Irony of Citizenship: Descent, National Belonging, and Constitutions in the Postcolonial African State

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In 2010, like many African countries since the 1990s, Kenya passed a new constitution. This constitution aimed to get rid of many past issues including the definition of citizenship. Globally, two general principles govern the acquisition of citizenship, descent from a citizen (jus sanguinis), and the fact of birth within a state territory (jus soli). In contrast to the prior Constitution that required both descent from Kenyan parents and birth in Kenya, the 2010 Constitution adopted a rule of citizenship by descent alone (jus sanguinis) from either parent. However, today Kenya is faced with a conundrum first articulated by Aristotle: how do you understand and operationalize citizenship by descent in a new state, or in the case of Kenya, one that has only just turned fifty? The crux of this conundrum is determining the basis of the citizenship of parents who precede the polity and therefore what they can transfer to their children. Understanding that articulations of citizenship are also systems of exclusion, this paper asks who can and cannot be a Kenyan citizen and why? What are the unintended consequences of efforts to escape Aristotle's conundrum?

> "… Balala is a Kenyan citizen whose grandfather was also a Kenyan before independence, and those of us who were around at independence know that if you were born in Kenya, you became a Kenya citizen on 12th December 1963. We cannot accept from the Minister without explanation that Sheikh Halid Balala ceased to be a citizen merely because of an administrative decision has been made within his office. … Sheikh Balala automatically became a citizen on 12th December 1963. That was the first constitution of this nation and that is how all of us became citizens of Kenya. It is a fact."
> Hon. Mwai Kibaki, Leader of the Opposition and later 3rd President of the Kenya, Kenya National Assembly: Parliamentary Debates, 8th December 1994 (Kenya National Assembly, 1994: 1092)

Imagine two people born on the same day, in the same hospital in Nairobi, in 1961, 2 years before the independence of Kenya.[1] Both came from families whose members were detained

The authors would like to thank Luis Guarnizo for suggesting engagement with Aristotle, and the anonymous reviewers and editors, as well as Fleur Ng'weno for many helpful comments and suggestions.

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[1] We cannot name the people involved due to ongoing court cases.

Law & Society Review, Volume 53, Number 1 (2019): 141–172
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https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

or jailed for activities against the colonial state during the State of Emergency declared on account of the war with the Mau Mau (1952–1958). Both had parents who were subjects of the United Kingdom and its colonies—one whose father was documented as such because he had travelled out of the country on a British passport. You would imagine, as did Mwai Kibaki in the quote above, that on December 12, 1963 when Kenya became independent, these two individuals automatically became citizens. After all, Kibaki states that it is a fact that *all* Kenyans became citizens in this way. He points out in Parliament in 1994 that, considering this fact, the government cannot just take away citizenship through an administrative decision. Kibaki insists that being born in Kenya and having a grandfather born in Kenya is sufficient means to citizenship. He asserts that it is guaranteed in the founding Constitution.

In spite of Kibaki's insistence about the clarity and the factual nature of Sheikh Balala's citizenship, equalizing Balala with all other citizens of Kenya, his citizenship was anything but straight forward. Rather, it was one of many examples where the Kenyan government, or individuals in power, draw on notions of *jus sanguinis* (citizenship by blood) to question an individual's moral right to be a citizen in a particular political context.

Sheikh Halid Balala was born in coastal Kenya in 1958. A Muslim bookstore owner, he became the spokesman of the Islamic Party of Kenya (IPK) in the early 1990s tabling concerns particular to Muslim populations in Kenya, just as Kenya entered a new period of multiparty politics after three decades of one party rule. The government refused to register IPK as a party fearing its appeal and call for coastal secession. The result was violent confrontations between IPK members and the government mainly in Mombasa.

In efforts to quell the growing Muslim radicalism and domesticate the appeal of religious politics, the ruling party KANU attempted to divide Muslims in Kenya between "Africans" and "Arabs" and to paint Sheikh Balala as a foreigner not a Kenyan (Oded 1996). The agenda to divide Muslims racially, for the most part, backfired among Muslim Kenyans at the coast who argued that Islam does not distinguish between people by race.

In 1994, Sheikh Balala was on a trip to Europe when the Kenyan government cancelled his passport, claiming that he was Yemini not Kenyan, rendering him stateless. Sheikh Balala protested that "I can't deny that my ancestors came from Yemen, but even my late grandmother did not know Yemen. Just like many Kenyans, my ancestors must have come from somewhere, yet as far as I am concerned, I am a bona fide and loyal Kenya citizen" (The East African 2005). The opposition parties took up the removal of his citizenship in Parliament asking how can a Kenyan, who meets all the criteria for citizenship, be made stateless. How

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

indeed? It was not until 2002 that Balala's passport was reinstated by which time the particular political threat posed by IPK had pretty much been neutralized.

Similarly, in our opening example, one individual did automatically become a citizen in 1963 and the other did not. Our question in this paper is why. This question is one that is coming up again and again in political debates, citizenship offices and courts across Kenya in the context of the 2010 new Constitution which sought to remove bias held in previous constitutions and to equalize citizenship for all Kenyans.

Today Kenya has a population of 46 million people made up of over 40 different ethnic groups and languages with no single group constituting a majority. About 40 percent of Kenya's population belongs to communities considered "border people." That is to say, that national borders run through their assumed ethnic territories and that they share culture and language with people in neighboring countries (for example, the Luo, Luhya, Somali, and Maasai communities). Racially, Kenya includes Africans, Europeans (mainly of British descent), and Asians (mainly of South Asian and Arab descent). Non-African populations make up tiny minorities (less than 1 percent combined). Due to colonial policy, many racial minorities are concentrated in cities. The center of economic and political power is the capital city, Nairobi, and its hinterlands of the central highlands.

Once a part of the Protectorate of British East Africa (until 1920) and later a Crown Colony of Kenya and the Kenya Protectorate (the coastal strip), Kenya became a state through armed rebellion and political settlement and gained its independence in 1963. In 1964, Kenya became a self-governing republic. After Kenya's founding Constitution of 1963, there was a consolidation of amendments in the 1969 Constitution and later other amendments. The 1969 consolidation broadened the scope of citizenship while the two amendments narrowed it. The 1969 consolidation and two of these amendments addressed citizenship specifically (Act 16 of 1966 and Act 6 of 1985).

In 2010, like 27 other African countries since the 1990s, Kenya passed a new constitution.[2] Similar to many other states in

[2] See the new or amended constitutions of Angola (2010), Benin (1990), Burundi (1992), Cameroon (1996), Chad (1996), Egypt (2014), Equatorial Guinea (1991), Ethiopia (1995), Eritrea (1997), Gambia (1992), Cote d'Ivoire (2000), Madagascar (2010), Mali (1992) Mauritania (1991), Namibia (1990), Niger (2010), Nigeria, (1999), Rwanda (2003), Senegal (2001), Somalia (2012), South Africa (1997), South Sudan (2011), Sudan (2005), Tanzania (1997), Tunisia (2014), Uganda (1995) and Zimbabwe (2013), which all have variants of *jus sanguinis* provisions, which the new constitutions either reinforced or instated.

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

Africa, Kenya's new Constitution reframed the basis of citizenship by defining it using only *jus sanguinis,* in other words, by descent alone but allowing dual citizenship for the first time. In 2011, the Kenya Citizenship and Immigration Act, 2011 was passed elaborating the citizenship laws outlined in the 2010 Constitution. With this new Constitution and Citizenship Act in mind, this paper asks, why is the status of these two people mentioned at the beginning of the article not yet equal? In addition, what contradictions does this inequality illuminate for citizens of other African states with constitutions that use descent from a citizen (*jus sanguinis*) as the foundations of citizenship?

We look at this question in two ways; first, putting Kenya's constitutions and legal statutes in historical context of colonialism and postcolonialism we ask why did some people come to be seen as automatically warranting citizenship and others not, and second, drawing on Aristotle's argument regarding *jus sanguinis,* we ask why is the issue of who can and cannot be a citizen a continuous contentious struggle in Kenya and what does this tell us about *jus sanguinis* citizenship more generally.

While postcolonial perspectives offer an approach that takes into account the central position of colonialism in defining contemporary notions of citizenship, allowing a critique of liberal citizenship, most scholars have addressed postcolonial citizenship through the rights conferred to citizens in terms of ethno-nationalism and constitutional equality (Adebanwi 2009; Aiyar 2015; Geschiere 2011; Jamal 2007; Jayal 2013; Kapur 2007; Lawrance and Stevens 2017; Lee 2011; Mamdani 2011; Manby 2010; Sadiq 2017). Our historical analysis reveals nuances in the way rights come to be conferred beyond ethno-nationalism and constitutional equality, by examining the way membership is negotiated and envisioned. Specifically, we argue that rather than looking at exclusion as arising from isolated national and historical contexts, in postcolonial states we need to look at the significance of formal definitions of citizenship to the method, form, and possibility of exclusion. We use Aristotle's discussion of problems of origin, revolution, and morality to examine articulations of *jus sanguinis* historically in Kenya with comparisons with other parts of Africa. We contend that because of the newness of African States, African examples dramatically highlight something inherent to *jus sanguinis* illuminated by the entanglements conditioned by a history of colonialism. We show how the issues of origin, revolution, and morality play out historically and how citizenship is constructed locally as well as in the interplay between states. Specifically, looking at Kenya demonstrates the way in which *jus sanguinis* necessitates constant reinterpretation and redefinition as it cannot address once and for all the moral question of who ought to be a

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

citizen. As such, while the use of *jus sanguinis* was first mobilized around issues of race, with time it came to be used to question others who racially might be seen as the same but were associated with some "morally suspect" past (colonial), space (borders), or activity (political party or social movement). In addition, as a "suspect" citizen one can never satisfy the request for legitimacy as the suspicion (morality) is inherent in the construction of *jus sanguinis* as a definition of citizenship, giving people the un-provable burden (as a group) of proving citizenship.

Citizenship in Postcolonial Africa

Citizenship of nation states is often taken as the legal relationship between the people and the state, conferring formal membership enshrined in a national constitution. Nevertheless, processes of nation and state building connect politics to citizenship through targeted inequality in political, economic, and cultural policies, affecting what citizenship is in practice (Jamal 2007). In addition, in postcolonial states citizenship "is structured by a history of colonial rule and the inherent power differentials and social control implicit in European imperial projects" (Sadiq 2017: 178). As such, citizenship is a contested space where legal status, rights and entitlements and forms of identity have "a pre-independence and a post-independence life" (Jayal 2013: 12). In this way, colonialism has a "deep and lasting impact" on the "understandings and constructions of citizenship in the contemporary period" (Kapur 2007: 537). For instance, countries in Africa and Asia had to rework institutions "meant to control and regulate colonial subjects with a racially determined secondary status" so that they could "serve the needs of independent citizens configured as equals by a new constitution" (Sadiq 2017: 179). Yet, as this article shows efforts to equalize racially through provisions for individuals in new constitutions proved difficult. The constitutions themselves then became the target of change.

In Africa, three major themes have structured scholarship on citizenship. The first theme is that of *governance* with emphasis on civil society, participation, and rights realizable through active sovereign individuals. Scholars ask questions about formal membership as citizens, institutional capacity and function, political will, and spaces for participation as well as legal mandates (Kanyinga and Katumanga 2003; Robins et al. 2008). Citizenship here appears straightforward. However, as in other parts of the world, inequality comes in the form of unequal distribution of the "rights, meanings, institutions and practices that membership entails to those deemed citizens," what Holston calls the substantive aspects of citizenship (2008: 8). As such, somehow, "the

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

formal membership in a nation-state is insufficient to guarantee the same treatments or distributions of the substantive aspects of citizenship" (Ng'weno 2012: 158).

The second theme is that of *postcoloniality* with emphasis on issues of subjectivity, institutions and political life structured in the aftermaths of colonialism (Berry 1992; Lee 2011; Mamdani 1996; Mbembe 2001; Robins et al. 2008). These have focused on the citizenship implications of legacies of colonialism for political authority and for identity and have looked at the transformation of institutions to deal with postcoloniality alongside colonial heritage. Citizenship is often a fraught relationship experienced through endless contradictions and insecure options (Berry 1992; Mbembe 2001). Based in colonial regimes of power, citizenship is an imposed system unable to account for the multiple other ways of being and belonging of the people it affects and shapes. The questions addressed here are not ones about the workings of institutions but the institutions themselves, their foundations, and the desires and actions of people in the face of these institutions.

The third theme is that of *autochthony* with emphasis on recognition, ethnic conflict, and statelessness organized through primary categories of group belonging and often, incommensurate otherness (Adebanwi 2009; Babo 2017; Ceuppens and Geschiere 2005; Dorman et al. 2007; Geschiere 2009; Geschiere 2011; Kagwanja 2003; Lawrance and Stevens 2017; Manby 2010). Citizenship here is in constant conversation with tradition, indigeneity, and collectivities other than nation states mobilizing relational histories and territories. Citizenship is mediated and largely dependent on "membership of specific gender, ethnic, religious and regional groups" (Adebanwi 2009: 353). Diaspora groups within nation states are marked as problematic, whether European (colonial and otherwise), or Asian (predominantly Lebanese or South Asian) often expressed in lack of marriage connections, cultural and linguistic distance, class distinctions, and political inconsistency (Akyeampong 2006; Mamdani 2011). In addition, for inside and outside "strangers," citizenship must be constantly verified and proved through an over reliance on documentation through birth certificates, identity cards, and passports as well as a reliance on material demonstrations of allegiance such as "donations" to political parties (Aiyar 2015; Lawrance and Stevens 2017; Mamdani 2011; Stevens 2017). Scholarship on autochthony has come to be the area that most focuses on the loss of, lack of, or inability to gain, formal membership in the nation state, that is to say, citizenship, across Africa.

These three approaches show that citizenship is an ongoing process and is constructed historically. It is thus always political. Manby (2015b) argues, however, that these approaches to African

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citizenship are not sufficient as (1) citizenship debates have not paid enough attention to Africa, and that (2) citizenship debates in Africa do not address legal definitions of nationality. It is our contention that, indeed, in debates on citizenship Africa is too often pigeon holed as a unique case. Not only did colonialism bequeathed African countries with legal structures that are similar, if not the same as, other countries in the world, but scholars such as Sadiq (2017), Kapur (2007), and Lee (2011) make a case for understanding the historical context of colonialism as affecting both the colonizer's and colonized's national formation of citizenship and belonging. Postcolonial perspectives, thus, shed light on not only what is happening in postcolonial states, but also on how we construct the concept of citizenship itself. Sadiq argues that, "a postcolonial lens offers an understanding of citizenship from the viewpoint of the marginalized, a critique of European experiences, and a reexamination of liberal constructions of citizenship" (2017: 179). To do this, in this article, we take seriously the colonial legacy of Africa, its inherited European institutions, its history and politics that have made it engage with a long history of citizenship debates not only in Africa but also in the rest of the world.

We use this historical analysis to focus on Manby's (2015a) second point about paying attention to the legal definitions of nationality, in order to reassess citizenship from a postcolonial perspective. Manby argues that it could be useful "for the citizenship debates to extend to Africa, and scholarship on autochthony and indigeneity in Africa to pay more attention to legal definitions of nationality and the process by which it is acquired, as well as the more nebulous question of how a sense of belonging and community is created" (2015b: 10). Sawyer (2013) points out that most countries today define citizenship through a combination of *jus soli* ("law of the land" or citizenship determined by where you are born) and *jus sanguinis* ("law of blood" or citizenship determined by descent). Sawyer argues that *jus soli* was a monarchial concept "based on the equation of a king's power with his dominion over his subjects" and it is fundamental to British common law (2013: 655). *Jus soli* was also fundamental to colonialism for establishing the rights of natives as well as nonnatives to territory. Lee argues that the "colonial context formed a crucible for rethinking the use and application" of *jus soli* and *jus sanguinis* in the colonies and the metropole (2011: 509). Although "all persons born in a country which is under British rule are natural-born British Subjects," this subject-hood was not enough to distinguish between categories of "native and non-native," which were determined by racial ancestry and which carried differential access to rights (Lee 2011: 511).

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Postcolonial countries were forced to address formal membership at independence. During decolonization, postcolonial nations had to decide how political membership would be determined while at the same time inheriting institutional structures and concepts from colonial rule (Sadiq 2017). Western philosophies of law, inherited in some manner by most of the postcolonial world, draw on what Habermas argues are two contradictory interpretations of citizenship. "The role of the citizen is given an individualist and instrumentalist reading in the liberal tradition of natural law starting with Locke, whereas a communitarian and ethical understanding of the same has emerged in the tradition of political philosophy that draws on Aristotle" (Habermas 1992: 5). Sadiq points out that for many scholars this contested space between new and inherited structures is determined by a tension between *jus soli* and *jus sanguinis* definitions of citizenship that reflected "ideals of constitutional equality and ethno-nationalism" (2017: 185). Yet, Sadiq finds this explanation insufficient stating, "such analysis reifies postcolonial citizenship as an outcome of divisive colonial polices and proposes that only a reform or removal of hierarchical colonial laws and colonial inspired executive actions will lead to a new citizenship fit for the diverse multiethnic societies of Asia and Africa" (2017: 188). Alternatively, writing about contemporary Africa and Europe, Geschiere argues for a return to the classical locus of autochthony to see the tensions and inconsistencies of new and old constructions of citizenship (2011).

In our study, we find that constitutional equality and ethnonationalism are not given sides of one coin, rather *jus soli* and *jus sanguinis* allow inclusions and exclusions in fundamentally different ways depending on the moral significance given to accidents of birth and how this can be associated with groups rather than individuals. While scholarship on citizenship in Africa discuss governance, postcoloniality, and autochthony, they tend to identify exclusion as arising from isolated national contexts and historical circumstances, and even at times from the actions of the excluded groups, sidelining the significance of legal definitions of citizenship to the method, form, and even possibility of exclusion. By contrast, we try to understand how the logical limits of the legal definitions of citizenship as *jus sanguinis, jus soli* or combinations of the two—give rise to, provide space for, and enable the contradictions and problems studied in these works on African citizenship and citizenship in the world more broadly. In particular, we ask how does *jus sanguinis* offer a supportive scaffolding onto which contradictions and problems of governance, postcoloniality and especially autochthony are built, dependent and given shape?

We argue that the use of *jus sanguinis* enables exclusionary autochthony laws and policies that are expressed through

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postcolonial anxieties over rights and belonging and often aim to redress colonial injustices and are institutionalized though biases arising in the wider society. In Africa, the legal limits of citizenship statutes are mobilized for, and in reaction to, political and social effects, articulated in ideologies of belonging that have as a subtext a complex combination of governance, postcoloniality, and autochthony. Thus, the legal definitions of citizenship have life and livelihood consequences. In the process, we recognize the political and exclusionary nature of citizenship and law's role in that politics and inclusion/exclusion.

We contend that African examples, rather than being exceptional, because of the newness of African states, dramatically illuminate something inherent to *jus sanguinis* (not inherent to Africa). As such, not only can African scholarship benefit from looking at citizenship but looking at Africa can enhance scholarship on citizenship more generally. Our argument is that *jus sanguinis* produces a serious of inherent contradictions (first identified by Aristotle) which can be exploited so as to deny unwanted groups (or in some cases individuals) citizenship when they do not fit within the specific in group at a particular time. We use Kenya as a case study to ask what is at stake in a *jus sanguinis* redefinition of citizenship? We look at issues of origins and revolution to demonstrate the ways in which *jus sanguinis* necessitates constant reinterpretation and redefinition as it cannot address once and for all, the moral question of who ought to be a citizen. As such, we argue that the legal definitions of citizenship are central to the way historical circumstance can be given significance.

Aristotle's Conundrums of *Jus Sanguinis*

In adopting citizenship by *jus sanguinis* alone from either parent, today Kenya is faced with a conundrum first articulated by Aristotle in *Politics* (Apostle and Gerson 1986): how do you understand and operationalize citizenship by descent in a new state, or in the case of Kenya, that has only just turned 50. In *Politics*, Aristotle lays out the issue of citizenship as follows: "for practical purposes, people define a citizen as a man whose parents are both citizens, not only his father or only his mother; others go further back and include grandparents or great grandparents or more distant ancestors" (Apostle and Gerson 1986: 74). Aristotle articulates the way *jus sanguinis* is often understood, although today many states count either mother or father as sufficient for citizenship as does Kenya's new 2010 Constitution (Constitution of Kenya, 2010 Article 14). That is to say, what is important in the *jus sanguinis* system is descent from a citizen where this can be

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understood as having a certain breadth (father or mother or both) or depth (parents, grandparents, or more distant ancestors).

However, Aristotle poses a simple question that disturbs the practical logic of the above formulation. He asks "How did one's grandparents or great grandparents, etc., come to be citizens?" (Apostle and Gerson 1986: 74). This is the first problem raised by the conundrum—the problem of origin. He states "The difficulty here is simple; for if by [our] definition [the ancestors] participated in the government, they might be citizens, but 'born of a father or mother who was a citizen …' cannot be applied to the first inhabitants or founders of a state" (Apostle and Gerson 1986: 74). Aristotle is arguing that there is a finite limit to the past ancestors that can guarantee citizenship and that limit is reached when the people predate the polity as is the case with founders of a new state.

Aristotle states that there is another greater difficulty in "the case of those who were made citizens after a change in government" (Apostle and Gerson 1986: 74). This is the second problem raised by the conundrum—the problem of revolution. He states, "for example, in Athens, after the expulsion of the tyrants, Cleisthenes enrolled as members of the tribe foreigners and slaves of foreign origin" (Apostle and Gerson 1986: 74). The issue here is one of people who had not previously been incorporated into the polity who, because of the radical change of government, must now be incorporated. Geschiere points out that "it is indeed striking that the laws on citizenship promulgated in 509 BC by Cleisthenes, Athens' great legislator during the city's ascension, were much more inclusive than Pericles' citizenship laws from 451 BC during the city's heyday" (2011: 329). Thus, it is not only a change in government, but also a change that demands new ways of understanding citizens, a revolution. In this case, the problem with citizenship by descent is that at the moment of revolution, it does not apply, as those who were once excluded and now incorporated do not have citizen ancestors.

The final problem raised by the conundrum of *jus sanguinis* is a moral one. Aristotle argues that the dispute that arises after a revolution is not one of whether the new citizens are citizens but if they are "justly or unjustly" citizens (Apostle and Gerson 1986: 74). The question then becomes: who ought to be a citizen after a revolution. Aristotle goes on to state that "one might also raise a further difficulty, namely, whether he who is unjustly made a citizen is in fact a citizen, as if being unjustly a citizen amount to being falsely a citizen (Apostle and Gerson 1986: 74).

Aristotle's *jus sanguinis* citizenship conundrum highlights three issues—origin, revolution, and morality—that are not easy to practically solve. This three-part conundrum is faced by states

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such as Kenya and other states in Africa, which are relatively new states, founded through post-colonial revolutions and a background of inequality based on race, who deploy citizenship by descent. Manby (2010) argues that international law tries to get at the issue of origins through the principle of "succession of states." "Under international law, individuals who had the nationality of a predecessor state should have the right to the nationality of at least one of the successor states" (2010: 9). Nevertheless, this principle is not able to address the issue of revolution and the incorporation of the previously excluded such that the three-part conundrum produces tricky entanglements.

These entanglements cause specific kinds of amendments to constitutions, certain ways of implementing laws and provide a space for contradictions in the carrying out of law within one country. The crux of this conundrum is determining the basis of the nationality of parents who precede the polity or are incorporated by revolution and therefore what they can transfer to their children and thus the morality of their descendants' citizenship.

While focusing on *jus sanguinis*, we recognize that there are also logical limits to *jus soli* and that the implementation of law can make either exclusionary (Jayal 2013; Price 2017). Nevertheless, we argue that *jus sanguinis* provides a particular burden made obvious by the newness of African states and made urgent by the use of *jus sanguinis* by half of the countries on the African continent. While focusing on Kenya as a case study of Africa we recognize that the conundrum raised by *jus sanguinis* remains present regardless of geographical location of the state and applies across the postcolonial world. What is particular to Kenya, or to any other location, is the historical circumstances and the political and social use to which the conundrum of citizenship is put. While Aristotle was writing about city states and is often used in discussion about rights accruing from citizenship, we feel that the tensions and inconsistencies highlighted by Aristotle's discussion of acquisition of membership, combined with examples from Africa, allows a reassessment of citizenship.

Methods and Data

This article is based on mixed methods that include historical examination of the different Kenyan constitutions, their amendments and the arising legislation from the constitutions, the Kenyan Parliamentary debates over citizenship and constitutional amendments, and a number of legal cases in Kenya dealing with claims to citizenship, as well as ethnographic interviews with

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individuals who have tried or are in the process of trying to get their Kenyan citizenship affirmed, reinstated, or documented. This material is looked at within a historical context to understand the processes, both domestic and international, that give rise to changes and concerns.

As such, because Kenya was a British colony we look at the constitution of subject-hood under British colonialism, as well as changes in British citizenship law that affected Kenya in various ways. In particular, we look at the British Nationality Act of 1948 to understand the basis of Kenya's citizenship policy. We examine the working of the Kenya citizenship legislation including the Kenya Immigration Bill 1967, the Kenya Trade Licensing Bill of 1967, which became Kenya Trade Licensing Act, No. 33 of 1967 and the Kenya Citizenship and Immigration Act 2011 in the context of the Independence Constitution, the Constitution of Kenya 1963, as well as the Constitution of Kenya Amendment Act No. 16 of 1966, the Constitution of Kenya 1969, the Constitution of Kenya Act No.5 of 1969, the Constitution of Kenya Amendment Act No. 6 of 1985, Constitution of Kenya 1969 as amended 1985, and the new Constitution of Kenya 2010. We also examine a number of cases on citizenship decided by the superior courts in Kenya and reported in both the print and online law reports in Kenya.

In addition, we look at legal changes abroad that affect legal statutes in Kenya, including in India, the Indian Citizenship Act No 57 of 1955; in Britain, the British Commonwealth Immigrants Act of 1968; and in Uganda, the Uganda Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree of 1972. We also make comparisons with legal cases (Sierra Leone, Botswana and Zambia) or constitutional analysis elsewhere in Africa where the issue of nationality and citizenship acquisition and the use of *jus sanguinis* has had political effects, in order to situate the implications of Kenya's changes to *jus sanguinis* understandings of nationality. We look specifically at the Ghana Nationality Act of 1957 and Ghana Nationality Decree of 1967, the Botswana Citizenship Act 1984, the Constitution of Zambia 1991 as amended in 1996, the Constitution of Zambia Act 17, 1996, and the Constitution of the Cote D'Ivoire 2000 to inform our analysis.

The contested issue of nationality acquisition and retention was brought to our attention by one of the individuals, described in the opening paragraph, who was trying to claim citizenship under the new 2010 constitution that allowed for dual citizenship. While we were able to interview a number of people regarding their struggle to regain or retain citizenship, due to ongoing court cases and worry about their current status the individuals preferred to remain anonymous. In most cases, the legal issues as

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stated in the interviews seemed straight forward, but as the claims dragged on for years with no clear decisions, and as more and more people approached us with similar narratives of legal stasis and bewilderment, like them we were forced to ask why? In the process of the research, we realized that the question has been asked continuously since independence and that the new cases appear each day. The ubiquity of the problem also became part of our inquiry.

In the article, we look at the case study of Kenya in light of Aristotle's conundrum on the legal definition of *jus sanguinis*, that is to say origins, revolution, and morality. We situate Kenya's contradictory engagement with Aristotle's conundrum historically, demonstrating an attempt to use the different iterations of a race-neutral language of citizenship in Kenya's Constitutions that was wielded to correct a racist system and to deal with internal and external pressures to include and exclude certain populations of people and to maintain certain actors in power. We also give examples from other parts of Africa where similar attempts had obvious consequences. What interests us in the case of African countries is that they are so young that their shaky foundations, with all the biases and politics, are laid open for all to see by just how uneasily *jus sanguinis* is made to work.

An Accident of Birth: Origins

After the First World War, the British across most of Africa, turned to indirect rule to govern their colonies and protectorates (Berry 1992). But Berry argues that indirect rule set in motion a "series of debates over the meaning and application of tradition, which in turn shaped struggles over authority and access to resources" (Berry 1992: 328). For Mamdani, indirect rule depended on the idea that Africans should have separate institutions appropriate to their "conditions and differing both in spirit and in form from those of Europeans" (1996: 7). Since Kenya was a settler colony, this division was along both racial and ethnic lines, that also distinguished spatially between city and country, and between what was considered civil and what was considered barbaric. Thus, a differential system based fundamentally on race provided different institutions for Africans, Asians, and Europeans, which later had ramifications on who could be considered citizens.

However, indirect rule assumed a stability between ethnicity and place, whereas in reality not only were people mobile prior to colonial rule but colonial economic and labor structures and policies moved people all over. Along with British settlers, many people

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

were pulled into the colonial project from across the world and across Kenya and East Africa. There were people pulled into the colonial administration (Greek, Goan, Portuguese, Somali, Swahili, Seychellois) and the colonial infrastructure such as the railways, the army, and the police (South Asian, Nubian, Somali, and Kenyans from the Coast, Central, Ukambani, Western and Nyanza areas) as well as those who by act of strange fate ended up in Kenya freed from enslavement and settled in places such as Freretown (Makonde and Yao) or as migrant laborers working on plantations (Makonde), and finally those who came to trade or farm aided by the expanding colonial regime (South Asians, Omani, Yemini, Greeks, Portuguese, Africaners). Restricted to urban areas, South Asians came to dominate trade and manufacturing in cities where they made up significant minorities (for instance, 30 percent of Nairobi at Independence) (Aiyar 2015), while the British dominated control over business and commercial farming. Overall, these migrant populations had, by Kenya's independence, lived in new locations in the colony for two or more generations.

Colonial policy struggled to characterize these "out of place" people coherently installing instead multilayered racial and class hierarchies and preferential treatment. Provisions for services, taxation, labor, wages, access to credit, and access to land were defined by hierarchies of race with the most privileges and advantages going to those deemed European (Ghai and McAuslan 2001). Mamdani (1996) argues that British colonial governance in Africa was spilt on two lines: citizens (urban peoples organized in a hierarchy of races, mainly European and Asian governed by statutory law) and subjects (rural people organized in a heterogeneity of ethnicities, all African, governed by customary law). As such, the colony was a society governed through race, which was tied to class, resulting in the marginalization of the majority of the population. What is important here is that indirect rule set up a system of differentiated unequal institutions, which were the basis for later distinguishing citizens from subjects. Also important is that most of these groups of "out of place" people associated with colonial expansion, while predating the polity like others who became Kenyan at Independence, prove difficult to incorporate in post-Independence ideals of citizenship.

Until the British Nationality Act of 1948 "the single status of 'British subject' was applied to all those born in the British crown dominion (including the United Kingdom)" (Manby 2010: 28). British subjecthood "was determined by a jus soli rationale, a practice established by the British Nationality and Status of Aliens Act of 1914 which went into effect in 1915" (Lee 2011: 511). Blake notes that, "For those who did not acquire citizenship of an independent Commonwealth state in 1948 (because some such states

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had not yet enacted citizenship laws of their own) an intended transitional and non-transmissible status of 'British subject without citizenship' was devised (s. 13 of the British Nationality Act 1948)" (1982: 179). Jayal argues that, "the primary differentiators of subject-citizenship in colonial India were race and class" (2013: 14). The status of British subject without citizenship "endured for far longer than was intended because when India and Pakistan enacted citizenship laws in 1950 and 1951 they did not grant citizenship to many people the British had expected to be absorbed in this way" (Blake 1982: 179). As such, after 1948 inhabitants of the British Commonwealth were not citizens but subjects of United Kingdom and its colonies. With reference to India, and also applicable to Kenya, Jayal asks, "Can subject-hood, on the one hand, and unresponsive domination, on the other, offer a plausible preface to a history of citizenship?" (2013: 11). He goes on to argue that indeed looking at the colonial period sheds light on the tensions and contradictions of citizenship finding expression today.

In order to obtain independence, Kenya, like other ex-British colonies in Africa, negotiated a Westminster model constitution (Ghai and McAuslan 2001; Nawabweze 1973; Okoth-Ogendo 1972; Singh 1965). Thus, at independence of Kenya on December 12, 1963, there became four ways by which people acquired Kenyan citizenship: by birth in the colony with at least one parent born in the colony, and by having their father become a citizen by birth, by naturalization, and by registration (Ojwang 1990). This definition of citizenship was generally in line with the British Nationality Act 1948, which stipulated that: citizenship was acquired by both birth and descent, that is, a combination of *jus soli* and *jus sanguinis* as birth qualifies descent and vice versa. In relation to Aristotle's conundrum, the problem of people predating the polity is solved by the use of *jus soli* (born in the colony) to legitimize parents (*jus sanguinis*).

Incorporating the Excluded: Revolution

Before the existence of a country and state called Kenya, the majority of inhabitants of the territories of Kenya were not citizens of the United Kingdom and its colonies but rather subjects. Thus, as Aristotle pointed out, ideas of descent needed to be extended to incorporate the once excluded. The struggle for independence was a struggle both for self-governance and for the undoing of the hierarchies and privileges of race, to enable the inclusion of people not previously included. Race and racial privilege was thus at the center of decolonization. But how is this legacy undone?

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

In adopting the Westminster model, Kenya adopted a racially neutral framing of citizenship, to undo a history of racial segregation, oppression, and inequality governed through race. In addition, because of the revolutionary way in which the state came about and the processes of deracialization, new racial groups (African rather than European) became dominant in the new state. Thus, although a racially neutral constitutional model was adopted and even though the Constitution was worded in racially neutral terms, subsequent history and implementation of citizenship law suggest that there was an assumption of a racially black African subject of citizenship. This is not that different from countries such as the United States that had espoused a racially neutral constitution but have assumed a racially white subject of citizenship made obvious in the Indian Citizenship Act of 1924 which enabled Native Americans born in the United States to finally become American citizens. As the racially black African subject became the taken for granted subject of citizenship, the Westminster model was found to be an insufficient tool to deal with revolutionary changes to racial structures sought by the new governments in postcolonial Kenya.

In many former British colonies in Africa, neutral constitutional language was replaced with overtly racial language after independence. For example, a person would acquire citizenship if they were of "negro descent" in Sierra Leone, "a person of African race" in Malawi and "indigenous origin" in Uganda (Manby 2010: 3) or belonging to "a community indigenous to Nigeria" (Adebanwi 2009: 352). This is illustrated by the case of *Akar vs. Attorney General of Sierra Leone* decided by the English Privy Council in 1969. As someone of Lebanese descent, John Joseph Akar had to appeal to the English Privy council to be included as a citizen following the change in the definition of a citizen in Sierra Leone's constitution, after being unsuccessful before the courts in Sierra Leone (*Akar v Attorney General of Sierra Leone* 1969). This case illustrates the thinking in Sierra Leone at the time that the independence constitution defined a citizen in wider terms than the new rulers of the country later wanted.

The language of the 1963 Constitution in Kenya was racially neutral but its application was not necessarily so. Kenya's independence Constitution did not permit dual nationality. At Independence, arrangements were made to allow those who did not obtain Kenyan citizenship to retain British citizenship. Those who did not automatically qualify as citizens were given two years until December 12, 1965 to register as Kenyans (Constitution of Kenya 1963 Article 1). These arrangements included in the Kenya Independence Order in Council were unique to Kenya and were not extended to other colonies (Hansen 1999; Qureshi 1968).

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Nayak argues that these provisions enabling racial minorities to retain British citizenship, along with discouragement from the Kenya government, resulted in few minorities taking up Kenyan citizenship after independence (1971). In addition, taking up Kenyan citizenship offered little protection from "Kenyanization" of government jobs where "Kenyanization" meant the hiring of black Kenyans at the expense of others (Nayak 1971: 925). As a result, there was increased migration to the United Kingdom (Ashton and Roger Louis 2004; Hansen 1999). Racial minorities who remained in Kenya experienced citizenship insecurity. To ensure the possibility of mobility, some deployed split family citizen dynamics, whereby one member, usually the mother, was a British citizen, which gave the children the right to both citizenships.

Restricting Citizenship on All Sides: Morality

In Kenya, the issue of, and threat to, racial minorities is expressed in the Parliamentary debate in 1964, a few months after independence. A Member of Parliament insinuated that there is no automatic citizenship for Asians, stating, "would the Minister make it quite clear in this House whether or not an Asian is an automatic citizen of this country, he still needs to be registered to become a citizen of this country and there is no such thing as automatic citizenship of an Asian" (Kenya National Assembly 1964: 1384).[3] Asian Kenyans, among other racial minorities were forced to face Aristotle's moral question of whether others felt they *ought* to be citizens or not.

Aiyar argues that "the rhetoric of African majoritarianism that threatened the livelihoods of the Indian petty bourgeoisie, the discourse of indigeneity that conflated national belonging with racial identity, and the skepticism of Indians about the ability of Africans to govern the nation state made Indians uncertain about their future in the country" (2015: 280). As a result, many Asians were hesitant to become citizens after independence in Kenya. This uncertainty was enhanced by Kenyan government attempts to redistribute Indian wealth through the 1967 Immigration Bill, which cancelled permanent residency, and the following Trade Licensing Bill, which required all businesses to apply for new trade licenses and which restricted trade in certain staples only to citizens (Aiyar 2015). In 1968, Asian Kenyans were disproportionally traders. The Ministry of Commerce and Industry represented by Kenneth Matiba warned that, "unless they [Indians] completely ally themselves with the government, then the *citizens of African*

[3] House of Representatives 6th August 1964, Question by Mr. Mahinda.

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

origin are likely to wonder whether those *non-African citizens* are *genuine citizens*" (Aiyar 2015: 28, original emphasis).

By 1968, emigration of East African Asians to the United Kingdom had increased to such an extent that the British Government passed the Commonwealth Immigrants Act of 1968. The statute took away the right of entry into the United Kingdom unless the citizen was born or at least one of his parents or grandparents was born in the United Kingdom (Qureshi 1968). Qureshi argues that the "Act had far reaching repercussions in Britain, in Kenya, in India and Pakistan, and on commonwealth and international law" (Qureshi 1968: 144). In addition, India had initially allowed dual nationality, but in 1955 had a policy change and passed the Citizenship Act No. 57 of 1955. Under that Act, anyone who had acquired the citizenship of another country voluntarily had ceased being a citizen of India. The result of this was that when Britain restricted citizenship in 1968, a number of Asians in East Africa were left stateless (*East African Asians v The United Kingdom* 1973*;* Shankardass 2001). Aiyar argues that, "between July 1967 and March 1968, it appeared that close to a century after dropping anchor across the Indian ocean, Indians were being uprooted from their territorial homeland, Kenya, abandoned by their civilizational homeland, India, and stripped of their citizenship rights in a new national homeland, Britain, that few of them had ever visited" (2015: 291).

Events in Uganda were to further complicate the situation. In 1968, the then President of Uganda, Milton Obote, had asked the British Government for assurance that all British citizens resident in Uganda would be allowed to enter Britain when they wished to or when Uganda chose to require them to leave (Ashton and Roger Louis 2004). Obote was overthrown by Idi Amin in 1972. That same year Idi Amin, through the Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree of 1972, ordered the expulsion of the Asian population from Uganda.[4] He initially made no distinction between citizens and noncitizens before protests led him to change his mind (Mazrui 1979). A number of the Asian Ugandans expelled from Uganda moved to Kenya. In Kenya, there was a hardening of attitudes toward Asian East Africans by some members of Kenya's parliament who supported the action by Idi Amin in distinctly racist language.[5]

[4] The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree 1972 cancelled all entry permits and certificates of residence issued or granted to persons of Asian origin, extraction or descent who were subjects or citizens of the United Kingdom, India, Pakistan, or Bangladesh.

[5] See, for example, Martin Shikuku, Assistant Minister in the Vice President's Office & Ministry of Home Affairs supporting Amin's action in Kenya National Assembly (1972: 1092) and referring to Asians as weeds that should be uprooted Kenya National Assembly (1981: 926).

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We can read subsequent changes in Kenyan citizenship law as a partial consequence of these changes in Britain, India, and Uganda as well as the racial/ethnic dynamics within Kenya. Amendments to the Constitution affecting citizenship were enacted in Kenya in 1966 and 1985, as well as in the 1969 consolidated Constitution.

In 1969, the Kenyan parliament passed the Constitution of Kenya Act No. 5 replacing the 1963 Constitution. The Act brought together all the amendments arising from the Independence Constitution. In consolidating the statutes, by accident or design, in the 1969 Constitution one became a citizen by birth alone (*jus soli*), omitting the restrictions of descent. Until 1985 when it was amended, Section 89 of the 1969 Constitution stated that, "every person born in Kenya after 11th December 1963 shall be a citizen of Kenya at the date of his birth" only qualified by children of diplomats and alien enemies who could not be citizens (Constitution of Kenya revised 1969). These 15 years between 1969 and 1985 was the most inclusive definition of citizenship in Kenya.

In March 1985, Attorney General Mathew G. Muli brought a bill to amend the Constitution to narrow the definition of citizenship, resulting in citizenship requiring both birth and descent similar to the 1963 Constitution. The 1985 amendment repealed section 89. Muli's arguments in parliament highlight efforts to address the issues first articulated by Aristotle's conundrum. He acknowledged that the majority of Kenyans were subjects not citizens prior to Independence. Thus, they could not inherit their citizenship from their parents. He stated "most of the Africans were not Kenya citizens as they did not have the right to call themselves citizens of this country or their country of birth, so they were either British subjects or protected persons" (Kenya National Assembly 1985: 1423). Nevertheless, they must be incorporated in the new country.

In his arguments, Muli emphasized that those to be automatically incorporated were racially African. He opposed *jus soli* citizenship stating, "if citizenship is acquired in the way that the section [89] provides, Kenya will not have a choice of saying who is a citizen of the country, anybody may become a citizen anyhow or just by birth" (Kenya National Assembly 1985: 1428). Finally, he read citizenship in moral terms, insisting that citizenship must be earned by parental allegiance to the state. He argued that it is "inconceivable that the government should allow all children born in this country to become citizens irrespective of their parents' allegiance to the country" (Kenya National Assembly 1985: 1428). Thus, in comparison with birth, he proposed allegiance to the country.

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This 1985 amendment came when anxieties about borders and citizenship was at a peak due to the 1981 changes to British laws on citizenship that further restricted access to Britain, the 1982 attempted coup in Kenya, as well as the 1981–1986 Ugandan civil war and Somalia's greater Somalia policy that claimed parts of Kenya as part of Somalia. The result of the 1985 Amendment was that some former Kenyans were made stateless.

In 2010, like many other African countries, Kenya passed a new constitution. One area of change was in the acquisition of citizenship. Article 14 of the 2010 Constitution states "A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen;" it goes on to add that the "above applies equally to a person born before the effective date whether or not the person was born in Kenya if either the mother or father of the person is or was a citizen" (Constitution of Kenya 2010).

In contrast to the prior constitutions, the 2010 Constitution adopted a rule of citizenship by descent alone (*jus sanguinis*) from either parent with no qualifications as to the individual's or parents' birth place. This article of the Constitution thus does not address how the parents acquired their citizenship. Fifty years after independence, the assumption is that in 2010 you are either a citizen or not. And if you are being born you are being born to a citizen. The definition of citizens in Article 14 of the 2010 Constitution would bring back Aristotle's problem of how the original citizens acquired citizenship. This is attempted to be addressed in the Transitional Provisions of the Constitution, Clause 30 of 6th Schedule, which defines a Kenyan citizen by reference to the old 1963 Constitution. Hence, the 2010 *jus sanguinis* provision contains the dilemma that you are now a citizen by descent but only because someone in your ancestry became a citizen by virtue of where they were born.

It bears noting that the 1963 and 1969 Constitutions were discriminatory on gender basis for persons born outside Kenya. They state that "A person born outside Kenya after 11th December 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya." For persons born in Kenya, there was no discrimination based on the gender of their parents. Unlike the racial, ethnic, border, religion biases used to question citizenship in Kenya, the gender bias is stated in these Constitutions and is transparent. It is something that can be challenged and was challenged in the 1980s and 90s. Many of those calling for reform pointed to the decision by the courts in Botswana in the case of *Attorney General (Botswana) v Unity Dow (*1992*)* that declared similar provisions of the Botswana Citizenship Act 1984 were unconstitutional (Mucai-Kattambo et al. 1995).

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There are a number of African countries with similar gender discrimination in how citizenship is acquired (Manby 2010, 2015a, 2015b). The 2010 Kenyan Constitution eliminated this discrimination of gender basis. Since the gender bias is formally stated and transparent, it has not been the focus of this article. Rather we are interested in the spaces where the bias is couched in neural language making it much harder to challenge in a court of law.

The Conundrum in Other Parts of Africa

Aristotle's question about the morality of membership can be seen in other parts of Africa as well. In the Cote d'Ivoire and in Zambia, the tensions that arise from amending independence era laws regarding the acquisition of citizenship to ones that emphasize *jus sanguinis* are most striking because they have affected presidential elections. In addition, in Cote d'Ivoire, the tensions around the change and the presidential elections descended into war (Babo 2017). But, Sierra Leone and Ghana also provide examples (as Uganda did earlier in this article) where countries have turned to use of *jus sanguinis* as the scaffolding onto which arguments about autochthony and exclusion are built. Initially framed in racial terms, soon the tool of *jus sanguinis* was used against minorities or unwanted populations of other sorts, enabling denial of citizenship as well as the deportation of large number of people, through legislation regarding who ought to be a citizen.

Today large proportions of Ivory Coast's population are migrants living in the north of the country. Following independence, coffee and cocoa became the foundation of the wealth and economy of Ivory Coast. Law 61–415 of December 14, 1961 opened citizenship to the children of foreigners unless both of their parents were foreigners (Babo 2017). Nevertheless, to support the growing economy and need for labor during boom years under founding president Felix Houphouët-Boigny, Cote d'Ivoire encouraged immigration, allowing nationals from the Economic Community of West African States (ECOWAS) living in Cote d'Ivoire to vote in Ivorian elections.

However, in the late 1980s, the price of coffee and cocoa plummeted, causing civil unrest and forcing the end of single party government. In the midst of economic crisis, the open immigration policy changed in the early 1990s with the new president, Henri Bédié. The declining economy made Bédié antagonistic to migration and he became a promoter of the xenophobic idea of "Ivoirité" or Ivorianness that made Ivoirians from the north of the country "suspected of not being authentic Ivoirians"

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

(Babo 2017: 209). "From 1960 to 1990, there was an ambiguous public policy toward foreigners that moved from *jus soli* to a sort of mix with *jus sanguinis*" (Babo 2017: 207).

Under General Guéï who took power in the 1999 coup that overthrew Bédié, a new Ivorian constitution was drafted in 2000 restricting presidential candidates to those whose both parents were born in Cote d'Ivoire to prevent the popular northerner, Alassane Ouattara, from running for president based on citizenship (Constitution of Cote D'Ivoire 2000). The investigation of Ouattara was generalized to the population at large to confirm citizenship status (Babo 2017). Bah argues that, "by the end of 2002, Cote d'Ivoire's political crisis had degenerated into civil war" displacing over 700,000 people by end in 2003 (2010: 604). Alassane Ouattara was eventually allowed to run for elections, won them, and has begun the process of reviewing the Constitution partly to remove the contentious citizenship provisions (Bassey 2014; Whitaker 2005). The Ivorian example demonstrates how different presidents used the category of citizenship to permit or restrict people who might vote for, or against them, depending on the economic and political situation. Similar to the exclusionary policies in Kenya, Babo argues that the "authenticity policy meant that citizenship was self-evident for a part of the population but in question for others" (2017: 215).

The notion of citizenship has been a constant fight at the presidential level in Zambia. A 1996 amendment to the Constitution of Zambia made it a requirement that the birth parents of a presidential candidate must be "Zambian by birth or descent."[6] The amendment was aimed at preventing Kenneth Kaunda, Zambia's founding president and leader for 27 years, from running for office again (Manby 2010). Kaunda could not run for president under the Constitution because his parents were from the former British colony of Nyasaland now called Malawi. He was effectively made stateless until 2000 when, following a withdrawal of the initial petition, the Zambian Supreme Court reversed the High Court decision.

In an ironic twist of fate, there was also a petition filed against the election of Frederick Chiluba as Zambia's president following the 1996 general election on the grounds that Chiluba's father was not Zambian. The Supreme Court of Zambia in the case of *Lewanika and others v Fredrick Jacob Chiluba* (1998) dismissed the petition. The arguments against Chiluba centered on his place of birth and that of his father. The court held that Chiluba was clearly a Zambian citizen having been born in Zambia and being a

[6] Constitution of Zambia 1991 as amended 1996.

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

British protected person at the time of independence. The petitioners also failed to show that Chiluba's father was not a citizen. In making the decision, the Supreme Court of Zambia was persuaded by the English House of Lords decision on *Motala and others v A-G* (1991: 682).

The Motala case concerns the automatic acquisition of citizenship of Zambia by children whose parents had prior to independence migrated to Zambia, then known as Northern Rhodesia, from India. The claimants were both born in Northern Rhodesia, and their parents were Indian citizens. In 1953, their father became a citizen of the United Kingdom and the colonies. Their mother also registered as a citizen of the United Kingdom. In 1979, the claimants were refused UK passports on grounds that they were not citizens of the UK and in addition that they were illegitimate as their parents' marriage was not valid. In 1983, the claimants sought and obtained a declaration that they were indeed legitimate and were citizens of the U.K. The Attorney General appealed, contending that the claimants although entitled to citizenship of the UK and colonies by descent, were also British protected persons in 1964 and therefore automatically acquired Zambian citizenship at Zambia's independence. The Court of Appeal in the UK rejected the Attorney General's contention. The Attorney General appealed further to the House of Lords, which agreed with the Attorney General, holding that the claimants automatically acquired Zambian citizenship at independence and lost the right to UK citizenship.

The decision in the Motala case seems to directly contradict the 1996 amendment to the Constitution. Nevertheless, the issue of citizenship of the President of Zambia was raised again in 2014. When Michael Sata, Zambia's fifth president, passed away in October 2014, Guy Scott, who was Zambia's Vice President, succeeded him as acting president for 90 days (Karimi 2014). Scott was however unable to contest the presidency due to the provisions of the Zambian Constitution that required both parents of a presidential candidate to be born in Zambia. Scott, who was born in Zambia before Independence and whose father had emigrated from Scotland and mother emigrated from England, could be acting president but could not be the substantive presidential candidate due to the constitutional requirement.

The 1996 amendments to the Zambian Constitution were considered by the African Commission on Human and Peoples Rights in the case of *Legal Resources Foundation v Zambia Communication* (1998). The Commission found that the amendment was vexing given that freedom of movement was an integral part of the Central African Federation (now Malawi, Zambia, and Zimbabwe) and at independence all residents were granted citizenship of Zambia. They ruled that retroactive changes would be unjust (African Union 2014).

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While the examples of presidential candidates facing citizenship issues are graphic, the restrictive interpretation of citizenship by birth is not limited to high political office aspirants nor is it isolated. Examples elsewhere in Africa illustrate the problem. The case of the Lebanese descendants in West Africa countries such as Sierra Leone and Ghana is also illustrative about the use of *jus sanguinis* as the scaffolding onto which arguments about autochthony are built. Akyeampong, for example, noted that in Sierra Leone, prior to independence, colonial reports had provided that "no provision exists for the permanent settlement of non-natives in the protectorate" (2006: 312). Despite this, when Sierra Leone attained independence in 1961, the citizenship provisions of the independence constitution were initially framed in race neutral terms. A person would become a citizen if he was born in Sierra Leone and either his parents or grandparents were born in the former Colony or Protectorate of Sierra Leone. In 1962, a year after independence, Sierra Leone sought to amend the constitution to restrict acquisition of citizenship in various ways including limiting it to persons of "negro African decent". The amendment was challenged in English Privy Council in the previously mentioned case of *Akar vs. Attorney General of Sierra Leone* decided in 1969. As someone of Lebanese descent, John Joseph Akar had to appeal to the English Privy council to be included as a citizen following the change in the definition of a citizen in Sierra Leone's Constitution, after being unsuccessful before the courts in Sierra Leone (*Akar v Attorney General of Sierra Leone* 1969).

Ghana is not that dissimilar from Sierra Leone. Unlike other British colonies, which gained independence later, citizenship provisions were not included in the Ghanaian Constitution but were to be found in the 1957 Nationality Act (Manby 2015a: 9). The Ghana Nationality Act of 1957 did not give automatic citizenship by birth but required one to be born of "Ghanaian" parents. Under this Act, those born in Ghana at the date of independence became citizens automatically if one of their parents was born in Ghana. Those without parents also born in Ghana had to naturalize as citizens. Akyeampong argues that for the Lebanese in Ghana it was "conceptually difficult to envision a non-black citizen in Ghana- and west Africa- during the period of decolonization" (2006: 299). He notes that although the Lebanese came to West Africa in search of a home and nationality "decolonization involved privileging the African political and economic agenda" that ended up distancing the Lebanese from Ghanaian citizenship (Akyeampong 2006: 312). The Ghana Nationality law was also mobilized to restrict participation in certain types of businesses by this segment of the population.

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The relationship between *jus sanguinis* and autochthony was to affect not only racial minorities, such as the Lebanese, but also other West Africans in Ghana. In the early year of Ghana's Independence, President Kwame Nkurumah's government used this legislation to deport a number of prominent political opponents to Nigeria (Kobo 2010: 75). The Act was even amended to include the need to have grandparents born in Ghana when a loophole was exposed (Kobo 2010). When Kwame Nkurumah's government was overthrown, the new government passed the Nationality Decree of 1967 granting citizenship to all persons born in Ghana. The decree was however repealed within a year (Kobo 2010). In 1969, the Nationality Act was used to deport a large number people whose provenance could be traced to elsewhere in West Africa even though they had been born in Ghana and families that had been in Ghana for generations (Kobo 2010; Sudarakasa 1979).

What happened in Kenya and other postcolonial African countries was also reflected in citizenship definition changes in India. Jayal argues that India's choice of *jus soli* at independence was partly legal inheritance but also a recognition that, "*jus sanguinis* would clearly have been an implausible basis for citizenship in a vastly plural society" (2013: 14). At independence India's Constitution adopted a secular *jus soli* conception of citizenship although the idea of "the 'natural' citizen, usually Hindu and male, strongly inflected the debate on it" (Jayal 2013: 53). Jamal argues that people fleeing across the border with Pakistan in both directions, and later the in-migration from Bangladesh in 1985, and thus becoming "out of place" complicated Indian citizenship. With time, India gradually moved towards *jus sanguinis* reflecting the continued presence of Partition in Indian politics and defining Indian citizenship in increasingly detailed and refined manner reflecting religious divisions. Jayal concludes that the "move from *jus soli* to *jus sanguinis* renders legally plausible that which is socially implausible and civically repugnant, eroding India's foundational commitment to pluralism" (2013: 14).

Unintended Consequences: Suspect Citizens

Aristotle makes the argument that the problem of citizenship after a revolution is not one of whether someone is a citizen but whether they ought to be, whether they are legitimately citizens. The issue of citizen legitimacy puts the burden on the citizen to prove worthiness and the structure of the doubt means the question is never settled once and for all but must be continuously claimed, legitimated, and reinforced.

https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press

Even after the enactment of the new Constitution of Kenya in 2010, the attitude of the executive to the issue of citizenship does not appear to have changed and it has required the intervention of the courts to assist persons pursuing citizenship rights. Where the courts have determined the question of citizenship, Aristotle's conundrum is brought up again and again. In the case of *Hashumukh Devani v Cabinet Secretary Ministry of the Interior and Co-ordination of National Government and 3 others* (2016) the court considered the question of entitlement to citizenship. Devani was born in Nairobi in 1949. His parents were citizens of India. Devani's father died in 1959 while still an Indian citizen while his mother died in 2005 as a Kenyan citizen. She was registered as a Kenyan citizen in 1969. Devani moved to the United Kingdom in 1963 and returned to Kenya in 1973. He took up residence by obtaining permits. When the Constitution of Kenya 2010 was promulgated he applied for a national identification card and passport arguing that he was a citizen by birth. He was denied the documents on grounds that neither of his parents was born in Kenya. The government contended that Davani should apply to become a citizen by registration.

The High Court agreed with the Government that Devani was not a Kenyan citizen by birth. He could, in the Court's view, also not benefit from the provision of the Constitution that allowed a person to become a citizen if he was a citizen of the United Kingdom or the Colonies or a British protected person as he was born after India's independence and acquired Indian citizenship on account of his parents. The Court explained that this provision was to ensure that "all locals or natives or residents who then held United Kingdom citizenship with a parent born in Kenya, did not continue with foreign citizenship as Kenya attained independence" (*Hashumukh Devani v Cabinet Secretary Ministry of Interior and Co-ordination of National Government and 3 others* 2016: 13). In this statement, the judge is reading into the Constitution the racial connotations of "native" or "local" showing that despite the neutral constitutional language the ideal black African, overtly stated in other African constitutions, had become an unwritten quality of Kenyan citizenship.

It is striking that many citizenship cases in Kenya and other parts of Africa (such as the examples here from Uganda, Cote D'Ivoire, Zambia, Sierra Leone, and Ghana) are cases dealing with groups of people who are associated with colonialism, be it the Lebanese in West Africa, South Asians in East Africa, or the multiple Africans not in their "countries of origin." Notwithstanding the racially neutral language of the constitutions, some groups of people still find their citizenship status uncertain. This affects the former colonizers and those who came with them. With time

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each of these groups of people, along with those residing in what became referred to as "border regions," would have their citizenship legitimacy questioned in one form or another. While this questioning was first articulated through race, for after all the system of colonial privilege was based on race, the same processes to delegitimize became used against those who racially might be seen as the same (Swahili, Somali, Nubian, Makonde, Yao) but were associated with a colonial history or other parts of Africa. Finally, in a short time, those living along the borders of Kenya (Luhya, Luo, Maasai, Somali, Turkana) were also considered suspect and had to legitimize their claims to citizenship in ways no one at the center was ever asked to do.

In October 2016, a group of 600 Makonde protesters wearing T-shirts stating "End Statelessness Now," sought an audience with Kenyan president Uhuru Kenyatta at State House, Nairobi, to press for their recognition as citizens of Kenya and requesting identity documents. The 40,000 Makonde, descendants of migrant farm laborers who were brought to Kenyan from Mozambique by the British in 1947, had unsuccessfully struggled to gain citizenship in Kenya (Wasike 2016). However, the 2010 Kenyan Constitution and the Citizenship and Immigration Act no 12 of 2011 allowed Parliament to consider the Makonde plea for citizenship under the rubric of statelessness. The status of the citizenship rights of the Makonde that had rendered them stateless for over 50 years was challenged at a politically sensitive moment.

The year 2017 being an election year, the President of Kenya quickly declared that they should get their identity cards by December 2016. The Makonde make up a sizeable population in a region of the country where the president is particularly unpopular. Much like in other parts of Africa, for instance, Cote d'Ivoire or Zambia, elections are moments where citizenship is enforced and challenged. Although the new Kenyan Citizenship and Immigration Act no 12 of 2011 has a provision for issuance of citizenship to stateless persons the Makonde had not until now been able to accurately document their status (Vidija and Wekesa 2016). Elections provided them with a point of pressure on the government that had not been responding for over 50 years.

Conclusions

Aristotle seems to pose an insurmountable conundrum—the questions of origin, revolution, and morality continue to vex those who use *jus sanguinis* as a definition of citizenship. The case of Kenya, and wider African examples as well as India, has addressed the conundrum with varying degrees of lack of success,

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showing the complications that arise. Aristotle was concerned with how to limit ancestry that could confer citizenship. In addition, he was concerned with the question of conceptualizing the original citizen for a new state where people predate the polity. He acknowledges that in the case of revolution, those who were not previously citizens must be incorporated. And finally, he highlights the related moral question of legitimacy.

As Kenya became independent, it had to absorb into citizenship those that had not been incorporated before, those who were not citizens but subjects of Great Britain or British protected persons. Postcolonial states such as Kenya sought to get around Aristotle's conundrum by qualifying *jus sanguinis* laws using *jus soli*. They did so by defining the legitimacy of the parents through their birth in the territory that then became Kenya. Through this move, they limited the depth of ancestry necessary to confer citizenship. At the same time, in not adopting *jus soli* alone or either *jus soli* or *jus sanguinis* (as in the United States), they started a conversation about the legitimacy of who ought to be Kenyans and who ought not to be. This was expressed in practices of governance and subtexts as well as in direct rhetoric of autochthony. This determination was predicated both on the movement of people during colonialism and the racialization of citizenship and privilege under a colonial system. In an effort to deal with this legacy, a race neutral constitution, which failed to equalize society, was retooled to contest a racially structured economy and institutions. As such, Kenya's constitutions and laws mobilized ideologies of belonging that are a complex combination of governance, postcoloniality and autochthony.

And this was to have consequences far beyond race. It came to serve the purpose of those in power, continuously narrowing the concept of citizenship, often for political expediency. The consequences included racial and ethnic profiling, statelessness, the use of citizenship for political ends, and the creation of suspect citizens. In addition, it was not able to address the contradiction that your parent's place of birth can secure your citizenship but not your own place of birth.

Postcolonial citizenship shows that under a *jus sanguinis* system the moral problem of belonging must only be addressed by some, but never by all. Those who must answer for their citizenship are marginal for historical, social, or political reasons. At one time aimed at Asians in East Africa, soon to be included were "out of place Africans," then "border people" and now "terrorists." The category against whom the tool of *jus sanguinis* is wielded is arbitrary, random, and capricious. It is also perpetual, a system where one can never satisfy the request for legitimacy as it is part and parcel of the *jus sanguinis* order. As so many new constitutions in

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Africa turn to *jus sanguinis* as a definition for citizenship we must remember that the moral problem of *jus sanguinis* is dangerous as it makes groups of people "other to the national," giving them an unprovable burden (as a group) of proving citizenship, thus enabling prejudice, discrimination, exile, statelessness, and the possibility of genocide.

What then does it mean to be a Kenyan? For two people born on the same day, in the same hospital in 1961, whose fathers were detained in the wars of independence, it means a very different future—for one, it means a taken for granted security of citizenship and belonging, never being questioned when applying for an identity document or for jobs or buying land, the ability to run for and gain the presidency. For the other, it means a citizenship battle that has lasted for 50 years, a fortune spent in work permits, an inability to buy and keep rural property before 2010, an insecurity of belonging, the possibility of expulsion and an inability to vote. One can affect the other's life but not vice versa. The new 2010 constitution does not ameliorate these positions but rather increases their disparity. Not just for these two individuals, but rather, for many more citizens who will 1day be called upon to legitimize their belonging.

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https://doi.org/10.1111/lasr.12395 Published online by Cambridge University Press