal regime founded on the law of the soil, the Burundian refugees in Tanzania remained stateless for over 50 years since their arrival. In response to their arrival, the Tanzanian government, contrary to global expectations, created policies to close down the borders with Burundi and initiated elaborate plans to repatriate the refugees back to Burundi²¹⁵ because repatriation is typically favoured over local integration as the most desired “durable solution”.²¹⁶ The government continued to deny their applications to be naturalized as Tanzanian citizens and their offspring were denied citizenship on account of their birth in Tanzania. This led to some form of protracted exile with the refugees facing an imminent threat in becoming stateless.²¹⁷ It was only until 2008 that the Tanzanian government yielded to the refugees’ pleas and promised them citizenship in a move that lauded the world over as the move that would avert a growing crisis that had led to those caught up in its midst effectively stateless.²¹⁸

Implementation of the same also became problematic. The Tanzanian government began to see how much their ‘open-door’ policy was proving to be cumbersome with issues of overpopulation and insecurity emanating from the application of unrestricted *jus soli* hence the reluctance to award citizenship.²¹⁹ Recently, the government of Tanzania acting on orders from the president, Mr. John Magufuli, deported Kenyans who had been living rightfully in Tanzania. Kenyan nationals living in the country claim that the exercise, popularly known as ‘Operation Timua Wageni’, was a move to free up jobs for the locals and it saw scores of Kenyan nationals, who were said to be the most targeted, declared prohibited immigrants and deported.²²⁰ In a rather shocking move, Tanzania informed the United Nations High

²¹⁵ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 306.

²¹⁶ Hovil L., ‘*Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship*’, October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²¹⁷ Hovil L., ‘*Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship*’, October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²¹⁸ Hovil L., ‘*Statelessness averted? Former Burundian refugees to receive Tanzanian citizenship*’, October 15, 2014, <https://ilg2.org/2014/10/15/statelessness-averted-former-burundian-refugees-to-receive-tanzanian-citizenship/> on 29th January, 2018.

²¹⁹ Aminzade R., *Race, Nation, and Citizenship in Postcolonial Africa: The Case of Tanzania*, 306.

²²⁰ <https://www.nation.co.ke/news/Tough-times-for-Kenyans-deported-from-Tanzania/1056-4281264-b6cl4i/index.html>

Commissioner for Refugees (UNHCR) in January of 2018 that it was suspending the granting of citizenship to some Burundian refugees and that it would discourage new asylum applications. This is after being considered, for the longest time, a safe haven for refugees, particularly from Burundi and the Democratic Republic of Congo.²²¹

The application of an absolute *jus sanguinis* regime would also be problematic and many not only create but also further statelessness in a country. Kenya is perfect example of how the application of the law of descent at the point of state creation made it impossible for communities such as Makonde, Nubians and the Kenyan-Asians to obtain guarantees of citizenship despite having lived in the country since before independence. The continuous application of the law of descent in turn makes statelessness hereditary in that those rendered stateless at the point of state succession cannot pass on any citizenship to their descendants.

In conclusion, it is clear that the two principles cannot apply absolutely and instead need to work in tandem for statelessness to be effectively dealt with. All proper *jus soli* systems require an inclusion of *jus sanguinis*, subsequently. The introduction of *jus sanguinis* was a remedy for the shortcomings of *jus soli* and should not be disregarded entirely.

5.2 Recommendations

This study makes the following recommendations:

In the event that following state creation, populations of non-nationals or aliens are found on a particular territory, revocation of citizenship or the expulsion of aliens should follow due process and ensure that considerations as to whether the persons would be rendered stateless following such an action are included.²²² This stance was upheld in a case against Mauritius where the state was found to have violated Article 12(5) of the Banjul Charter²²³ forbidding expulsions on the grounds of nationality.

Internationally accepted norms such as: ensuring all children born in a state obtain citizenship of that state if they would otherwise have been rendered stateless, the right to at least one nationality of predecessor states in the event of state succession and the prohibition of discrimination in the granting of citizenship should be upheld and replicated in municipal laws as well.²²⁴

²²¹ <https://www.nation.co.ke/news/africa/Tanzania-withdraws-from-UN-refugee-programme-/1066-4299208-g709y kz/index.html>

²²² Mauritania: Malawi African Association and Others v Mauritania (2000) AHRLR 149 (ACHPR 2000)

²²³ Article 12(5), African Charter on Human and Peoples' Rights, 27th June 1981.

²²⁴ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 10.

National constitutions and nationality laws should provide for an explicit and unqualified right to a nationality from birth. The law should provide for persons to have a right to nationality (whether from the time of birth or by acquisition at a later stage) on the basis of any appropriate connection to the country, including birth in the territory, having a father or mother (including an adoptive father or mother) who is a citizen, marriage to a citizen, or habitual residence.²²⁵

There should be a provision of the law allowing for persons to have the right to the documents necessary for proving nationality and alternative systems of identification where documentation is unavailable or cannot be reasonably obtained.²²⁶ Instances where such documentation is withheld, as was in the case of the Nubian children with respect to birth certificates, should be made illegal and punitive action taken.

Finally, policy changes to the laws that were created at the time of state succession should be applied in a bid to create a citizenship law regime that is cognisant of the historical, political, cultural, social and economic conditions of the state and its constituents.

²²⁵ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 10.

²²⁶ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2010, 21.