



Comments on the Citizenship Provisions of the Draft Kenyan Constitution (draft dated 23 February 2010)

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This is an analysis by the Citizenship Rights Africa Initiative (CRAI) and the Open Society Initiative for East Africa (OSIEA). CRAI is a campaign by the Global Pan African Movement, the International Refugee Rights Initiative (IRRI) and the Open Society Institute. The campaign aims at raising awareness of unequal access to, and arbitrary deprivation of, citizenship as a major human rights problem and one of the principle causes of displacement and unrest in Africa. This initiative seeks both to mobilise civil society and calls on governments to adopt policies that are more progressive. OSIEA promotes public participation in democratic governance, the rule of law, and respect for human rights by awarding grants, developing programs, and bringing together diverse civil society leaders and groups. Based in Nairobi, with an office in Uganda, the initiative supports work in Kenya, Tanzania, Uganda, and Sudan as well as regional organizations whose mandate encompasses eastern Africa.

Overview

The provisions on citizenship in the draft Kenyan Constitution represent a substantial advance on the content of the 1963 Constitution and Citizenship Act (Cap.170).

Particularly welcome are:

- the end to gender discrimination under the law in relation to a woman's ability to pass her nationality to her child or spouse (see Art 14(1); Art 15(1); and Art 27);
- the statement that every Kenyan is entitled to a passport and all registration or identity documents issued to citizens (Art 12(1)(b));
- the restriction of the grounds for deprivation of citizenship (Art 17);
- the provisions on freedom of movement for all citizens (Art 39(3); and
- the end to the prohibition on dual nationality for adults (Art 16 and Art 15(4)).

However, the draft provisions still have important weaknesses, which are discussed further below, most importantly in relation to the lack of effective protections against statelessness. In particular, we note:

- the lack of safeguard against statelessness at birth for children born on the territory (Art 14)
- the lack of provisions for the grant of nationality to stateless adults and of protection against the creation of statelessness; and
- the lack of explicit due process protections in the case of administrative proceedings relating to citizenship.

Lack of effective protection for stateless children

The Draft Constitution fails to provide in Art 14 for children of stateless parents or who would otherwise be stateless to have citizenship by birth. **The lack of a provision on the grant of citizenship to stateless children is in violation of Kenya’s obligations under the African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child.**

Kenya is a party to the African Charter on the Rights and Welfare of the Child (ACRWC), which provides (repeating a provision of the UN Convention on the Rights of the Child, to which Kenya is also a party) for every child to have the right to acquire a nationality. The ACRWC provides that:

“States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he [sic] has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”¹

Moreover, Kenya’s 2001 Children Act already provides for every child to have the right to a name and nationality.² This recognition of international law should be reflected in the Constitution and citizenship law.

The existing Kenya Citizenship Act dating from 1963 is extremely restrictive and takes no account of this concept. The only article allowing for otherwise stateless persons to be granted citizenship is a provision giving the minister power “under special circumstances” to cause any minor to be registered as a citizen³, and there is no known case of this provision being used.

¹ African Charter on the Rights and Welfare of the Child, Article 6. The 1961 UN Convention on the Reduction of Statelessness, which entered into force in 1975, also makes it a duty of states to prevent statelessness in nationality laws and practices. Article 1 mandates that “A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.” Kenya is not yet a party to this convention, but the African and UN child rights conventions endorse the same principles.

² “Every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity.” Kenya Children Act (No. 8 of 2001), Section 11.

³ Kenya Citizenship Act, Section 4(2)(b).

In practice, there are large numbers of stateless persons born in Kenya who are never given the right to a nationality.

The Draft Constitution should rectify this omission and place the right to nationality within the framework of constitutional law.

The **single most important amendment** to the Draft Constitution's citizenship provisions is that Art 14 should be amended to add a clause that:

- *A person born in Kenya of stateless parents or who would otherwise be stateless shall be a citizen by birth.*

Parliament may then enact legislation providing for the modalities of demonstrating that the child would otherwise be stateless: this legislation should provide that, where the State has denied an application for recognition of citizenship on behalf of a stateless child, it falls to the State to show that the child has the right to another nationality.

Many countries in Africa provide that a child born on their territory of a parent also born there shall have the right to citizenship by birth; or (alternatively or in addition) that a child born on the territory who is resident there for a large proportion of his or her childhood and at majority shall have the right to recognition of citizenship by birth at his or her majority. These provisions ensure that statelessness is not a multi-generational problem, and that marginalised populations are progressively integrated into the polity. To provide further protection against statelessness, we recommend that the Draft Constitution also include provisions that:

- *A person born in Kenya whose mother or father was also born in Kenya shall be a citizen by birth.*
- *A person born in Kenya who is still resident there at majority shall have the right, on application, to recognition of citizenship by birth.*

Parliament may then establish by legislation the means of obtaining recognition of citizenship by birth in these cases.

In addition, we recommend that:

- *Kenya should as a matter of urgency ratify the 1961 UN Convention on the Reduction of Statelessness as well as the 1954 UN Convention relating to the Status of Stateless Persons.*

Transitional provisions and lack of protection for stateless adults

The latest draft of the Constitution ensures, through Article 14 read with Article 30 of the Sixth Schedule, that those excluded from citizenship by previous discrimination

(especially gender discrimination) are now recognised as citizens by birth. This is a very welcome step forward, and an improvement on the previous draft which only allowed for citizenship by registration.

However, the provisions of the Draft Constitution do not provide sufficient avenues for the thousands of people who have always lived in Kenya and know no other home, but who are stateless or who have difficulty in establishing their nationality, to obtain recognition of the nationality by birth that has against all reason been denied to them. Notable among these stateless persons are members of the Nubian, Galjeel Somali, and other Somali communities in Kenya.

The new clauses of Art 14 proposed above would substantially reduce the incidence of statelessness in Kenya, at least for the next generation of children. In addition, the prohibition on discrimination included in Art 27 should in theory assist a person of any ethnic group to claim an equal right to nationality. However, there are individuals in Kenya who have significant ties to the country and few if any ties to any other state; while stronger steps are needed to overcome historical injustice. We also recommend the addition of a new Art 13(4) that:

- *The State shall take steps to ensure that stateless persons who have an appropriate connection to Kenya, for example through birth and habitual residence on the territory, are provided with the possibility of obtaining Kenyan citizenship by birth or by registration.*

A transitional provision should be included in Part 6 of the Sixth Schedule to the effect that:

- *All persons who are stateless at the time of entry into force of this Constitution and have a connection to Kenya through birth and habitual residence on the territory are to be deemed citizens of Kenya.*

In addition, a new sub-paragraph should be adopted to Article 18 on legislation that:

- *Parliament shall enact legislation providing procedures for the grant of nationality to stateless persons.*

Citizenship by registration

Art 15 provides for citizenship by registration on grounds of marriage, residence, adoption, reacquisition and other circumstances. Some of the earlier problems with this article have been resolved in the latest draft, which is welcome. However:

- *Art 15(3) provides for a child adopted by a citizen to be a citizen by registration. Such a child should be a citizen by birth, and this should be reflected in Art 14.*

Renunciation of citizenship

Art 18(d) provides for Parliament to enact legislation providing for voluntary renunciation of citizenship. The Constitution should establish that:

- *Citizenship may not be renounced if the person would thereby become stateless;*
- *The State has no discretion to prevent a person from renouncing their citizenship, aside from establishing that the person will not become stateless.*

Lack of a provision on reacquisition of citizenship

A previous provision (Art 19(5) of the Harmonised Draft Constitution dated 8 January 2010) provided for reacquisition of citizenship by those who have acquired another, but who are now entitled to dual citizenship. This citizenship was stated to be by registration whereas it should be by birth. In the latest draft, the provision has been deleted altogether, but it is necessary.

- *A new article should be inserted to provide for reacquisition of citizenship (by birth) by those who have voluntarily renounced it or by those who lost citizenship on acquiring another under the previous dispensation of the law.*

Refugees

We welcome the recognition in Art 45 of the right to seek and asylum, as well as the recent enactment (after many years' delay) of the Refugee Act (No. 13 of 2006). However, the Refugee Act does not provide for an explicit right for refugees to naturalise as Kenyans, and in practice, they are not enabled to do so.

- *The Constitution (and other relevant law) should be amended to provide explicitly for refugees to become Kenyan citizens after a period of residence that is no longer than the general period for naturalisation and ideally is less long, and for the children of refugees born in the country to be citizens by birth.*

Revocation of citizenship

The provisions of Draft Constitution provide for greatly reduced grounds on which citizenship can be revoked (Art.17), compared to the current state of the law, and this is welcome. The latest draft has, however, broadened the grounds on which citizenship can be revoked from the Harmonised Draft Constitution of 8 January 2010, going beyond the permissible grounds in the Convention on the Reduction of Statelessness. In addition, the article is defective in that it does not provide that citizenship may not be revoked if the person would thereby become stateless.

Article 17(1)(c), providing for deprivation of nationality by registration in cases of persons sentenced to imprisonment for common crimes, should be deleted. Article 17(1)(b), relating to trading with an enemy, should be redrafted to provide for the actions concerned to be “seriously prejudicial to the vital interests of the State” in line with Article 8(3) of the Convention on the Reduction of Statelessness.

Moreover, the Constitution should establish principles of proportionality limiting the revocation of citizenship on grounds of fraud or false representation, especially in the case of those presumed to have acquired citizenship by birth, to situations where the fraud was serious and discovered within a fixed time period, and the harm done by revocation is not disproportionate to the seriousness of the fraud or misrepresentation alleged.

Article 17(2)(b) and (c) should also be deleted. They provide that citizenship by birth may be revoked if “the nationality or parentage of the person becomes known and reveals that the person was a citizen of another country” or if “the age of the person becomes known and reveals that the person was older than eight years when found in Kenya”. Both these sub-articles appear to refer specifically to Article 14(4), yet this is not stated. In addition, given that the Draft Constitution provides for recognition of dual nationality, there is no reason why finding that a child was a citizen of another country should mean that they lose their Kenyan citizenship; while revoking citizenship on the grounds of later discovery that a child was over eight at the age found seems unnecessarily draconian. Both circumstances are in any event already covered by Article 17(2)(a) about concealment of fraud, false representation or material fact.

Article 17 should be amended (in line with the UN Convention on the Reduction of Statelessness) to provide that:

- *Citizenship may not be revoked if a person would thereby become stateless.*⁴
- *Citizenship may not be revoked on grounds that it was acquired by fraud, false representation or concealment of a material fact where the fraud occurred more than ten (for example) years previously or where the harm caused to the person by the revocation of citizenship is disproportionate to the seriousness of the fraud alleged.*

In addition:

- *Articles 17(1)(c) and 17(2)(b) and (c) should be deleted.*

⁴ In accordance with Article 8(1) of the UN Convention on the Reduction of Statelessness, which directs that “A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.”

- *Article 17(1)(b), relating to trading with an enemy, should be redrafted to be more restrictive, in line with Article 8(3) of the Convention on the Reduction of Statelessness*

Due process protections

Article 17 also does not include sufficient due process protections. These are particularly necessary because the current Kenya Citizenship Act explicitly excludes the right of any person to apply to court for the review of an administrative decision under the Act.⁵ While the details may be left to legislation, the Constitution should provide certain protections, including that a decision to refuse recognition or deprive a person of citizenship must be subject to review by a court.

The Constitution should include provisions that :

- *Any person refused recognition of citizenship by birth or registration shall have the right to reasons for that refusal and to apply to court for review or appeal of the decision.*
- *A person's citizenship may not be revoked except by order of court on application by the State.*

Dual citizenship

We welcome the Draft Constitution's ending of the prohibition on dual citizenship. However, the Draft does not formulate any principles to guide parliament in enacting legislation governing dual citizenship. The current draft is an improvement on the previous draft in specifying that Parliament shall enact legislation establishing conditions for the acquisition of citizenship by those who are citizens of other countries. It would be helpful if the Constitution specified that :

- *A person who acquires Kenyan citizenship by registration shall not be required to renounce any other citizenship.*

We find the restrictions in Art 78 on the holding of State office by dual citizens to be overly restrictive. We recommend that :

- *Any prohibition on the holding of State office or membership of the defence force by dual citizens should be restricted to the very highest offices, and should only apply from the time the person takes up the post, and not if they are merely an applicant for it.*

⁵ "The Minister shall not be required to assign any reason for the grant or refusal of any application under this Act and the decision of the Minister on any such application shall not be subject to appeal to or review in any court." Section 9 Kenya Citizenship Act, Cap 170.

Political restrictions on citizens by registration

Art 137(1)(a) provides that a candidate for the presidency must be citizen by birth. Given that the president is the “symbol of national unity” in terms of Article 152 (3), the proposal that such an individual be a Kenyan citizen by birth may be defensible in a democratic society. In principle, however, we do not see why a person who is a citizen by registration (or naturalization, if such a category is created) should not run for president. The 1963 Constitution currently in force does not require presidential aspirants to be Kenyan citizens by birth.

Moreover, in the Kenyan context, where many thousands of people are denied recognition of citizenship by birth, even though by any rational system they should have it, this provision potentially excludes individuals who would have much to contribute to the country from running for the highest office. Even if the amendments we suggest above to reduce statelessness are adopted, it will take many years for this history of discrimination to be overcome. We therefore recommend that:

- *Art 137(1)(a) should be amended to require simply that a candidate for president must be a citizen. If desired, a time period during which the candidate for president has been a citizen, as has been established for Members of Parliament.*

Landholding by non-citizens

Art 65 of the Draft Constitution and Art 8 of its 6th Schedule restrict ownership of land for non-citizens to a 99 year lease. We do not support this provision, in particular since it may detrimentally affect members of stateless Kenya’s stateless communities, including the Nubians, Galjeel, and other groups.

- *Art 65 of the Draft Constitution and Art 8 of its 6th schedule should be deleted.*

Proof and documentation: Birth registration

A very welcome provision of the Draft Constitution is Art 12(1)(b) that “Every citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the State to citizens.”

in practice, however, only 40 per cent of Kenya’s infants are registered, and the 60 per cent not registered are disproportionately from certain population groups. In 2007, the UN Committee on the Rights of the Child noted its concern at “the restrictive measures around birth registration, the discrimination with regard to the registration of children

born out of wedlock and of non-Kenyan fathers, as well as the lack of mechanisms and infrastructure to facilitate birth registrations”.⁶

The KNHRC has conducted several investigations and published reports indicating discrimination against certain population groups, including Somali and Nubian Kenyans, in the grant of birth registration and identity documents.⁷

The African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child, to both of which Kenya is a party, establish that “Every child shall be registered immediately after birth”, and that this obligation shall be reflected in national constitutions (Article 6, ACRWC).

The Constitution should provide that:

- *Every child born in Kenya has the right to registration at birth, and to later registration where registration at birth has not occurred as it should.*

In practice, the Kenyan State needs to take urgent measures to ensure that universal birth registration is achieved, without discrimination. These measures should include, for example, the use of mobile birth registration units, registration free of charge and flexible systems of proof where it is not reasonable to meet the standard requirements. The Kenyan State should provide relevant documentation to all those who are entitled to citizenship and to ensure that the administrative processes by which persons acquire registration and other documents required to prove a right nationality are accessible on the same basis to anyone who satisfies the criteria established by law.

More generally, we recommend that the Constitution (and not just the law) should provide for alternative systems of proof of identity and other requirements to obtain recognition of nationality in contexts where documentary evidence is not available or cannot reasonably be obtained. The law should provide for the certification of nationality by the courts where an application for recognition of nationality has not been processed within a reasonable time or where the official documentation necessary to prove nationality does not exist or cannot be obtained, and for the courts to order that any other documents be issued.

⁶ Committee on the Rights of the Child, Concluding observations: Kenya, CRC/C/KEN/CO/2, 19 June 2007, para. 30.

⁷ *An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya*, Kenya National Human Rights Commission, 2007. See also *The People’s Choice: The Report of the Constitution of Kenya Review Commission*, 2002. Another KNHRC report on statelessness is forthcoming.