

JUS TRIBALIS: STATELESSNESS, ETHNICITY AND REGISTRATION IN KENYA

SAMANTHA BALATON-CHRIMES*

Many cases of mass statelessness arise from discrimination against groups. Accordingly, the United Nations High Commissioner for Refugees ('UNHCR') and others sometimes pursue group forms of recognition in campaigns to remedy statelessness. In this article, I consider the implications of such an approach by examining its effects in Kenya using the cases of Makonde, Pemba, Shona, Nubian and Gajje'el ethnic communities. I argue that securing citizenship is neither purely political and group-based nor purely legal and individual, but rather that these conceptions of citizenship are interdependent, that there are both risks and opportunities in this entanglement and that the management of both requires attention to a cultivated vagueness that characterises the role of ethnic identity in registration and citizenship in Kenya. I conclude with an argument for more vigilance regarding the use of ethnic identity in citizenship bureaucracy and for caution in the export of this group-based campaigning strategy to other national contexts.

TABLE OF CONTENTS

I	Introduction.....	63
	A Methodology.....	65
II	Citizenship, Registration and Ethnicity in Kenya.....	66
	A Legal and Regulatory Framework.....	67
	B How Registration Really Works.....	69
	C Ethnicity in Registration.....	72
	D Vetting and Ethnicity.....	73
III	Code-Seeking.....	75
	A Makonde, Shona and Pemba Communities.....	76
	B Nubian People and Ethnic Patrimonialism.....	82
	C Galje'el People and the Risk of Exclusion.....	84
IV	Conclusion.....	85

I INTRODUCTION

It is widely acknowledged that most of the world's stateless people are stateless in the country they call home ('in situ'), usually because of discrimination based on ethnicity, race, language or other facets of identity.¹ They are rendered stateless either by exclusions in nationality laws or, more commonly, because of issues to do with registration and the acquisition of proof of nationality, are

* Sam Balaton-Chrimmes is a Senior Lecturer in Politics at Deakin University (Melbourne, Australia). She is an interdisciplinary scholar of citizenship, identity, and belonging in postcolonial contexts, especially Kenya. She uses qualitative methods to examine how difference and hierarchies are produced and transformed by 'banal' practices like bureaucracy, global processes and agendas, and forms of knowledge itself. Her current book project examines how the Kenyan State classifies its population by ethnicity, including through administrative and electoral boundary drawing, the census, population and citizenship registration, and affirmative action legal categories for minorities. Her next projects will explore census identity categories, and ways of quantifying and knowing statelessness in global, comparative perspective.

¹ United Nations High Commissioner for Refugees ('UNHCR'), *'This is Our Home': Stateless Minorities and Their Search for Citizenship* (Report, 3 November 2017) 1 (*'This is Our Home'*).

sometimes referred to instead as ‘undocumented nationals’.² An inability to access necessary documents can arise from state weakness, deliberate neglect of groups perceived not to belong to the nation, or from targeted discrimination. In these cases, the condition of statelessness or of being an undocumented national is manufactured.³ To go ‘the last mile’⁴ and register the excluded often requires mobilising on the very basis of that exclusion by campaigning for citizenship (or documents) for entire *groups* of people.⁵

This is the case in Kenya, where several small ethnic groups have recently emerged from statelessness or similar conditions through their recognition as a ‘tribe of Kenya’. These groups — Makonde, Shona and Pemba peoples — had faced hurdles in accessing ID cards, which function as proof of citizenship in Kenya (though under law they do not have that status). With support from civil society, the United Nations High Commissioner for Refugees (‘UNHCR’) and local politicians, they received (a vague form of) presidential recognition as belonging to the nation and benefitted from subsequent registration drives. In this article, I consider the implications of using a group-based approach to address denial of citizenship and/or documents.

The first part of my argument is that the stories I relay here are neither purely group-based nor purely individual. Rather, there is an entanglement — indeed an interdependence — between the two. On the one hand, presidents perform as if citizenship is a group-based grant. On the other hand, the law is clear: citizenship is individual, entitlement to it is (mostly) not discretionary and citizenship has no relation to ethnic identity. But between these poles lies a messier reality. In activating legal entitlements, both group and individual identities matter. In practice, *individuals* have gone through registration processes through the political goodwill to fund and implement registration drives targeting them as members of groups, with special procedures tailored to each ethnic community’s unique needs.

The second part of my argument is that there are both risks and opportunities in the entanglement of group and individual approaches. The risks need to be carefully managed and the opportunities actively exploited, more so than we have seen so far. This is a significant lesson not just for Kenya, but for other cases where group-based citizenship campaigning is undertaken by civil society and UNHCR, as in many cases in the UNHCR *#IBelong* Campaign to End Statelessness.⁶ The risks are serious. They include individuals slipping through the cracks of registration drives and then being neglected when attention then turns away from the group, manipulation of recognition by politicians, the reproduction of ethnic patrimonialism and the ongoing exclusion of groups who are less palatable to politicians and the political community. The opportunities, however, are also significant. They include the issuing of life-changing documentation, the symbolic act of inclusion and reducing discrimination, the potential use of increased capability on the part of bureaucracy to undertake registration in challenging cases

² See Wendy Hunter, *Undocumented Nationals: Between Statelessness and Citizenship* (Cambridge University Press 2019) (‘*Undocumented Nationals*’).

³ See Neha Jain, ‘Manufacturing Statelessness’ (2022) 116(2) *American Journal of International Law* 237.

⁴ Hunter, *Undocumented Nationals* (n 2) 8.

⁵ The precise relationship between citizenship or nationality (used interchangeably here) and ‘documents’ is what I tease apart here. My focus is on proof of nationality, not legal identity (which does not necessarily prove nationality).

⁶ See ‘#IBelong’, UNHCR (Web Page) <<https://www.unhcr.org/ibelong>>, archived at <perma.cc/9W45-LTW3>.

and stronger state-civil society relationships. The latter two opportunities could be used to expand registration more broadly and advance stronger regulations regarding due process.

The third component of my argument is that the possibility for broader gains from the practice of targeting ethnic groups hinges, in part, on the cultivated vagueness that characterises the role of ethnic identity in registration. I show how individual registration and ethnic classification take place in a messy terrain of population knowledge production that is not transparent and not well interrogated by the public. Cultivated vagueness makes possible a place for ethnic identity that does not exist in law or regulation. This is in part what allows the President to appear to ‘grant’ citizenship to groups. Rather than question this, however, it has been more useful for some communities to use it, and thereby further entrench the vagueness. Cultivated vagueness stands as a theoretical contribution to the growing literature underscoring the significance of informality and negotiability in bureaucratic management of identity and nationality.⁷

There are two key practical lessons here. The first, for Kenya, is that a significant responsibility for vigilance in managing risks and exploiting opportunities associated with targeting groups lies with those actors at the front-line: bureaucracy, civil society and UNHCR.⁸ These are the groups most active in the day-to-day work of citizenship registration and are therefore accountable for the culture that surrounds this work.⁹ The second, for other contexts, is that it is vital to take account of the politics of belonging and political economy in each context before inviting the risks of targeting groups in anti-statelessness campaigning. My aim is to make the high stakes of this approach clear.

In what follows, I outline the legal and regulatory framework for citizenship registration in Kenya and contrast this with the practices on the ground in relation to registration. In doing so, my focus is on the role of ethnic identification vis-à-vis registration and citizenship. I go on to briefly explain several cases of community leaders seeking ethnic ‘codes’ as a way to shore up their citizenship claims, three of which led to citizenship for many (Makonde, Shona and Pemba peoples) and two of which illustrate the limits and risks of this approach (Nubian and Galje’el peoples). I conclude by articulating the irresolvable conundrum posed by ethnicised approaches to citizenship, and argue that the path forward requires greater vigilance and careful debate and communication among key bureaucratic and civil society actors.

A Methodology

The work here is based on my research into minority ethnic group citizenship rights in Kenya, conducted from 2009. At that time, I conducted ethnographic research with the Nubian community, motivated by an intellectual and political

7 Séverine Awenengo Dalberto, and Richard Banégas (eds), *Identification and Citizenship in Africa: Biometrics, the Documentary State and Bureaucratic Writings of the Self* (Routledge 2021) 41. See also Bronwen Manby, ‘The Sustainable Development Goals and “Legal Identity for All”: “First, Do No Harm”’ (2021) 139 *World Development* 1, 8 (‘Sustainable Development Goals’).

8 I add UNHCR here, not because they have any particular responsibility under law or in democratic terms, but because in Kenya they have played an important role in advocating for stateless people and in promoting the ethnicised notions of citizenship that I query in this article and should be held accountable for that.

9 Of course other bodies carry responsibilities, such as judicial bodies and commissions, but they typically get involved only once a coalface actor alerts them to a problem.

interest in what was portrayed at the time as statelessness.¹⁰ Since then, I have worked on several projects on minority politics and rights, and have visited Kenya most years for periods ranging from a few weeks to a few months. This article is informed by these many years of work but mostly draws on research conducted for a book project on how the Kenyan State classifies citizens by ethnicity,¹¹ one aspect of which is the use of ethnicity in citizenship and identity registration.

Sources for this article include tens of face-to-face (and a few online) interviews and informal conversations with civil society and community activists and bureaucratic officials, consultation of personal archives of community leaders and grey literature, all of which I conducted personally. All interview participants were chosen for their knowledge and experience in working with either statelessness or ethnic classifications in bureaucratic work more broadly. There is no intention to portray the stories laid out here of Makonde, Pemba, Shona, Galje'el or Nubian peoples as representative of these communities' experiences as a whole, and that is not the objective of the article.

There is considerable sensitivity around ethnicity in bureaucratic practice and ethnic politics in general. In formal interviews, most people, especially in government, asked to remain anonymous. Accordingly, given the small size of the professional field working on statelessness in Kenya, which would make it easy to identify people if too much detail is provided, I have avoided (for the most part) too much detail about interviewees (including the quantity of interviewees), as well as direct interview citations or quotes. In any event, the understanding underpinning this work arose as much through my long-term work in Kenya, through informal conversations and observations and from all that was not said or could not be explained, and cannot be reduced to only the interviews conducted directly on registration processes.¹²

II CITIZENSHIP, REGISTRATION AND ETHNICITY IN KENYA

Talking with Kenyans or reading media and civil society materials about statelessness, one gets the sense that ethnic identity is a criterion for citizenship. Technically this is not the case, but politically it is. In this part I lay out the legal and regulatory frameworks for citizenship and registration and show how they are characterised by cultivated vagueness. All actors — politicians, bureaucrats, UNHCR, civil society and community groups — participate in talk and public representations that are thin on detail regarding many dimensions of citizenship registration, but especially the role of ethnicity. While it is not a deliberate or orchestrated strategy, vagueness serves all their interests in different ways: politicians look good and gain votes, bureaucrats can juggle competing pressures, UNHCR, civil society and communities can enjoy the inclusion of new ethnic groups — that inclusion is at risk if they get too particular. It is in this practice of cultivating vagueness that both risks and opportunities lie.

10 See, eg, Adam Hussein Adam, 'Kenyan Nubians: Standing up to Statelessness?' (2009) 32 *Forced Migration Review* 19, 19 ('Kenyan Nubians'); Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalisation of Kenya's Nubians* (Ashgate 2015) ('*Ethnicity, Democracy and Citizenship in Africa*').

11 Samantha Balaton-Chrimes, *Knowing Ethnicity* (pending publication).

12 The research was approved by the Deakin University Human Research Ethics Committee (Project Number 2018-385) and all research recruitment, conduct and data storage is compliant with the requirements laid out therein.

A *Legal and Regulatory Framework*

Under the current Constitution of Kenya, *jus sanguinis* principles apply such that citizenship by birth is automatic for anyone whose mother or father is Kenyan, even if that child is born outside Kenya.¹³ Citizens by registration fall into two categories. The first is for those with a *right* to acquire Kenyan citizenship, who merely have to register: people married to a Kenyan for seven years and adopted children.¹⁴ The second is for those whose application can be rejected, a process akin to naturalisation.¹⁵ The *Kenya Citizenship and Immigration Act 2011* entailed (now expired) provisions for stateless people and their descendants to be registered via application (the second, discretionary kind) and gave a window of up to eight years for this to take place.¹⁶ The *Kenya Citizenship and Immigration Regulations 2012* established the relevant mechanisms, though it was not until 2016 that an appropriate procedure for stateless people was developed.¹⁷ The window closed in 2019. Nowhere in any law or regulation is there any mention of ethnic identity.

The phrase ‘registering’ can mean different things. It can mean registering through either the right-based or discretionary processes for *acquiring* citizenship, where the implication is that a person was stateless or a citizen of another country and then becomes Kenyan. The discretionary process is more akin to applying rather than registering. The term can also mean registering for an ID card upon turning 18. Though an ID is not legally proof of citizenship, it functions that way in day-to-day life, in part because there are different cards for foreigners and refugees.¹⁸ When someone previously thought of as ‘stateless’ successfully registers directly for an ID, the implication is that they were always citizens but lacked recognition of that fact.

The term ‘stateless’ is also used, colloquially, to refer to a range of conditions, not all of which would legally constitute statelessness. In Kenya, it most commonly, refers to someone lacking identity documents.¹⁹ However, people

¹³ *Constitution of Kenya*, art 14.

¹⁴ *ibid* arts 15(1), 15(3).

¹⁵ *ibid* art 15(2).

¹⁶ Articles 15, 16 and 17 of the *Kenya Citizenship and Immigration Act 2011* allow for the application for registration for people with no other citizenship who were either born in or migrated to Kenya before independence and their descendants, provided that the applicant resides in Kenya, speaks Swahili and has no serious criminal record: *Kenya Citizenship and Immigration Act 2011*, arts 15, 16 and 17 (Kenya) (*‘Kenya Citizenship and Immigration Act 2011’*). The *Kenya Citizenship and Immigration Act 2011* included a three year extension, taking it to 2019. A 2012 amendment further permitted the possibility that some people may be registered even if they hold identity documents (IDs or passports) of another country, subject to Cabinet Secretary approval: *Kenya Citizenship and Immigration Act 2011* as amended by *Act No 12 of 2012* (Kenya). See Bronwen Manby, *Statelessness and Citizenship in the East African Community* (Report, UNHCR, September 2018) (*‘Citizenship’*).

¹⁷ In the first schedule of the *Kenya Citizenship and Immigration Regulations 2012*, the registration period was extended for three years from 30 August 2016: *Legal Notice No 178 ‘Extension of Time’, The Kenya Citizenship and Immigration Regulations 2012* (2016) Kenya Gazette Supplement No 169, sch 1 (Kenya).

¹⁸ International Bank for Reconstitution and Development (*‘ID4D’*) and World Bank Group, *Country Diagnostic: Kenya* (Report, 2016) 1, 4–5 <<https://documents1.worldbank.org/curated/en/575001469771718036/pdf/Kenya-ID4D-Diagnostic-WebV42018.pdf>>, archived at <perma.cc/6YS3-4N4G> (*‘Country Diagnostic Kenya’*).

¹⁹ Amal de Chickera and Laura van Waas, ‘Unpacking Statelessness’ in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 53.

can lack documents because they are not entitled to them under law, because they are entitled to them but have been discriminated against, or because they are — prima facie — entitled to them but lack other documents to prove it. Only the first of these unambiguously aligns with the international legal definition of statelessness.²⁰ Individuals in the other two scenarios might be more accurately described as undocumented nationals.²¹ Legally, the former require acquisition of citizenship, the latter only recognition of citizenship. The difference between naturalisation and recognition of existing nationality is blurred in public discourse.²² Whether these distinctions get made in campaigns or government announcements depends on how useful it is in any given context to use one or another, or to be vague. There are often inconsistencies and disagreements within communities and civil society on this point.

The expression ‘ethnic group of Kenya’ is even more vague. It is widely used by presidents, parliamentary committees, civil society, media and the communities who wish to be recognised as such.²³ Kenya does not, however, have any legal or administrative list of its ethnic groups with any special authority. There is a widespread belief that the nation is made up of ‘42(+) tribes’; some original list of 42 plus Makonde and Asian peoples, whom former President Uhuru Kenyatta declared the 43rd and 44th ‘tribes’, respectively.²⁴ The figure ‘42’ comes from the list of ‘tribes’ in the 1969 census,²⁵ though most people do not know that and every other census has counted a different number, most recently well over 100.²⁶ Indeed, there are several lists in operation: the census, a National Registration Bureau (‘NRB’) list (discussed below), a Public Service Commission list to measure ethnic representation in public service

20 The 1954 *Convention relating to the Status of Stateless Persons* defines a stateless person as someone who is not considered a national by any state under the operation of its law: *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1.

21 Hunter, *Undocumented Nationals* (n 2) 3.

22 In practice, it is the case that many Africans have been operating without a clear need to determine whether they are nationals or not. Some might call citizenship acquisition ‘naturalisation’ but it is perhaps actually just recognition of existing nationality: Bronwen Manby, ‘Naturalization in African States: Its Past and Potential Future’ (2021) 25(4) *Citizenship Studies* 514, 525 (‘Naturalization in African States’).

23 For a discussion on the contestation around determining the ethnic groups of Kenya see Samantha Balaton-Chrimes, ‘Who are Kenya’s 42(+) Tribes? The Census and the Political Utility of Magical Uncertainty’ (2021) 15(1) *Journal of Eastern African Studies* 43, 45 (‘Kenya’s 42(+) Tribes’).

24 Modesta Ndubi, ‘The Makonde: From Statelessness to Citizenship in Kenya’, *UNHCR* (Blog Post, 15 March 2017) <<https://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html>>, archived at <perma.cc/T5N7-FF5G>. Kenyan Asians were counted as a racial group during the colonial period and never actively sought to be recognised as a ‘Tribe of Kenya’ in the same way as Makonde, Shona, or Pemba people, for example: Zarina Patel and Jill Ghai, ‘Big Read: A Tribe, a Nation, a People — or just Kenyans?’, *The Star* (Nairobi, 14 August 2017) available at *Citizenship Rights in Africa Initiative* (Blog Post, 14 August 2017) <<https://citizenshiprightsfrica.org/big-read-a-tribe-a-nation-a-people-or-just-kenyans>>, archived at <perma.cc/BV62-KHYU>. As a more economically secure community, the political implications of recognition are markedly different for Asians. However, there is a subset of the community who have suffered statelessness because of complexities in transition citizenship laws at independence. See Manby, *Citizenship* (n 16) 50–2.

25 Kenya Central Bureau of Statistics, ‘Kenya Population Census 1969’ (Census, 1970) vol 1.

26 Balaton-Chrimes, ‘Kenya’s 42(+) Tribes’ (n 23) 45.

employment²⁷ and an Independent Electoral and Boundaries Commission list to monitor the ethnic make-up of political parties.²⁸ None of these lists match, and they all change frequently. When people speak of ‘recognising’ ethnic groups as ‘tribes of Kenya’ and giving them a ‘code’, these are political exercises with no explicit or necessary consequences in any law or regulation. Nonetheless, they are exercises that have significant influence over the implementation of law and regulation.

Kenya, like many other places, is a context in which the legal definitions of key terms rub up against more complex social and bureaucratic realities with which they often do not align. Yet, the terms persist and are incorporated into the messy milieu of ways to make sense of citizenship status and belonging, including in ways that prove useful, despite — or rather because of — their imprecision. In what follows I use the legally correct terms, but also draw attention to ways in which they are used vaguely by others. Without keeping this vagueness in play, one cannot fully comprehend the politics of citizenship, statelessness and ethnicity.

B *How Registration Really Works*

The earliest bureaucratic registration of individuals in Kenya was driven by the needs of the settler colonial state and was accordingly characterised by the bureaucratisation of racial hierarchy. Today, civil registration is — in principle — used to keep track of the size of an economy’s labour force, public health, planning needs, legal identity and relations between people via birth, marriage and divorce. However, these functions were not universal during the colonial period. Civil registration was significantly more developed for European, American and Indian populations, whose health, planning needs, legal identity and legal relationships were more important to colonial authorities.²⁹ It was only extended to Africans after independence. During the colonial period, registration of Africans pertained primarily to labour and tax. Labour was monitored through the registration of African males over age 16 who were required to wear around their necks a *kipande*, a copper tin with papers inside listing ethnicity, employment history and fingerprints. Its primary purpose was to prevent desertion from labour and reduce African workers’ bargaining power by limiting freedom of movement and changes of employment.³⁰ It was a key tool in the establishment of racial capitalism in settler colonial Kenya.³¹ Such a pattern of registration and record keeping echoes that of South Africa³² and other colonial

²⁷ A Public Service Commission dropdown list when applying online for jobs, used to measure ethnic representation in public service employment.

²⁸ An Independent Electoral and Boundaries Commission dropdown list, used in the online the form for nominating for office, data from which is used to monitor the ethnic make-up of political parties.

²⁹ Yacob Zewoldi, Centre of Excellence for CVRS Systems and International Development Research Centre, *Snapshot of Civil Registration and Vital Statistics Systems of Kenya* (Report, 2019) 4 (*‘Snapshot’*). See also R Kucynski, *Demographic Survey of the British Colonial Empire*, vol 2 *South Africa High Commission Territories, East Africa, Mauritius, Seychelles* (Oxford University Press 1948).

³⁰ Keren Weitzberg, ‘Biometrics, Race Making and White Exceptionalism: The Controversy over Universal Fingerprinting in Kenya’ (2020) 61(1) *Journal of African History* 23, 26.

³¹ For further detail on ways in which the system was subverted by African subjects in both liberatory and oppressive ways see *ibid* 24.

³² Michael Savage, ‘The Imposition of Pass Laws on the African Population in South Africa 1916–1984’ (1986) 85(339) *African Affairs* 181, 200–01.

states, where the ‘will to know’ was not comprehensive, but rather instrumental and limited by budgets and bureaucratic capacities.³³

Ethnicity featured in this registration system in a particular way: to administratively associate each man with his Native Reserve.³⁴ Ethnic classification, then, in its earliest official individual form, served an unambiguously divisive function in the service of White access to exploitable labour and capital accumulation. Once embedded in this earliest individual registration practice, ethnic identity remained for decades to come, even when it no longer served such an obvious function. This contributed to the entrenchment of an imaginary, shared by state and citizen alike, that ethnicity is something one ought to officially know about an individual.

Today, civil, citizenship and identity registration are — for the moment — handled separately by the Civil Registration Services, the Directorate of Immigration Services and the NRB, respectively, all housed in the Ministry of Interior and National Administration. Civil registration is weak because it is poorly incentivised and poorly resourced: registration of births and deaths is low, at 64% for births and 42% for deaths.³⁵ The World Bank notes this is ‘too low to provide a solid foundation for the national [ID] registration system’³⁶ and it also cannot deliver meaningful vital statistics. Citizenship registration is for those becoming Kenyan nationals based on marriage or adoption or applying for naturalisation through the discretionary process, and both are quite rare.³⁷ It is identity registration that is, in practice, the most significant, because of the utility of the ID card in accessing the benefits of citizenship. Theoretically, anyone who meets the criteria for citizenship by birth can register for an ID, and the right to identity documentation has been established in law in recent years.³⁸ However, resourcing of the NRB has historically been inadequate, morale among staff low and corruption high.³⁹ This means practical problems accessing ID cards are numerous, even for many who have the right to one.

In line with global agendas to establish legal identity for all and the push for digital identification systems that has accompanied it, since 2007 there have been efforts to integrate the NRB register of adult Kenyans with the other registries to create a single source of truth population register with an individual digital ID

33 Keith Breckenridge, ‘Power Without Knowledge: Three Nineteenth Century Colonialisms in South Africa’ (2008) 26(1) *Journal of Natal and Zulu History* 3; Keith Breckenridge and Simon Szreter (eds) *Recognition and Registration: Documenting the Person in World History* (Oxford University Press 2012) 6.

34 See Morris Carter, Secretary of State for the Colonies, Nairobi, Kenya, *Report of the Kenya Land Commission* (Report, 1933).

35 Zewoldi, *Snapshot* (n 29) 3; ID4D and World Bank Group, *Country Diagnostic Kenya* (n 18). Though by African standards this is high. The United Nations Children’s Fund (‘UNICEF’) reports that the continent-wide registration rate is 44% (children under 5): UNICEF, *A Statistical Update on Birth Registration in Africa* (Brochure, 2022) 6.

36 ID4D and World Bank Group, *Country Diagnostic Kenya* (n 18) 2.

37 Manby, ‘Naturalization in African States’ (n 22) 514.

38 *Kenya Citizenship and Immigration Act 2011* (n 16) art 22(g).

39 See Kenya National Commission on Human Rights (‘KNCHR’), *An Identity Crisis? A Study on the Issuance of National Identity Cards in Kenya* (Report, 2007) vol vii (‘*An Identity Crisis?*’); *Snapshot* (n 29); Kenya Anti-Corruption Commission, *Examination Report of the System, Policies, Procedures and Practices of the Ministry of Immigration and Registration of Persons* (Report, April 2006) 7; ID4D and World Bank Group, *Country Diagnostic Kenya* (n 18).

for every member of the population.⁴⁰ There are several motivations for this project including improving access to government services, the effectiveness of security surveillance through the use of biometrics and access to individual credit information for financial institutions (whose use of this service was intended to be a major source of funding).⁴¹

There have been several iterations of both the database (the Integrated Population Registration System or ‘IPRS’ and the National Integrated Identity Management System or ‘NIIMS’)⁴² and either cards (Huduma card, associated with NIIMS) or life-long numbers (President William Ruto’s ‘Maisha number’, a Universal Personal Identifier).⁴³ These have all been plagued by major implementation hurdles, most notably resourcing, concerns about participation in planning and data security.⁴⁴ Notably, it is not yet clear what measures will be taken to address exclusion of those who lack existing forms of ID.⁴⁵ If the Maisha number (or another version thereof) proceeds it will raise the stakes of being an identified national and undermine the forms of negotiability by which people without documents currently get by.

For now, ‘registration’ in Kenya is comprised of an incomplete and disconnected series of registers of varied utility which do not function smoothly. The knowledge landscape is disaggregated, unorganised, under-resourced and frequently fails to fulfil its aims, with the possible exception of security surveillance in some contexts. In such an environment, differences between legal right and bureaucratic practice have ample space to bloom, and it is here that ethnicity comes to feature in citizenship and registration.

40 Plans for the latest version are not yet clear, but earlier iterations were intended to register citizens, refugees and foreigners; a foundational database that would not determine nationality. For a comprehensive analysis of the risks of digitisation projects and legal identity see Manby, *Naturalization in African States* (n 22). It may also integrate other registries, such as for voting, drivers’ licences and land titles.

41 Keith Breckenridge, ‘The Failure of the “Single Source of Truth about Kenyans”: The NDRS, Collateral Mysteries and the Safaricom Monopoly’ (2019) 78(1) *African Studies* 91, 95. Furthermore, a notable controversy regarding biometrics (currently limited to fingerprints) is that surrounding ‘double registration’, whereby people who registered in a UNHCR/National Registration Bureau (‘NRB’) database for refugees later apply for an ID and are refused as foreigners based on fingerprint matches. At least some of these people are Kenyan and are registered as refugees in the context of poverty to access humanitarian aid. These people are at risk of statelessness: Haki na Sheria, ‘Biometric Purgatory: How the Double Registration of Vulnerable Kenyan Citizens in the UNHCR Database Left them at Risk of Statelessness’, *Citizenship Rights in Africa Initiative* (Blog Post, 17 November 2021).

42 UNICEF, *CRVSID Case Studies: Kenya* (Report, September 2023) 7 <<https://www.unicef.org/media/147186/file/Kenya.pdf>>, archived at <perma.cc/N3XW-32XW> (‘Case Studies Kenya’).

43 *ibid*; Chris Burt, ‘Kenya Approves Maisha Namba, Plans Launch This Month with \$6.8M Budget’, *BiometricUpdate.com* (online, 13 September 2023) <<https://www.biometricupdate.com/202309/kenya-approves-maisha-namba-plans-launch-this-month-with-6-8m-budget>>, archived at <perma.cc/6W6H-K74J>.

44 Nubian Rights Forum et al, ‘Government Shouldn’t Force Flawed Digital ID System on Kenya’, *Kenya Human Rights Commission* (Press Release, 27 February 2024) <<https://khrc.or.ke/press-release/government-shouldnt-force-flawed-digital-id-system-on-kenya>>, archived at <perma.cc/PQ6G-FR3K>.

45 Grace Mutung’u and Isaac Rutenberg, ‘Digital ID and Risk of Statelessness’ (2020) 2(2) *Statelessness & Citizenship Review* 348, 349.

C Ethnicity in Registration

The *Registration of Persons Act 1947* was amended in 2018 to remove the legal requirement that the Register of Persons include ‘declared tribe or race’; a hangover from colonial times.⁴⁶ Yet, ethnicity remains, at the time of writing, a part of the application process, albeit in ways that are poorly understood and unclear. Since I began working on this issue in 2009, I have heard frequent talk of a ‘list’ of ethnic groups used by the NRB but had been unable to acquire it and was frequently told it did not exist or that it was too sensitive to share. In 2022, through an influential contact who preferred not to be named, I finally acquired it, shared with me as a photo on WhatsApp. This contact was surprised it existed and none of the civil society groups I know who have campaigned on this over many years had seen it either; a testament to the opacity of its content and purpose. The list is a one page printed document that lists 93 ethnic groups. Unlike the census, there is no mention of ‘sub-tribes’. There is no distinction between types of ethnic groups — those who ‘belong’ and those who are to be vetted, for example. There is also no official marking, no letterhead and no instructions on its use.

Nonetheless, it is possible to piece together how it might be used. When one applies for an ID there is still a field that asks the applicant to nominate their ethnicity.⁴⁷ The field is blank, suggesting an open answer format, but when one is aware of the list it becomes clear that the options are probably not limitless. In the words of an NRB official I interviewed, ‘it is within the Government operations who knows where this listing number is. The applicant might not know’. So, while the State may not *routinely* confer ethnic identities, there is opportunity for bureaucrats to do so, including without the applicant’s knowledge. This is consistent with common anecdotes that the registrar can ‘write in’ a different ethnic group if they do not find the one you declare on their list. What happens to that classification after application is entirely unclear.

As with the other significant state lists of ethnic groups, how the list is determined is not transparent. Civil society organisations were unable to explain it. In interviews with mid-ranking NRB officials, they invoked the common but unfounded idea of ‘the 42 tribes of Kenya’ plus ‘those that were added’. But neither the origins of the list, nor any *official* process for being added to it, nor any official significance could be explained to me by anyone I interviewed. The purpose and functioning of the list cannot be properly understood through officialdom.

Instead, its purposes are both more obtuse and multiple. One NRB official opined that ‘it may not be easy to say ... let’s say it’s like a political decision. You see the politicians ... they wouldn’t want people *not* to know, right?’ Even though politicians don’t have access — I am assured — to ethnic data, it still pays for them to cultivate a more generalised ethno-political subjectivity; a sense that your ethnicity matters in political life.

46 Rule 5(1)(d) of the *Registration of Persons Ordinance 1947* required declared ‘national status and race or tribe’: *The Registration of Persons Ordinance No 33 of 1947*, r 5(1)(d) (Kenya). In 1979 the law was changed to ‘declared tribe or race’: *Registration of Persons Act No 33 of 1947*, as amended by *Act No 18 of 1979*, r 5(1)(d) (Kenya). The 2018 change of the *Registrations of Persons Act 1947* was triggered by civil society lobbying and possibly donor pressure to facilitate the planned digital ID: *Registration of Persons Act No 33 of 1947*, as amended by the *Statute Law (Miscellaneous Amendments) No 18 of 2018* (Kenya) (*‘Registration of Persons Act 2018’*).

47 The expectation is of a single ethnic identity, even if one has several.

There is ample speculation that data on ethnic populations is used by politicians to manipulate electorates. Ethnicity is an important factor in voting in Kenya, with demonstrable patterns of ethnic voting.⁴⁸ This is not to suggest that Kenyans are merely dupes of politicians, for research also shows that ethnicity is not the only factor in voting,⁴⁹ it is not purely patrimonial⁵⁰ and that it is often defensive.⁵¹ Nonetheless, it remains broadly in the interests of politicians for citizens to perceive themselves as members of ethnic groups and their interests as group-based. Assuming the NRB representatives are correct when they say politicians do not have access to ethnic population data produced via registration, it remains the case that the act of self-identification and the knowledge the data exists — somewhere — contribute in a diffuse way to these electoral strategies.⁵²

But it would be a mistake to reduce the use of ethnicity to such pernicious motivations. As I have argued elsewhere,⁵³ to be Kenyan is to belong to an ethnic group of the nation. National identity is inextricably multi-layered. It is simply common sense in Kenya that to work out if someone belongs, one would inquire about their ethnicity. This can be both inclusive and exclusive.

D *Vetting and Ethnicity*

It is through ID registration, and specifically vetting, that the Kenyan State has excluded certain ethnic groups from citizenship. Many people assume themselves to be Kenyan until they apply for an ID card and their Kenyan nationality is questioned. Vetting is a process where applicants are required to provide extraordinary documents and sit before a committee to authenticate their identity and right to Kenyan nationality. Officially, vetting takes place in urban and border areas, where there is a higher risk that an applicant may be from a neighbouring country and not properly entitled to Kenyan citizenship.⁵⁴ In practice, there is abundant evidence that an applicant's ethnic identity is a better determinant than place of residence of the likelihood of being vetted.⁵⁵ There is marked discrimination against groups perceived by bureaucrats as not indigenous to Kenya, including Somalis, Nubian, Makonde, Pemba and Shona people (discussed

48 C Hornsby, 'Election Day and the Results' in M Rutten, A Mazrui and F Grignon (eds), *Out for the Count: The 1997 General Election and Prospects for Democracy in Kenya* (Fountain 2001); Karen E Ferree, Clark C Gibson and James D Long, 'Voting Behavior and Electoral Irregularities in Kenya's 2013 Election' (2014) 8(1) *Journal of Eastern African Studies* 153, 159–60.

49 Julie Macarthur, 'How the West was Won: Regional Politics and Prophetic Promises in the 2007 Kenya Elections' (2008) 2(2) *Journal of Eastern African Studies* 227, 228.

50 Gabrielle Lynch, 'The Fruits of Perception: "Ethnic Politics" and the Case of Kenya's Constitutional Referendum' (2006) 65(2) *African Studies* 233, 252.

51 Michael Bratton and Mwangi S Kimenyi, 'Voting in Kenya: Putting Ethnicity in Perspective' (2008) 2(2) *Journal of Eastern African Studies* 272, 279.

52 I have made a similar argument with respect to census ethnic population data, which, since 1989, has only been released at the level of the national population and not at the level of county or electorate: Samantha Balaton-Chrimes and Laurence Cooley, 'To Count or not to Count? Insights from Kenya for Global Debates about Enumerating Ethnicity in National Censuses' (2022) 22(3) *Ethnicities* 404.

53 Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa* (n 10).

54 KNCHR, *An Identity Crisis?* (n 39) 22.

55 Ibid 27; KHRC, *Foreigners at Home: The Dilemma of Citizenship in Northern Kenya* (Report, 2009) 36 ('*Foreigners at Home*'); Open Society Justice Initiative, *Committee on the Elimination of Racial Discrimination: Submission for Review of Kenya* (Report, Open Society Justice Initiative, 15–16 August 2011) 4.

below), and Coastal Arabs.⁵⁶ The prevalence of Muslim communities (Somalis, Nubians, Pemba and Coastal Arabs) among these groups suggests religious discrimination as well.⁵⁷

The first major incidence of vetting was a notorious mass nationality screening exercise of Somalis under authoritarian President Daniel arap Moi.⁵⁸ Ethnic Somalis have long suffered discrimination arising from both suspicion of their nationality and security risks, both insurgent (Shifita) and terrorist (Al-Shabaab).⁵⁹ In the 1989 screening, Somalis were either issued a pink ‘screening card’ of unclear legal significance or had their ID card revoked and were rendered stateless.⁶⁰ Since then, similar screening procedures have been applied to members of certain ethnic groups when applying for ID cards.

The legal and regulatory nature of vetting is not very clear. In 2014, an amendment to the *Registration of Persons Act 1947* provided for ‘identification committees’ to ‘assist in the authentication of information’ and this carried over to s 8 of the *Registration of Persons Act 2018*. However, prior to that, vetting had no legal basis.⁶¹ Even though it is now legally permitted, there are no guidelines or regulations.⁶² Nonetheless, the workings of vetting committees demonstrate some broad consistencies.⁶³ Vetting takes place at the lowest administrative level (sub-location) and usually in the district of one’s birth, including if that requires travel. Committees are comprised of some combination of county administrators, often at the level of Chief (who normally have good knowledge of the community), NRB registrars, officers from the National Intelligence Service and local elders — usually men. The appointment process and authority of elders is unclear,⁶⁴ despite their significant power to authenticate identity, parentage and nationality.⁶⁵ The committees can demand ‘such documentary or other evidence of the truth of that information as it is within the power of that person to furnish’ and have been known to require ludicrous documents like a grandparents’ birth certificate, or a

56 Open Society Justice Initiative (n 55) 5.

57 Truth, Justice and Reconciliation Commission (Kenya) (‘TJRC’), *Report of the Truth, Justice and Reconciliation Commission* (Report, 2013) vol IIC, 226–236 (‘*Truth, Justice and Reconciliation*’).

58 KHRC, *Foreigners at Home* (n 55) 36–37; KNCHR and UNHCR, *Out of the Shadows Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya* (Report, July 2010) vii, 15; TJRC, *Truth, Justice and Reconciliation* (n 57) 228.

59 Emma Lochery, ‘Rendering Difference Visible: The Kenyan State and its Somali Citizens’ (2012) 111(445) *African Affairs* 615, 637 (‘Rendering Difference Visible’); Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Hart 2018) 185–93 (‘*The Law of Belonging*’); Keren Weitzberg, *We Do Not Have Borders: Greater Somalia and the Predicaments of Belonging in Kenya* (Ohio University Press 2017).

60 Lochery, ‘Rendering Difference Visible’ (n 59); KHRC, *Foreigners at Home* (n 55) 36.

61 KNCHR, *An Identity Crisis?* (n 39) 22.

62 See Manby, *Citizenship* (n 16) 32–3; KNCHR, *An Identity Crisis?* (n 39) 22. See also *Muslims for Human Rights (‘MUHURI’) v The Registrar of Persons* [2011] (Petition No 1 of 2011, 18 February 2011) (High Court of Kenya at Mombasa) 6, 9, for the various unsanctioned circulars and unofficial instructions mandating vetting.

63 Manby, *Citizenship* (n 16) 32–3; KNCHR, *An Identity Crisis?* (n 39); Lochery, ‘Rendering Difference Visible’ (n 59) 636; Samantha Balaton-Chrimes, ‘Statelessness, Identity Cards and Citizenship as Status in the case of the Nubians of Kenya’ (2014) 18(1) *Citizenship Studies* 15 (‘Statelessness, Identity Cards and Citizenship’).

64 KHRC, *Foreigners at Home* (n 55) 36.

65 KNCHR, *An Identity Crisis?* (n 39) 22. Elders are meant to be paid but frequently report they have not been, which has been used as an explanation for occasional extortion of applicants.

land title deed.⁶⁶ Decision-making is not transparent and there is no accessible appeal process.⁶⁷ If one is denied an ID, there is little option but to bribe an official or — in an act experienced as deeply degrading — adopt a different name and/or ethnic identity.⁶⁸ In sum, informality and discretion characterise the workings of the committees.

Though there are obvious problems with due process, this turn to informality has also been the path *out* of statelessness — under certain conditions — for many. As Manby notes,⁶⁹ identity verification systems that are parallel to the state can be vital for inclusion.⁷⁰ Vetting can potentially overcome several problems facing marginalised ethnic groups in Kenya: discrimination by registrars in the processing of applications, a lack of documentation and fear of hostile authorities. Once community elders were appointed to vetting committees in Kibra, for example, Nubian people found the ID card application process much easier.⁷¹

Herein lies the multi-pronged conundrum not just of vetting, but of a general link between ethnicity and citizenship. Many stateless people have no official identity documentation and the only practical way to authenticate them is through negotiable processes that draw on informal documentation and oral testimony. The most useful of these processes tend to be anchored in ethnic communities, because in Kenya experiences of belonging and exclusion are deeply ethnicised. As one former UNHCR official rightly put it to me, every ethnic community that is stateless is so in a different way.⁷² Processes that are tailored to an ethnic community allow for the authority of social networks to verify people's identities, create space for working around patterns of documentation problems that are common to the group and — done carefully — can create an environment of trust.

III CODE-SEEKING

Kenya has emerged, in recent years, as an often cited example in the remedying of mass statelessness.⁷³ However, this has not been achieved through changes to law.⁷⁴ Rather, it has been through collective recognition of marginalised

66 *Registration of Persons Act 2018* (n 46) art 8(1).

67 There is an appeal process for revocation of an ID card but not refusal: *ibid*, art 18A(3). Manby suggests there is an appeal process via the county commissioner, then the Director of the NRB (see Manby, *Citizenship* (n 16) 32) and by the High Court of Kenya based on the constitutional right to an ID card, however I am not aware of any use of these avenues.

68 KHRC, *Foreigners at Home* (n 55) 39.

69 Manby, 'Sustainable Development Goals' (n 7) 8.

70 See also Bronwen Manby and Rainer Bauböck, *Unblocking Access to Citizenship in the Global South: Should the Process be Decentralised?* (Working Paper, European University Institute, RSC 2021/07, 2021) and other contributions in the same forum for a discussion of how decentralisation (and by implication, informality) might facilitate naturalisation for stateless people in the Global South.

71 Balaton-Chrimes, 'Statelessness, Identity Cards and Citizenship' (n 63) 22.

72 Communities are, of course, never this singular. People on the margins can be disadvantaged by negotiability and dependence on elders. Nonetheless, the very local nature of these committees has been a functional solution for many.

73 For example, the UNHCR '#IBelong' campaign regularly profiles Kenyan cases: UNHCR, *This is Our Home* (n 1).

74 For a comprehensive summary of the gaps in nationality law in Kenya, see Manby, *Citizenship* (n 10). A *jus soli* based citizenship would be the best solution to statelessness in the country. As Manby points out, this was the basis of Kenyan citizenship law until a quiet and surprisingly uncontested change in 1985 to *jus sanguinis*, a change that was — arguably

communities as ‘ethnic groups of Kenya’; the source of political will to resource and problem solve to register members of those groups. This approach to citizenship and belonging is anchored in a social imaginary that Kenya, as a nation, is made up of its ethnic groups; the ‘42+’. To belong to the nation, you must belong to one of them. However, as described earlier, no such official, authoritative list exists, and recognition as an ethnic group of Kenya carries no official benefits. The vagueness around the idea of a code is part of what makes it easy for presidents to give them. Nonetheless, the idea of a ‘code’ or a ‘list’ remains powerful in the public imagination and has significant, if unofficial, political and practical effects.⁷⁵ Marginalised groups are increasingly engaging in what I call ‘code seeking’ to get a number assigned to their ethnic identification (45, 46 — something in that vicinity) and the attendant anticipated benefits.

In this part of the article, I show how this strategy led to citizenship acquisition for Makonde, Shona and Pemba communities. But I also show the broader effects of code-seeking. Through the case of Nubian people, I show how code-seeking relates to ethnicised political patronage, and through the case of Galje’el, a Somali clan, I show how, though it facilitates inclusion for some, it reproduces exclusion for others. Bringing these cases together shows the depth of the conundrum of using group recognition to address gaps in citizenship documentation: it is as effective as it is risky.

A Makonde, Shona and Pemba Communities

The Makonde community of roughly 4000 people lives on the Coast of Kenya, mostly in Kwale County.⁷⁶ The earliest members came to Kenya during the colonial period from Mozambique, recruited by the British to work on sisal plantations, while a later wave arrived as exiles from Mozambique’s civil war, starting in 1977 and lasting until the early 1990s.⁷⁷ In a UNHCR survey conducted in 2015 as part of efforts to address statelessness, 97% of the community lacked both birth certificates and ID cards.⁷⁸ The community has suffered attendant disadvantages, including very low levels of education, dissuaded by their ineligibility to register for school-leaving exams.⁷⁹ After a strong campaign, in 2016 they were recognised by then President Kenyatta as ‘the 43rd tribe of Kenya’, and (many) were registered as citizens.⁸⁰

On the surface, this looked like a mass citizenship grant. Media and civil society reporting (and even Wikipedia) routinely group together the ideas of the ‘43rd tribe’ recognition and the ‘granting’ of citizenship, cultivating the idea that

illegally — made retrospective. In the absence of a *jus soli* law, there are some discrete areas in need of improvement, eg, a right to nationality for children born on the territory who would otherwise be stateless.

75 Balaton-Chrimes, ‘Kenya’s 42(+) Tribes’ (n 26) 56.

76 UNHCR et al, ‘Integrated, but Undocumented: A Study into the Nationality Status of the Makonde Community in Kenya’ (Report, 2015) <https://citizenshiprightsafrika.org/wp-content/uploads/2016/04/UNHCR_Makonde_2015.pdf>, archived at <perma.cc/JK34-ESRJ> (‘Integrated but Undocumented’).

77 UNHCR, *This is Our Home* (n 1) 40.

78 UNHCR, ‘Integrated but Undocumented’ (n 76) 12.

79 *ibid* 7.

80 While Kenyan Asians were later gazetted as the 44th ‘tribe of Kenya’ there is no Gazette Notice for Makonde: ‘*In the Matter of the Petitions by the Asian Community for Formal Recognition as a Tribe in Kenya*’, *Gazette Notice No 7245, 21 July 2017* (2017) Vol CXIX, No 102, *The Kenya Gazette*, 4621 (Kenya). In any event, the official significance of a Gazette Notice in this context is not clear.

citizenship is discretionary and issued on a collective basis to groups on some fictional list of ‘Kenya’s tribes’.⁸¹ In October 2016, more than 300 Makonde people and supporters, including Governor of Kwale County, Salim Mvurya, walked in a high-profile four day march to Nairobi to seek an audience with the President. The President received the representatives and used executive influence to order the NRB to do a registration drive. According to the Kenya Human Rights Commission (‘KHRC’), in this meeting then President Kenyatta said ‘I apologize on behalf of my government and that of previous governments for having lived in this condition for so long. You are not visitors in this country, and I order that ... the people should be registered.’⁸² The role of political support in this case is undeniable. Some insiders I interviewed believed the President had personal sympathies for this community, members of whom were known to his father, Jomo Kenyatta, Kenya’s first President. The motivations of the Governor were more transparent, explicitly asking the community to ‘return the favour’ by voting for Jubilee, his party, and that of the President.⁸³ Gazette Notice 8768 of 25 October 2016 made it compulsory for Makonde individuals to be registered and waived related fees.⁸⁴

This points to what really happened behind the scenes, which is not widely reported and differs from the media and civil society narrative of a group-based grant. Though the march itself required significant organising and resourcing, the capacity building and negotiation around registration were at least equally critical. The UNHCR country office and several civil society organisations had lobbied bureaucrats and politicians over several years to get recognition that Makonde people belong in Kenya, and on the practical matter of registration. The initial five year window for registration of statelessness people lent the claims some urgency, but was not, alone, enough, and had not yet been given much attention by authorities.

In response to these efforts and international campaigning around statelessness, including a 2014 United Nations High Level Segment on Statelessness, the Government formed a Task Force on Statelessness, headed by the NRB and including the Civil Registration Services, Directorate of Immigration, the Kenya

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- 81 UNHCR, *This is Our Home* (n 1); NTV Kenya, ‘Kenya’s 43rd Tribe Celebrates the New Status as Full Citizens’, *YouTube* (Video, 24 March 2017) <<https://www.youtube.com/watch?v=VwncSbkddks>>, archived at <perma.cc/E4RN-7REU>. Note how the notion of the ‘43rd’ tribe has been disseminated through popular avenues of knowledge despite the absence of a formal connection between the declaration of a 43rd tribe and citizenship: ‘Makonde People’, *Wikipedia* (online, 2023) <https://en.wikipedia.org/wiki/Makonde_people>, archived at <perma.cc/AF32-VEA7>.
- 82 Catherine Kamatu, ‘The Makonde Community Finally Recognised as Citizens’, *Kenya Human Rights Commission* (Blog Post, 25 October 2016) <<https://www.khrc.or.ke/2015-03-04-10-37-01/blog/561-the-makonde-community-finally-recognized-as-kenyan-citizens.html>>, archived at <perma.cc/B9V8-WUU9>.
- 83 Farouk Mwabege, ‘Joy as Makonde Finally Register for Kenyan IDs’, *The Nation* (online, 29 June 2020) <<https://nation.africa/kenya/counties/kwale/joy-as-makonde-finally-register-for-kenyan-ids-320460>>, archived at <perma.cc/KK7L-XNR2>.
- 84 ‘Declaration under s 9(2) of The Births and Deaths Registration Act 1928’, *Gazette Notice No 8768, 25 October 2016* (2016) Vol CXVII, No 132, *The Kenya Gazette*, 4399 (Kenya). Registration is in fact already compulsory for citizens: *Registration of Persons Act 2018* (n 46) art 6(i).

National Bureau of Statistics and security services.⁸⁵ It became a bureaucratic hub of capacity building around registration of stateless people, and a channel through which UNHCR could liaise with sympathetic politicians and key bureaucrats. It is not an entirely apolitical body implementing impartial bureaucratic rules, but rather operates in a highly political context where members balance competing interests not just of different bureaucratic functions, but of politicians and civil society groups with whom they have relationships. It has, for example, been the site of internal disputes between arms of bureaucracy, with reportedly frequent resistance from security. Nonetheless, it provided a locus for those challenging conversations and problem-solving efforts.

Through a combination of capacity building and sensitive negotiations, NRB, with UNHCR support, was eventually able to establish arrangements that could cater for this largely undocumented community. This began with the aforementioned UNHCR mapping study, to determine the nature and scale of the population and documentation problems.⁸⁶ After the successful act of ‘recognition’ and the Gazette Notice waiving fees, a three-week outreach registration program was developed. Makonde people were called to ad hoc centres where immigration, civil registration, NRB, security services and specially trained paralegals were gathered to register individuals as citizens and then those over 18 for IDs and those under 18 for birth certificates. Applicants were vetted by committees comprised of Chiefs, village elders, county officials and the security service. Requirements for a certificate of good conduct (itself requiring an ID) were waived, and NRB agreed to accept atypical forms of documentation, such as from schools or churches, to verify identities. The outcome was that around 1200 Makonde people received ID cards and 2000 received birth certificates.⁸⁷ Makonde people are now on the list of 93 groups used by the NRB. Other patrimonial resources also followed, including 200 places reserved in the National Youth Services and recruitment to the police and the military.⁸⁸ It was an extraordinarily successful campaign.

The Shona case constitutes a consolidation of the logic that emerged in the Makonde case. Living in Nairobi, Shona people are descendants of missionaries of the Gospel Church of God from Zimbabwe. The date of their arrival in Kenya is inconsistently reported, ranging from 1959 to the 1970s.⁸⁹ The community

⁸⁵ On the inter-departmental taskforce, see Radha Govil, “‘I Feel I am Born Again’: Citizenship Brings Hope to Stateless Minority in Kenya”, *UNHCR* (Blog Post, 6 November 2017) <<https://www.unhcr.org/au/news/stories/i-feel-i-am-born-again-citizenship-brings-hope-stateless-minority-kenya>>, archived at <perma.cc/2AKT-CNFR>.

⁸⁶ UNHCR, ‘Integrated but Undocumented’ (n 76). The survey of 220 Makonde people presented data making a strong case for a right to citizenship, though it doesn’t clearly distinguish between citizenship by birth or registration. On some of the pitfalls and risks of ‘mapping’ exercises of this kind, see Heather Alexander, ‘The Ethics of Quantifying Statelessness’ in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance and the Problem of Citizenship* (Manchester University Press 2021) 238.

⁸⁷ According to Manby, *Citizenship* (n 16) 48, 1,492 people were registered as citizens, and 1,176 people issued ID cards. Some had citizenship by registration applications rejected for having Mozambican registration documents, and some whose claim was based on marriage were instructed to go through a more onerous and expensive process. The plight of those who remain without documents seems to be largely forgotten in campaigning.

⁸⁸ UNHCR, *This is Our Home* (n 1) 43; NTV Kenya (n 81).

⁸⁹ UNHCR and World Bank, *Understanding the Socioeconomic Conditions of the Stateless Shona Community in Kenya: Results from the 2019 Socioeconomic Survey* (Report, 2020) 3

numbers between 2300 and 3500 people.⁹⁰ Until recently, their experience of identification was varied: reportedly none had IDs, but some had alien cards from an old law or residence permits.⁹¹ There have been reports of arrests and deportation efforts affecting the community.⁹² In the 2019 census Shona people were included in the awkward category ‘Stateless (Galje’el, Shona, Wapemba, Pare, etc.)’. In the (short-lived) Huduma (digital ID) registration exercise the same year, they were also reportedly registered as stateless.⁹³

Like Makonde people, Shona people built alliances with sympathetic local administrators (Chiefs), Members of the Kiambu County Assembly and the National Assembly⁹⁴ who stood to benefit electorally from giving this support.⁹⁵ The community’s religious piety and social integration with the local Kikuyu community, including Gikuyu language ability, has been a key reason for this local support, as they are seen by local politicians to be ‘just like us’.⁹⁶ Their most powerful sympathiser, however, was the President himself. The KHRC reports that President Uhuru Kenyatta, whose father knew members of this community, was visiting the local area for another purpose.⁹⁷ While handing out cash to his constituents, some Shona Sisters caught his attention:

He asked her ‘Are you still at your place at Daystar [Christian university]?’ She replied, ‘Yes’ ‘You are the ones who need citizenship?’ She replied, ‘Yes’ He went on to say, ‘I have heard your cry and I promise to come to your place and give you citizenship. But I will come to your place and give you citizenship. I promise to come and give you IDs’.⁹⁸

This statement is a quintessential example of the kind of patrimonialism made possible by vagueness.

However, again as in the Makonde case, individuals had to be registered in accordance with law and regulation. In this respect, the community benefitted from the support and increased capacity — built in the Makonde campaign — of civil society and bureaucracy. In 2019, after an in principle agreement had been

(‘Stateless Shona Community In Kenya’); KHRC, *African Missionaries in Identity Limbo* (Report, 2024) (‘*African Missionaries*’); Andrew Wasike, ‘Stateless Shona Community Gets Kenyan Citizenship’, *Anadolu Agency* (online, 28 July 2021) <<https://www.aa.com.tr/en/africa/stateless-shona-community-gets-kenyan-citizenship/2317077>>, archived at <perma.cc/UK4R-DLP2>; Modesta Ndubi, ‘The Shona: A Stateless Community in Kenya Yearning to Gain Citizenship’, *UNHCR* (Blog Post, 2 September 2017) <<https://www.unhcr.org/ke/12739-shona-stateless-community-kenya-yearning-gain-citizenship.html>>, archived at <perma.cc/PSS5-TWXQ> (‘A Stateless Community in Kenya’).

90 KHRC, *African Missionaries* (n 89) 3; UNHCR and World Bank, *Stateless Shona Community in Kenya* (n 89) 3.

91 Manby, *Citizenship* (n 16) 49–50.

92 KHRC, *African Missionaries* (n 89) 17.

93 *ibid* 18; Edwin O Abuya ‘Registering Persons at Risk of Statelessness in Kenya: Solutions or Further Problems?’ in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance and the Problem of Citizenship* (Manchester University Press 2021) 251, 255. However, I was not able to verify this and it is not clear this was a formal category in the Huduma registration.

94 KHRC, *African Missionaries* (n 89) 14.

95 KHRC, *Annual Report April 2020 – March 2021* (Report, 2021) <<https://khrc.or.ke/wp-content/uploads/2024/02/KHRC-April-2020-March-2021-Annual-Report.pdf>>, archived at <perma.cc/2LLW-DRNB> (‘*Annual Report*’).

96 Ndubi, ‘A Stateless Community in Kenya’ (n 89). KHRC, *African Missionaries* (n 89) 18.

97 KHRC, *African Missionaries* (n 89) 20.

98 *ibid* 21.

reached to naturalise eligible Shona individuals, UNHCR, the World Bank and the Kenya National Bureau of Statistics ('KNBS') undertook a major socio-economic study of Shona people that was much more detailed than the Makonde study.⁹⁹ UNHCR then supported measures to address the lack of official identity documentation, including creating family trees and the gathering of birth registrations undertaken by a sympathetic Chief for some years. After first applying for citizenship under the special process for stateless people, in July 2019, 1,670 members of the Shona community received IDs at a ceremony at the Ministry for the Interior,¹⁰⁰ and a further roughly 600 Shona children were given birth certificates.¹⁰¹ They are now on the NRB list of ethnic groups.

The case of Pemba people, numbering around 3,500–4,000,¹⁰² demonstrates yet further consolidation of a politics of group-based citizenship, even more significant for being under a new President and for being a community whose belonging is more controversial. Many Pemba people lack Kenyan identity documents and suffer the associated disadvantages, in particular the constant threat of arrest for fishing without a permit.¹⁰³ The community lives on the coast of Kenya, surviving via fishing and subsistence farming, and most Pemba people are Muslim. There are several stories in circulation regarding the group's history. On one account, 'they' have resided on the coast of what is now Kenya for as long as any other community.¹⁰⁴ On another, they came from the island of Pemba, in what is now Tanzania, during the colonial period and in yet another they arrived in the 1970s, escaping local conflict.¹⁰⁵ The proffering of narratives of long-term residence within Kenya's current boundaries aligns with widespread discourses in Kenya emphasising indigeneity as a condition of citizenship. Suspicion around Pemba people's rights to Kenyan nationality is tied to their close proximity to and integration with ethnically Pemba peoples in Tanzania, and the fear of an influx of other Pemba peoples of Tanzanian nationality into Kenya.

Back in 2016, at the same time as the Makonde campaign took off, UNHCR undertook a survey study which presents a complicated picture of the community's nationality situation. While it importantly demonstrates a definite risk of statelessness and clear forms of deprivation for several thousand people, it also shows that more than half the adults surveyed did have a Kenyan ID card; 17% were Tanzanian citizens by their own reckoning and therefore not stateless (though they may also be entitled to apply for Kenyan citizenship, either renouncing their

99 UNHCR and World Bank, *Stateless Shona Community in Kenya* (n 89). The report also demonstrated the socioeconomic disadvantages of statelessness.

100 KHRC, *Annual Report* (n 95) 12.

101 HKRC, *Annual Report* (n 95) 4; Wasike (n 89).

102 UNHCR, *This is Our Home* (n 1) 32; Shaban Omar, 'MPs Petition State to Recognise Stateless Pemba Community', *The Star* (15 February 2022) <<https://www.the-star.co.ke/counties/coast/2022-02-15-mps-petition-state-to-recognise-stateless-pemba-community>>, archived at <perma.cc/4GUC-EUZG>; Hiba Zene, 'The Pemba Minority Stateless in Kenya', *GHRTV* (29 June 2021) <<https://ghrtv.org/the-pemba-minority-stateless-in-kenya>>, archived at <perma.cc/Q5P7-72L7>.

103 Departmental Committee on Administration and National Security, *Report on the Public Petition No 41 of 2020 Regarding Recognition of the Pemba People of Kenya as Citizens of the Republic of Kenya* (Report, The National Assembly of the Republic of Kenya, 11 August 2021) <<http://libraryir.parliament.go.ke/handle/123456789/2464>>, archived at <<https://perma.cc/VA7E-KQCY>> ('*Report on the Public Petition No 41 of 2020*'); KHRC, *Annual Report* (n 95) 16; UNHCR, *This is Our Home* (n 177).

104 Omar (n 102).

105 UNHCR, *This is Our Home* (n 1).

Tanzanian citizenship or becoming dual citizens), that more than half arrived after independence, muddying their claim to Indigeneity and that there appeared to be a combination of people entitled to citizenship by birth and by registration.¹⁰⁶ Nonetheless, public discourse on this matter among all actors presents a picture of a singular community with similar experiences of statelessness.

Presenting themselves in this unified way, community groups organised and were supported by KHRC, Haki Centre (a legal non-governmental organisation based in the coast of Kenya) and UNHCR, among others, to advance a campaign for nationality using the same measures as the previous two cases. In 2020, not yet having had the same success as Makonde and Shona, the community petitioned Parliament, supported by their local Member of Parliament ('MP'). In response the Departmental Committee on Administration and National Security recommended that the community be recognised as an indigenous ethnic group of Kenya and 'be issued with' identity documentation.¹⁰⁷ It took a further 16 months and a new President, William Ruto, for these recommendations to be implemented. In December 2022, Ruto announced that a legal process to 'confer citizenship to the Pemba people' would begin,¹⁰⁸ and in July 2023, he announced Pemba 'an ethnic group of Kenya' in a ceremony, reminiscent of an election rally, where ID cards were given out.¹⁰⁹ Given the window for special registration of stateless people had expired in 2019, these people received ID cards as citizens by birth.¹¹⁰ Ruto deployed the cultivated vagueness around ethnicity and citizenship here to appear inclusive in his first months as President, and it was not in the interests of Pemba people to question it, having never had such support under Kenyatta. Because the Pemba case was more delicate than the others, due to the proximity of ethnic kin in Tanzania and being Muslim, civil society would not undermine this progress by questioning either.

In these cases, technical nuances notwithstanding, the political will generated by Presidential recognition as an 'ethnic group of Kenya' brought about durable solutions to a lack of citizenship and/or documents for large numbers of people. There are certain consequences of this success that are worth drawing attention to, all with ambiguous potential. First, the presidential statements and the Parliamentary Committee on the Pemba case explicitly link citizenship, documentation and ethnic status, specifically indigenous ethnic status, despite no such link in law.¹¹¹ Second, the processes have further entrenched the politicisation of citizenship conferral, enhancing the role of the President, the Parliamentary committee and local politicians in triggering registration drives. This further entrenches upward and downward patrimonial networks between politicians and with these new citizens. Third, the NRB — and the nervous security organisations — have greater capability to issue identity documents in

106 The UNHCR report was never published. A copy of the report is on file with the author.

107 *Report on the Public Petition No 41 of 2020* (n 103) 29–30.

108 William Ruto, 'Jamhuri's Day' (Speech, Nyayo Stadium, 12 December 2022) published in 'President Ruto's Jamhuri Day Full Speech', *Kenyans.co.ke* (online, 12 December 2022) <<https://www.kenyans.co.ke/news/83108-rutos-jamhuri-day-full-speech>>, archived at <perma.cc/3K9R-YH8K>.

109 For an excellent example of President William Ruto's political use of this case, see @HusseinMohamedg, *Twitter* (online, 29 July 2023, 4:34 am AEDT) <<https://twitter.com/HusseinMohamedg/status/1684995646263062528>>, archived at <perma.cc/2ZV8-MD5B> ('*Twitter Post*'). The number of ID cards issued is as yet unclear.

110 *Report on the Public Petition No 41 of 2020* (n 103) 22 (f).

111 See, eg *Twitter Post* (n 109); *Report on the Public Petition No 41 of 2020* (n 103) 22.

challenging contexts. Fourth, and lastly, civil society and UNHCR also have enhanced capacity to provide support to stateless people or undocumented nationals, though anchored in ethnicised notions of citizenship rights. While these politics and new capabilities could be deployed for other groups, there are also risks here, including the reproduction of ethnic patrimonialism, demonstrated by the Nubian case, and the reproduction of exclusion for groups perceived as less desirable, demonstrated by the Galje'el case.

B Nubian People and Ethnic Patrimonialism

Numbering 21,319 in the 2019 census, Kenya's Nubian community has its origins as soldiers for the British colonial project, recruited from displaced members of the Sudanese–Egyptian military.¹¹² This history meant they suffered accusations of foreignness and discrimination in access to ID cards. They were the first ethnic group in Kenya to achieve a high profile through an agenda of statelessness.¹¹³ Back in 2007, the KNCR noted that one of the causes of Nubian ID problems is that 'Kenyan citizenship is linked to ethnic identity and Nubians are yet to receive official recognition as a Kenyan ethnic grouping'.¹¹⁴ At the time, using the term 'stateless' attracted support from organisations like Open Society.¹¹⁵ Now, many Nubian experts in this field prefer to describe themselves as undocumented nationals, affirming their right to citizenship and locating the problem in discriminatory bureaucratic procedure. Since the statelessness campaigns of the late 2000s, much has changed and much has stayed the same. The longer-term plight of the Nubian community is instructive for thinking through the implications of ethnicised claims to nationality.

In terms of citizenship, the Nubian community has largely overcome its problems in accessing ID cards, albeit not securely, and it remains discriminatory that they are vetted. Even back in 2011, 87% of Nubian people reported having an ID card.¹¹⁶ Following an ad hoc arrangement with the NRB established in the late 2000s that puts Nubian elders on vetting committees, access to IDs has improved.¹¹⁷ However, this has not delivered all the benefits Nubian people had hoped for. Accordingly, their quest for recognition — or, rather, distribution — continues. The Nubian community has not been proclaimed a 'tribe of Kenya' by a President, but they have been recognised in similar ways. In 2009 the Kenyan Nubian Council of Elders was informed by KNBS that they would be 'counted as the 43rd Tribe of Kenya' in the upcoming census.¹¹⁸ Nubians are now in the census and the NRB list, but not the lists kept by the public service or electoral commissions to monitor ethnic diversity.

¹¹² Kenya National Bureau of Statistics, '2019 Kenya Population and Housing Census, Volume IV: Distribution of Population by Socio-Economic Characteristics' (December 2019) 423.

¹¹³ Adam, 'Kenyan Nubians' (n 10); Samantha Balaton-Chrimes, 'Counting as Citizens: Recognition of the Nubians in the 2009 Kenyan Census' (2011) 10(2) *Ethnopolitics* 205 ('Recognition of Nubians').

¹¹⁴ KNCHR, *An Identity Crisis?* (n 39) 14.

¹¹⁵ See, eg, 'Nubians in Kenya Appeal for Their "Right to Existence"', *Open Society Foundations* (Press Release, 16 June 2005) <<https://www.opensocietyfoundations.org/newsroom/nubians-kenya-appeal-their-right-existence>>, archived at <perma.cc/J827-WRPN>; Adam, 'Kenyan Nubians' (n 10).

¹¹⁶ Open Society Justice Initiative, *Nubians in Kenya: Numbers and Voices* (Data Sheet, April 2011) 2.

¹¹⁷ Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa*: (n 10) 77–8.

¹¹⁸ Balaton-Chrimes, 'Recognition of Nubians' (n 113) 92.

Nonetheless, despite these forms of recognition, and because of their failings, some members of the community continue to push for a code. Over recent years another campaign has emerged, driven by the Nubian Rights Forum ('NRF'), a community-based organisation of paralegals who assist people going through vetting. Like their elders before them, NRF has embarked on a campaign of letter writing, press conferences and social media posts to get 'a code'. They enlisted support from their MP (until 2022), Imran Okoth, who was raised in Kibra, the informal settlement in Nairobi where many Nubians live. In 2021, Okoth petitioned the National Assembly to secure 'the recognition of the Nubian Community as marginalized and minority community in Kenya', and to secure access to citizenship documents and presence in 'all government portals'.¹¹⁹ The petition was referred to the Departmental Committee on Administration and National Security, the same body that considered the Pemba petition.

The Committee recommended that the Cabinet Secretary for the Ministry of Interior and National Coordination, which houses the various registration bodies, should 'initiate the process of recognizing the Nubian people as a tribe in the Republic of Kenya' but did not explain that process. It also recommended that the Ministry issue guidelines to make vetting more transparent and non-discriminatory, though noted that many Nubians already have IDs.¹²⁰ In local media, the recommendation around due process in vetting was ignored and the outcome was reported instead as a recommendation to 'recognise' the Nubian community through the issuing of a code, number 50 — a number used by NRF but not in the Committee recommendation — which does not mention a code at all.¹²¹ Though the petition also mentioned access to civil service jobs, the recommendation did not touch on this. The three month timeframe for implementation has long since passed with no action. Neither Uhuru nor Ruto have made any declarations affirming Nubian people as an indigenous ethnic group of Kenya.

While this is bruising for Nubian citizens on a symbolic level, it is the impact on material distribution that stings the most. When I discussed this campaign with Okoth in 2022, he explained his motivation to ensure Nubian people could access not just ID cards, but also quotas for jobs at the county and national levels. The 2010 Constitution includes affirmative action provisions in jobs, development resources and political representation for 'minorities' and 'marginalised communities',¹²² provisions Nubians lobbied for (with others) in the constitutional drafting process, and believe to be owed to them.¹²³ At least two other communities, Wayyu and Sakuye, have similarly pleaded for consistent 'coding',

¹¹⁹ Departmental Committee on Administration and National Security, *Report on the Public Petition No 023 of 2021 Regarding Accessing National Identity Cards by the Nubian Community* (Report, The National Assembly of the Republic of Kenya, 23 November 2021) iii <<http://libraryir.parliament.go.ke/xmlui/handle/123456789/2463>>, archived at <perma.cc/D5WD-G6RR>.

¹²⁰ *ibid* 2.

¹²¹ Emmaline Owuor, 'Nubians Clash with Matiangi over Recognition Report', *Ghetto Radio* (online, 23 May 2022) <<https://ghettoradio.co.ke/nubians-clash-with-matiangi-over-recognition-report>>, archived at <perma.cc/HLR6-VV35>.

¹²² *Constitution of Kenya* (n 13) art 56.

¹²³ Adam Hussein Adam and Waikwa Wanyoike, 'For the Nubians, The Constitution Promise May Be Slow in Coming But It Is', *The Star* (online, 4 August 2014), available at <<https://allafrica.com/stories/201408040625.html>>, archived at <perma.cc/L7SR-2WRQ>.

not because their citizenship is threatened, but for what they see as ethnic entitlements to jobs.¹²⁴

But these ‘jobs’ are rarely perceived only as entitlements in law. Like proof of citizenship, those entitlements can be understood as most commonly activated via political patronage. Okoth, for example, was unapologetic about his disappointment that the lead-up to the 2022 election, prime time for patronage from senior politicians, had not resulted in recognition for Nubian people.¹²⁵ Indeed, electoral gains for local MPs supporting communities are a widely influential factor in getting support from politicians, be it for recognition, citizenship or jobs. Ethnic patronage of this kind is a logical extension of granting citizenship on the basis of ethnicity.

C Galje’el People and the Risk of Exclusion

Galje’el people are a small sub-clan of ethnic Somali people, all of whom live under constant suspicion from the State related to long-term trans-border movement of large numbers of Somali people, especially refugees from war-torn Somalia, historical claims to irredentism and the rise of terrorist activity. In the mass screening of Somalis that took place in 1989–90, many Galje’el people had their identity documents confiscated and many were deported to Somalia.¹²⁶ The Galje’el community experienced particularly high levels of violence on the part of state authorities in this process, entailing horrific widespread sexual assault of Galje’el women and the confiscation of cattle; a principal form of wealth.¹²⁷ Outcry over this process led to the cessation of screening, but no resolution of the cases of people whose documents had been confiscated was forthcoming. Some have reportedly since had their citizenship confirmed via vetting, but without the conferral of documents.¹²⁸ There are also reports of unreasonably high levels of discretion by the then Provincial Commissioner in the cancellation of re-issued cards.¹²⁹

Efforts by the community and its supporters to get the ID cards they are, *prima facie*, entitled to by birth, have not enjoyed nearly the same results or support as those of Makonde, Shona or Pemba peoples, despite pre-dating them by two decades. In 2004 and in 2011, members of the community pursued their legal right to ID cards via the High Court of Kenya, and in the second case, under the more progressive Constitution, the Court ruled in their favour.¹³⁰ Manby reports that ID cards were subsequently issued to the two plaintiffs, but despite the NRB visiting the community, no other members have had their right to documentation fulfilled.¹³¹

124 Dalle Abraham, ‘What Code is Your Tribe?’, *The Elephant* (online, 18 December 2020) <<https://www.theelephant.info/analysis/2020/12/18/what-code-is-your-tribe>>, archived at <perma.cc/5NW9-3FFY>.

125 Interview with Hon Imran Okoth (Samantha Balaton-Chrimes, July 2022).

126 TJCRC, *Truth, Justice and Reconciliation* (n 57) 229–30.

127 Alamin Mazrui, ‘Banditry and the Politics of Citizenship: The Case of the Galje’el Somali of Tana River’ (Report, Muslims for Human Rights (‘MUHURI’), 1999) <https://citizenshiprightsafrika.org/wp-content/uploads/1999/06/MUHURI_Galjeel-Somalis_1999.pdf>, archived at <perma.cc/5SK9-AP2P>; TJCRC, *Truth, Justice and Reconciliation* (n 57) 229.

128 TJCRC, *Truth, Justice and Reconciliation* (n 57) 229–30.

129 Eight Provinces were replaced with 47 Counties in the 2010 Constitution: *ibid* 230.

130 *Hersi Hassan Gutale v Attorney General* [2013] eKLR (Constitutional Petition No 50 of 2011, 21 January 2013) (High Court at Nairobi, Milimani Law Courts).

131 Manby, *The Law of Belonging* (n 59) 191.

The Galje'el community are highly unlikely to benefit from Presidential recognition as an 'ethnic group of Kenya' without a substantial shift in attitude compared to all previous administrations. Somalis are an ethnic community whose identities, allegiances and mobility the Kenyan State has never come to terms with. Add to this local grievances relating to historical interactions over land and elections, an association with banditry¹³² and intra-Somali marginalisation,¹³³ and sympathies for the community are few. In interviews, there was suggestion that the security apparatus would be very unlikely to permit the same outreach and workaround activities to register Galje'el people. As one civil society activist put it, bureaucrats 'require political movement'. Galje'el people lack the charisma (and the Christianity) of Shona people and their piousness, or Makonde people and their march. The Pemba precedent is more significant, as they are also Muslim and have ethnic kin in a neighbouring country, but they are not perceived as threatening in the same way as Somalis.¹³⁴ The major risks of a group-based approach to citizenship are vividly illustrated by this case.

However, there may still be opportunity to capitalise on the successful group-based cases. NRB's relationship with civil society and UNHCR improved dramatically because of collaboration on these cases, as has its capacity to register people in challenging circumstances, including by working with community organisations and leaders to consider local histories and circumstances. These capabilities could theoretically be extended, even without recognition as an 'ethnic group of Kenya', and especially if carefully thought through regulations could be developed about how to do registration in 'challenging' cases.¹³⁵ This would require a more conscious effort on the part of UNHCR and civil society to demand due process and extend their support to less charismatic communities. If this support could be mustered it might be the best option for the most marginalised of Kenya's communities.

IV CONCLUSION

A senior NRB official said to me in an interview, '[m]aybe in future we will even drop this [ethnic classification] because it is not adding much value'. Such a frank admission was unusual in my research, but insightful. Ethnic coding has no official status, is not linked to any official policy, has no transparent impact on any bureaucratic lists and is not a legal guarantee of either citizenship or resources. In practice, the effectiveness of recognition is linked in troubling ways to the patrimonial use of executive influence and the reproduction of ethnopolitical subjectivities that serve that kind of power.

Yet, at the same time, ethnic coding serves important immediate needs for citizens, too; needs that will have to be met elsewhere if the classification — both in the NRB register and the vague use of 'codes' — is to be abandoned. Foremost among these is the need for citizenship in both its affective sense of feeling one

132 Mazrui (n 127) 6.

133 Mazrui (n 127).

134 A further consideration in what makes a group 'desirable' for group recognition is their effect on electoral politics. Makonde, Shona, Pemba and Galje'el communities are all only a few thousand people. Refugees in Kenya — over 600,000 of them — are also very unlikely to ever be recognised as among 'ethnic groups of Kenya' and offered naturalisation despite having lived in Kenya for generations, in many cases. See Manby, 'Naturalization in African States' (n 22) 523.

135 Manby, 'Sustainable Development Goals' (n 7) 8.

belongs securely, and its material sense of possessing the documentary basis for rights claims and daily functioning. Being recognised — whatever that means — as an ‘ethnic group of Kenya’ has been, by far, the most effective strategy for remedying statelessness. Though individual documentary processes followed, these did not happen until the community as a whole was publicly recognised.

So there is a conundrum here: the means to an end to discrimination for some groups reproduces a political environment prone to the cultivation of ethnic discrimination more broadly and for others. This extends beyond nationality rights out to a broader political economy shaped by ethnic patronage where, after citizenship, struggles for ‘codes’ now take place primarily in relation to jobs. There is no silver bullet for resolving this dilemma. Neither continued emphasis on group recognition nor a liberal difference blindness will generate a clean exit.

The conclusion I come to here, then, is that there is little alternative but to advocate for a fierce vigilance about the risks and opportunities of this approach. It is doubtful politicians can be relied upon to ensure citizenship and registration are treated with the necessary care. While many politicians — local and presidential — supported Makonde, Pemba, Shona and Nubian peoples, there is no guarantee such support will continue if it no longer serves electoral interests. The practical responsibility must lie with bureaucrats and civil society groups who have developed expertise in this field. UNHCR, given its key role in driving the Makonde, Shona and Pemba cases, also has a responsibility here. There are several practical paths that could be pursued.

One such path would be for a concerted civil society effort to push for inclusion and recognition of all ethnic groups who want it, especially those whose acceptance in Kenya is less likely. This is underway, spearheaded by groups like Haki Centre and Haki na Sheria, but faces serious resistance. If group-based membership is pursued, civil society, UNHCR and also media organisations should work harder at public communications that are more subtle. The reporting of ‘recognition’ can support inclusion, but clarifications are needed to actively undermine the idea that nationality is a mass grant made at the whim of the President. This might require more public discussion of the role of the law and individual biography as arbiters of access to nationality documentation. This is especially important for individuals within targeted groups who still lack documents.

At the same time, while the symbolic and political use of ethnic identity as a basis for inclusion is pursued, the technical use of ethnic identity in registration should be called into question. Civil society groups should push the NRB to clarify the existence and nature of its list of ethnic groups, what is done with data on ethnicity, whether statistics are being kept, who has access to them and the purposes for which they are used. There should be a public debate on this, and NRB should consider abolishing the list if it is not able to make a persuasive public case for its continued use. Such a campaign might focus on the role of ethnicity in vetting and discrimination, and advocate for strengthening of due process.

These suggestions call for a little more separation of politics from law and bureaucracy, but not so much that all political will is lost. This might allow the continuation of the benefits of the cultivated vagueness around who belongs to Kenya: symbolic forms of inclusion, and avoidance of inflammatory and unnecessarily difficult drawing of hard lines. But it also maintains appropriate checks, balances and rights enforcement at the individual level.

There are also significant lessons from the Kenyan case for efforts to remedy statelessness in other contexts. Most centrally, these stories underscore the vital importance of understanding the politics and political economy of each context before uncritically endorsing the easiest path forward. UNHCR in particular played a key role in the cultivation of this culture of remedying statelessness via ethnic recognition, and is now holding Kenya up as an example around the world. While there remains a technical distinction between individual registration — which followed legal and regulatory processes — and the appearance of group recognition — which was political — as this article has shown, the individual/legal and group/political approaches are deeply entangled, and one cannot wholly extract one from the other. Accordingly, it may not be appropriate in other contexts to adopt a group recognition campaign as a way to end statelessness. Indeed, it is not without risks even in Kenya. UNHCR country offices and local civil society and community groups should exercise caution in following Kenya's lead here, and consider the broader political dynamics and longer-term implications of a group-based approach to problems of undocumented nationality.