THE WORLD'S STATELESS

DEPRIVATION OF NATIONALITY

CITIZENSHIP ERASURE

CITIZENSHIP ERASURE: THE ARBITRARY RETROACTIVE NON-RECOGNITION OF CITIZENSHIP

BY BRONWEN MANBY*

In the vast majority of cases, people deprived of citizenship have not been subject to any formal invocation of deprivation provisions in the citizenship law. Rather, they have simply been denied a document that confirms citizenship. Sometimes, they have never had such a document even though entitled in the law; sometimes officials have destroyed documents they previously held; sometimes a document is cancelled on the grounds that it was obtained by fraud; sometimes, there is just an indefinite delay in renewing a document that has expired, or a failure to take a decision. Thus, the methods most often used to denationalise a person are not to invoke the formal processes of deprivation, but simply to deny that he or she ever had citizenship to start off with and assert that any previous recognition was either in error or obtained by fraud.

Some of the best-known cases of this "citizenship erasure" relate to prominent politicians from the African continent. As far back as 1978, the Botswanan government declared that the leader of the newly founded opposition party, John Modise, previously recognised as a citizen, was not a citizen after all, and deported him to South Africa – which did not recognise him either.[1] A decade and a half later, in 1994, the Zambian government deported to Malawi two leading members of the main opposition party (and former liberation movement), William Steven Banda and John Lyson Chinula, both on the grounds that they were not citizens.[2] They were not accepted as Malawian citizens. Five years after that, the High Court in Zambia declared that the former president, Kenneth Kaunda, was not a citizen of the state he had governed for 27 years.[3] The same year, a tribunal in Côte d'Ivoire annulled the nationality certificate of the former prime minister, Alassane

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[1] African Commission on Human and Peoples' Rights, *John K. Modise v. Botswana* (2000), Communication No. 97/93.

[2] African Commission on Human and Peoples' Rights, *Amnesty International v. Zambia* (2000), Communication No. 212/98.

[3] African Commission on Human and Peoples' Rights, *Legal Resources Foundation v. Zambia* (2001), Communication 211/98.

Ouattara, on grounds that it had been irregularly issued.[4] All these cases reached the African Commission on Human and Peoples' Rights, which ruled every time against the governments concerned. Many others have also been litigated at national level.[5]

These cases, which should perhaps be described as "arbitrary retroactive non-recognition" of citizenship rather than as deprivation (since in no case were formal deprivation procedures mobilised by the governments wishing to silence their critics) are far from confined to these high-profile individuals, though it is these cases that have reached the courts. For those who are not considering running for public office or challenging the government in other ways, it is through the process of applying for or renewing a national identity card or passport, or when they are arrested and deported, that they find that they are in fact not, or no longer, considered to be citizens.

In the most egregious cases of citizenship erasure, citizenship laws are amended or judicially reinterpreted to retroactively remove rights that were previously held by particular segments of the national population. But even in those cases, the key amendments have not been to modify the formal powers to deprive a person of citizenship, but rather to restrict access to citizenship based on birth and residence; to establish discriminatory procedures based on race, religion or ethnicity; to apply rules on dual citizenship strictly even if the person has never held citizenship papers from another country; or to exploit any ambiguity in the rules applied on succession of states.[6] Often, changes in the rules to restrict eligibility for citizenship are then applied retroactively, even if in principle the amendments only apply to those born after the changes.

Myanmar's Citizenship Law of 1982 created a presumption that only members of certain "national groups" are citizens. Although the law still provided for existing citizens to retain their citizenship, the change to the law helped to enable decades-long denationalisation of Rohingya by the imposition of ever-stricter evidential requirements to prove their citizenship. Under the 1982 law's procedures, citizens were required to re-register. Rohingya who submitted their old documents for this purpose had them replaced with new documents which explicitly did not recognise their citizenship.[7] In the Dominican Republic, the notorious 2013 judgment of the

[4] African Commission on Human and Peoples' Rights, *Mouvement ivoirien des droits humains (MIDH) v. Côte d'Ivoire* (2008), Communication No.246/02.

[5] B. Manby, *Citizenship in Africa: The Law of Belonging,* (Hart Publishing 2018), chapter 5.5; B. E. Whitaker, 'Citizens and Foreigners: Democratization and the Politics of Exclusion in Africa' (2005), African Studies Review, 8(1), p. 109-126.

[6] B. Manby, 'You can't lose what you haven't got: citizenship acquisition and loss in Africa', in A. Macklin and R. Bauböck (eds.) *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, RSCAS 2015/14.

[7] Act No. 4 (1982), article 3. See discussion in N. N. Kyaw 'Unpacking the Presumed Statelessness of Rohingyas' (2017), Journal of Immigrant & Refugee Studies, 15(3), p. 269-286; N. Cheesman, 'Problems with Facts about

Constitutional Tribunal confirmed constitutional amendments that revoked birthright citizenship from anyone born between 1929 and 2007 to a parent deemed "in transit" or "residing illegally", and ordered the government to conduct a retrospective civil registration audit to remove them from the population register.[8] In Mauritania, the government introduced legal reforms in 2010, in advance of the roll out of a new national identity card, that removed all rights based on birth in Mauritania, as well as the possibility of late registration of birth or recognition of nationality based on apparent status as a national.[9] The subsequent discrimination in the issue of new identity cards led to the creation of a protest movement which accused the authorities of "biometric genocide".[10]

In some cases, retroactivity is explicit. In Kenya, legislation adopted in 1985 removed the right to citizenship based on birth in Kenya with retroactive effect, establishing instead a purely descent-based regime (which had already been applied in practice) derived from ancestors who were already two generations born in the country at independence in 1963. The 2010 constitution, adopted after a decades-long struggle to constrain executive powers, placed greater limits on deprivation of citizenship from a naturalised citizen (citizenship by birth was and is not possible to revoke) and provided that every citizen is entitled to "a Kenyan passport and any document of registration or identification issued by the State to citizens". [11] Despite this provision, Kenya's constitutional human rights bodies have repeatedly had to condemn the executive for discrimination and arbitrary decision-making in the issue of documents when it comes to members of certain minority groups: this discrimination has been enabled by the retroactive non-recognition of rights based on birth in Kenya.[12]

It should surely be the case that a change in the rules or retroactive finding that a person previously recognised as a citizen was issued citizenship documents in error is just as subject to the prohibition on arbitrary deprivation of citizenship as any procedure under formal deprivation provisions.[13] The African Court on Human

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Rohingya Statelessness', e-International Relations (8 December 2015) available at https://www.e-ir.info/2015/12/08/problems-with-facts-about-rohingya-statelessness/.

[8] República Dominicana, Tribunal Constitucional, Sentencia TC/0168/13. See discussion in E. Hayes de Kalaf, *Dismantling Dominicans: Legal Identity, Access to Citizenship and the Contours of Belonging*, (Anthem Press, forthcoming 2020).

[9] Loi. No. 2010-023 du 11 février 2010 abrogeant et remplaçant certaines dispositions de la loi 61-112 du 12 juin 1961 portant Code de la nationalité mauritanienne, especially deletion of article 9 and amendments to articles 13, 19 and 58.

[10] See discussion in B. Manby, *Citizenship in Africa*, chapter 7.6; Z. Ould Ahmed Salem, 'Touche pas à ma nationalité: enrôlement biométrique et controverses sur l'identification en Mauritanie' (2018), Politique africaine, 152(4), p. 77-99.

[11] Constitution of Kenya (1969), as amended to 2008, article 94; Constitution of Kenya (2010), articles 12 & 17.

[12] B. Manby, *Citizenship in Africa*, chapter 7.3; B. Ng'weno and L. Obura Aloo, 'Irony of Citizenship: Descent, National Belonging, and Constitutions in the Postcolonial African State' (2019), Law & Society Review, 53(1), p. 141–172.

[13] UN Human Rights Council, 'Report of the Secretary-General: Human rights and arbitrary deprivation of nationality', A/HRC/13/34 (14 December 2009), para. 23; UNHCR, 'Expert Meeting - Interpreting the 1961

and Peoples' Rights agrees (see *The case of Anudo Ochieng Anudo* below). Yet these executive decisions, often purely administrative in legal character, may be out of reach of any due process protections – whether because excluded in law, or inaccessible in practice.

There is a major push to strengthen population registration systems, through the initiation or strengthening of requirements to hold a national identity card, for birth registration and civil registration in general, and for the use of biometric data in these documents. This push has the potential to reduce statelessness. But it also carries significant risks of arbitrary non-recognition of citizenship in practice. There is a strong possibility – probability in some national contexts – that governments will seek only to police ever more strongly the boundaries of their systems, excluding anyone of "doubtful" nationality, while failing to reform legal provisions and administrative practices that create statelessness by arbitrary exclusion. The avoidance of citizenship erasure by arbitrary retroactive non-recognition through these processes needs international attention.

The case of Anudo Ochieng Anudo[14]

Anudo Ochieng Anudo was born in 1979 in the Butiama district, north-west of Tanzania. In 2012, while he was working in Arusha for a German NGO providing solar power, his passport was retained when he was seeking to register his marriage, on the grounds that there were doubts about his citizenship. In September 2013, he wrote to the Minister of Home Affairs and Immigration protesting the confiscation of his passport. In April 2014, the immigration service opened an investigation. A letter from the minister dated 21 August 2014 informed Anudo that his passport had been cancelled on the grounds that he was not a citizen.

Unaware of the letter, the applicant went to the immigration office on 26 August 2014, hoping to recover his passport. Upon arrival he was arrested, detained and beaten. One week later, he was escorted to the Kenyan border and compelled to sign a notice of deportation and a document attesting that he was a Kenyan citizen. In November however, the Kenyan authorities

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Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality' *("Tunis Conclusions")*, (March 2014), especially para. 9.

[14] B. Manby, 'Case Note: Anudo Ochieng Anudo v Tanzania (Judgment) (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018)' (June 2019), Statelessness & Citizenship Review, 1(1).

declared that Anudo was an irregular migrant and expelled him back to Tanzania where he was not readmitted.

The applicant's father protested in writing to the Tanzanian Prime Minister, but the Minister of Home Affairs and Immigration confirmed the decision in December. The Tanzanian Citizenship Act 1995 provides that the minister's decision in relation to any application under the Act "shall not be subject to appeal or to review in any court" (Article 23); the Immigration Act, also of 1995, similarly provides that in decisions relating to matters under the act "the Minister's decision shall be final" (Article 10(f)).

Anudo then lived in no man's land between Kenya and Tanzania for the next three years. In May 2015, without the benefit of legal advice, he sent an email directly to the African Court on Human and Peoples' Rights, based in Arusha, to seek its help. The application was registered and, in early 2016, the court itself contacted Asylum Access Tanzania, which agreed to provide legal assistance to the applicant.

In its judgment, delivered in March 2018, the African Court noted that there is no general provision on the right to a nationality in the International Covenant on Civil and Political Rights (ICCPR) nor the African Charter on Human and Peoples' Rights (ACHPR); however, it filled this gap by drawing on the Universal Declaration of Human Rights (UDHR), noting also a reference to the UDHR in the Tanzanian Constitution. Article 15(2) states that "No one shall be arbitrarily deprived of his nationality".

Thus, while the court affirmed that the conferral of nationality is the sovereign right of states, it stated that international law permits loss of nationality only in "very exceptional situations". In addition to affirming a general obligation to avoid the risk of statelessness, the court drew on the UN Secretary-General's 2013 report on human rights and arbitrary deprivation of nationality to state that the conditions to be fulfilled are: (i) a clear legal basis, (ii) a legitimate purpose conforming with international law, (iii) proportionality to the interest protected,

and (iv) procedural guarantees allowing the person concerned to defend himself before an independent body.[15]

In considering whether these conditions had been fulfilled, the court held that:
[S]ince the Respondent State is contesting the Applicant's nationality held since his birth on the basis of legal documents established by the Respondent State itself, the burden is on the Respondent State to prove the contrary.[16]

This reversal of the burden of proof is perhaps most important of the African Court's contributions to international law in this field. While welcome, the ruling did not address the situation of those who have never had citizenship documents but have always been treated as citizens – which indeed is the case for most Tanzanians, where a national identity card was only introduced from 2016, and some applications are being indefinitely delayed, without any reason given. The Tanzanian government, moreover, did not implement the African Court's judgment, and Anudo sought refugee status in Uganda.

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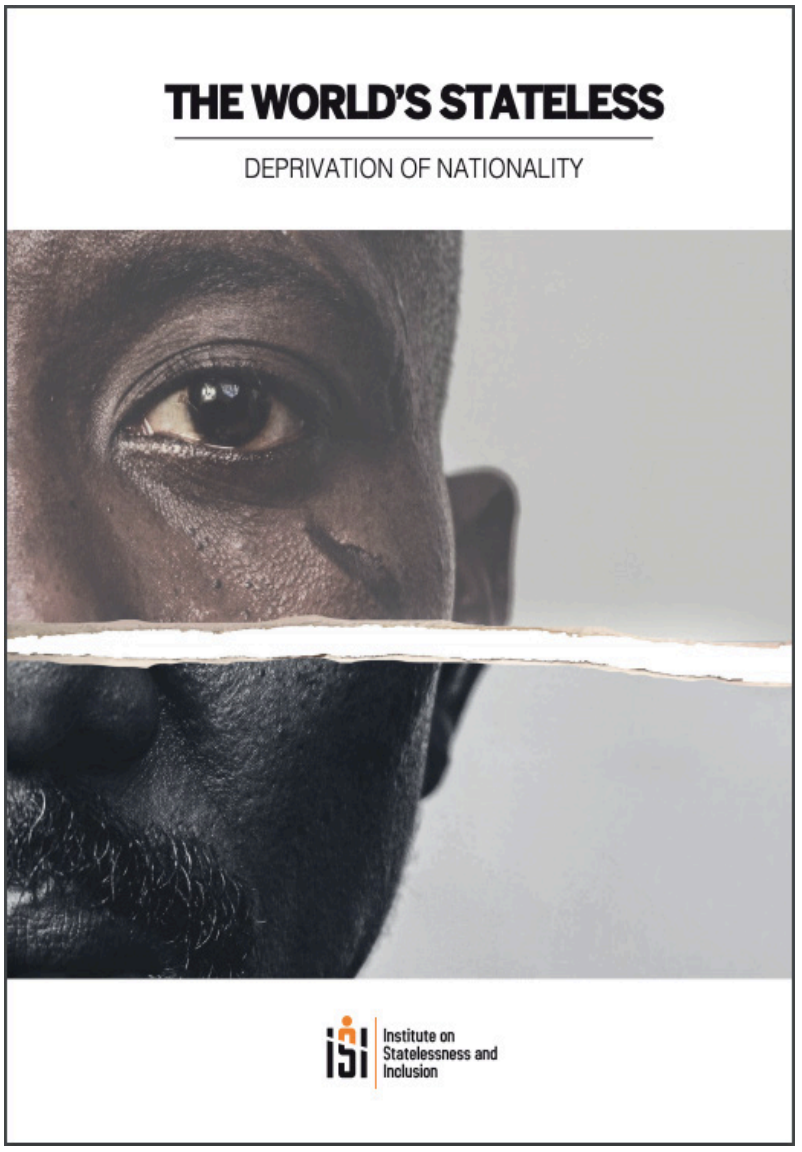
[15] UN Human Rights Council, 'Report of the UN Secretary General: Human rights and arbitrary deprivation of nationality', A/HRC/25/28 (10 December 2013).
[16] African Court on Human and Peoples' Rights, *Anudo Ochieng Anudo v Tanzania* (2018), App. No. 012/2015, para. 80.



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