

POLICY PAPER

Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya



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Cover photo: A member of the Nubian community in Nairobi, Kenya, holds her national identity card at a polling booth in the Kibera neighborhood in October 2013. ©Georgina Goodwin/AFP/Getty Images

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Introduction

Universal legal identity is an important cross-cutting goal in the UN's 2030 Agenda for Sustainable Development, and is a key component of Sustainable Development Goal (SDG) 16.9.¹ Legal identity is often described as a right, yet in practice claiming the benefits associated with this right generally requires documentation that demonstrates or provides proof of one's identity. In many contexts such documentary proof is necessary to access basic social services such as education, health care and social welfare benefits.² In such cases, access to documentation is likely to be associated with improved development outcomes.³ As a result, documentation of legal identity will have important implications for the achievement of many of the other SDGs.

An important question for national and international actors working to design, implement, and monitor goal 16.9 is how to most accurately and effectively measure legal identity, and therefore track progress on the implementation of the goal. This report is a practical effort to address this question for a global audience. We draw on recent research conducted in one national context, Kenya. Our analysis suggests that in order to fully monitor progress in providing universal legal identity, supplementary and regionally or country-specific indicators are necessary in addition to a global birth registration indicator. Our goal in this analysis is to contribute to the global conversation around goal 16.9, rather than speak to specific debates surrounding policies, initiatives or legislation in Kenya.

It is important to recognize that the push for a global goal on legal identity carries potential risks as well as benefits. One potential risk is that national governments, in an effort to demonstrate compliance with goal 16.9, may implement more formalized and thus potentially restrictive systems with respect to legal identity. This could, for example, make it more difficult for some individuals or groups to gain access to legal documentation. Or worse, it could provide the opportunity for some states to limit or restrict the status of certain groups or individuals. Another potential concern is that more formalized registration systems could increase the extent to which states make access to basic services conditional on citizenship or possession of particular forms of documentation. This could lead to worse development outcomes, especially among vulnerable populations.

Similarly, the effort to construct and implement specific measures tracking legal identity also carries potential risks as well as benefits. It is extremely difficult to construct a measure of legal identity that represents the different legal, political and social realities of over 200 countries in the international system. Thus any single measure to track the implementation of goal 16.9 will inevitably shed light on some challenges and obscure others. As we show in this paper, a measure of birth registration, on its own, would provide a limited and inaccurate picture of who in Kenya has documentary proof of legal identity and who does not. Creating an additional global indicator is not the solution because an appropriate measure for Kenya

would not necessarily be appropriate for many other national contexts. Rather, supplementary country-specific indicators are necessary to provide a complete picture.

Definitions of key terms

In this report, we use the following definitions:

Legal identity: “the recognition of a person’s existence before the law, facilitating the realization of specific rights and corresponding duties.”⁴

Legal documentation: documents that are necessary for the enjoyment and exercise of one’s rights. This includes, but is not limited to, passports, personal identification documents, birth certificates and marriage certificates.⁵

Birth registration: “the continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements.”⁶

Statelessness: the status of stateless persons. The international legal definition of a “stateless person” is someone “who is not considered as a national by any State under the operation of its law.”⁷

Systematic research that explores the multifaceted process of acquiring legal documentation remains limited. There is a small but growing body of research that tests the relationship between access to documentation, and the many socio-economic outcomes with which it is often linked.⁸ This report discusses new research conducted in Kenya by the authors, which aimed to contribute to these two bodies of literature. Our research focused on the Nubian community in Nairobi. Nubians in Kenya are a key community of interest for discussions of equitable access to legal documentation because they have historically been subjected to discriminatory practices during the application processes for national ID cards as well as passports.⁹ The Kenyan case affirms the central importance of universal access to legal documentation for development. It also suggests that measuring birth registration alone will be insufficient for monitoring progress on goal 16.9. We provide evidence from Kenya to make four core arguments:

- For people whose legal status lawfully entitles them to social services and political rights, documentation of that legal status matters for development. Evidence from Kenya strongly indicates that holding particular forms of legal documentation (in this case, birth certificates and national identity cards) is associated with better outcomes across a range of development goals. These include access to employment and

economic wellbeing, access to justice, political engagement, and access to services such as health care and education.

- There may be no reason to assume a link between birth registration or birth certification *on their own*, and core development outcomes. A birth certificate is not always the core document necessary to establish citizenship, claim rights, and access various services. In Kenya a national identity card issued at age 18, rather than a birth certificate, is the necessary document to access many services and exercise rights.¹⁰ In addition, a birth registration measure will exclude children and adults who are past the point for birth registration but may still lack legal identity and/or legal documentation.
- Even when groups hold legal documentation at relatively equal rates, this can still mask serious inequities in *gaining access* to that documentation. Our research demonstrates that some groups face discriminatory treatment in the documentation process. Such patterns of discrimination may have real impacts on individuals' lives and aspirations, even if they do not result in differential rates of documentation across identity groups.¹¹ A single indicator such as rates of birth registration may not capture important forms of discriminatory treatment, particularly those that emerge in the process of attaining documentation.
- Taken together, our findings indicate that supplementary and regionally or country-specific measures of access to documentation will be necessary to accurately monitor whether legal identity is truly universal.

The report proceeds in five sections. Section 1 outlines the rationale for legal identity's inclusion in the 2030 Agenda, and situates Kenya's legal identity system. Section 2 maps the connections between legal identity and core development outcomes, and draws on new survey data to test these associations in the Kenyan context. Section 3 analyzes the barriers to acquiring legal documentation, and presents evidence on the sometimes-subtle effects of discriminatory policies. Section 4 returns to the SDG legal identity target, assesses potential challenges for its implementation, and looks at the implications of the Nubian study for monitoring goal 16.9. Section 5 concludes.

1. Legal identity in the 2030 development agenda: situating the Kenyan case

The Millennium Declaration framed international development efforts from 2000-2015 around a set of core ethical principles. Among these was equality: “no individual and no nation must be denied the opportunity to benefit from development.”¹² While the Declaration acknowledged the challenges faced by vulnerable groups, the Millennium Development Goals (MDGs) did not attempt to address discrimination or deprivation that could impede equal access to development (with the important exception of gender-based discrimination). In contrast, a primary goal of the new 2030 Agenda for Sustainable Development is to “leave no-one behind,” and the target for the universal access to legal

identity is important to this overall objective. Attention has focused on birth registration as a quantifiable, globally comparable measure of progress towards the provision of legal identity. However, policy analysts have pointed out inequities in historically marginalized groups' access to legal identity and documentation. In these cases, effective measures must go beyond birth registration, in order to track whether individuals and groups have access to the range of documentation that enables them to fully and equally participate in society.¹³

The case of Kenya illustrates the challenges that arise from legacies of discrimination, in combination with the complex national systems that govern the provision of legal documentation. The Kenyan context highlights the potential barriers to achieving universal legal identity that will go undetected if the monitoring of SDG 16.9 is undertaken using a single measure like birth registration. In Kenya, as in many other countries, a national identity card (ID card) is most often the necessary piece of documentation that is required to demonstrate citizenship and access goods and services. A national ID card is necessary to be admitted to the hospital, to enroll in university, to vote, to open a bank or mobile money account, to get married, get a passport, and attain many other basic services. Kenyan law grants citizenship to anyone who has at least one parent (mother or father) who is a Kenyan citizen. The constitution and the relevant legislation do not require birth registration for citizenship to be transmitted, though in practice birth registration may be critical to prove the facts on which the right to citizenship is based – that is, in the Kenyan case, the identity of the parents. However, a birth certificate showing that a child was registered at birth is *necessary but not sufficient* to acquire an ID card at a later date. Kenyan law also provides the officials responsible for processing ID applications with significant discretion to defer or deny applications, or to burden applicants with additional requirements for documentation, such as parents' or grandparents' birth or death certificates, signed affidavits from local chiefs or tribal elders, school leaving certificates, and baptismal or madrassa certificates.¹⁴ This discretion has enabled pervasive discrimination to be practiced against certain ethnic groups, such as Nubians, Somalis, and other groups.

As we will show, the case of Kenya provides evidence of the link between access to legal documentation and core development and governance outcomes. It also provides a cautionary note regarding the limits of formalizing registration systems to resolve inequity. Doing so may provide the opportunity for states to formally restrict some individuals' access to documentation and proof of citizenship, thereby limiting access to their rights. When Kenya adopted advanced new “second generation” national ID cards in 1995, the government required all “first generation” ID card holders to reapply for new ID cards. This reapplication process provided an opportunity for the government to apply a discriminatory practice known as vetting (described in greater detail in section 3 below) to members of the Nubian, Somali and other marginalized communities in order to attain second generation ID cards.¹⁵ The transition to second generation ID cards allowed the government in many cases to confiscate first generation ID cards and deny access to second generation ID cards.¹⁶

The findings that we present in this report draws on qualitative and quantitative research conducted in Kibera, Kenya in February, April and May 2015.¹⁷ Kibera is a large and densely populated urban informal settlement of approximately 250,000 people in central Nairobi. It is also the historical home of the Nubian community in Kenya.¹⁸ There are no official statistics on the size of the Nubian population in Kenya. Estimates place the total population at 20,000-30,000 people, approximately half of whom are in Nairobi (and further, the majority of those in Nairobi reside in Kibera).¹⁹ The research included an original population survey, designed to compare access to legal documentation across similarly situated households, and to explore the link between access to documentation and core development and governance outcomes. The survey interviewed 1,179 adult respondents (aged 18 or older) in Kibera, of which 624 were Nubian and 555 were non-Nubian.²⁰ A discussion of the survey methodology, including sampling, field implementation, and human subjects protections, is described in an annex to this document. The questionnaire included a range of indicators designed to measure many aspects of the application process for various forms of legal documentation, as well as measures designed to track development outcomes and political participation. The analysis below presents comparisons between people with varying degrees of documentation: those without birth certificates or national ID cards; those with only birth certificates, those with only ID cards, and those with both documents. It also disaggregates by ethnic identity, in order to illustrate the scale and impact of discriminatory policies in the application process for legal documentation.

2. Legal identity matters for development outcomes

Our survey results suggest that holding documentation that demonstrates legal identity is linked to access to basic services like education. In Kibera, we find that lifetime educational attainment varies by documentation. Table 1 presents the highest level of education attained by survey respondents, cross-tabulated with respondents' access to birth certificates and national ID cards. As Table 1 shows, individuals with both birth certificates and ID cards have higher secondary and post-secondary completion rates, while those who lack documentation altogether have lower levels of attainment. In short, being “fully documented” is associated with attaining more years of education. Although the nature of our survey prevents us from making causal claims, our interview data indicates current practice in schools comports with government policy: a birth certificate is necessary to attend primary school and sit a school-leaving exam in order to graduate, and a national ID card is necessary to enroll in university.

Table 1: Access to documentation and educational attainment
(frequency, row percentage, column percentage)

| Education level | No birth certificate or ID | Only birth certificate, no ID | Only ID, no birth certificate | Both birth certificate and ID | Total |
|----------------------|----------------------------|-------------------------------|-------------------------------|-------------------------------|--------|
| Some primary or less | 21 | 5 | 83 | 38 | 147 |
| | 14.29% | 3.4% | 56.46% | 25.85% | 100% |
| | 28.38% | 6.1% | 21.23% | 6.03% | 12.49% |
| Completed primary | 22 | 20 | 96 | 79 | 217 |
| | 10.14% | 9.22% | 44.24% | 36.41% | 100% |
| | 29.73% | 24.39% | 24.55% | 12.54% | 18.44% |
| Some secondary | 13 | 27 | 69 | 82 | 191 |
| | 6.81% | 14.14% | 36.13% | 42.93% | 100% |
| | 17.57% | 32.93% | 17.65% | 13.02% | 16.23% |
| Completed secondary | 15 | 24 | 112 | 242 | 393 |
| | 3.82% | 6.11% | 28.5% | 61.58% | 100% |
| | 20.27% | 29.27% | 28.64% | 38.41% | 33.39% |
| Some post-secondary | 3 | 6 | 31 | 189 | 229 |
| | 1.31% | 2.62% | 13.54% | 82.53% | 1.31% |
| | 4.05% | 7.32% | 7.93% | 30% | 19.46% |
| Total | 74 | 82 | 391 | 630 | 1,177 |
| | 6.29% | 6.97% | 33.22% | 53.53% | 100% |
| | 100% | 100% | 100% | 100% | 100% |

Documentation that demonstrates legal identity can also be necessary for full and equal participation in economic life. In many countries, people without legal documentation are unable to work in the formal economy, and are more likely instead to earn livelihoods informally, without legal protections and often at a lower wage.²¹ In the case of Kenya, a national ID card is required to lawfully work in the formal labor market, and our survey results demonstrate that labor market participation is clearly linked to legal documentation. Table 2 presents data demonstrating that respondents with ID cards are more likely to be engaged in work for pay. Again, it is important to note that we do not make causal claims here, and the relationship between accessing national ID cards and work for pay may be

endogenous.²² At the time of the survey, over half of those who currently have an ID card report working for pay, while under one-third of people who do not hold a national ID card report working for pay.

In many national contexts, access to legal documentation also has a clear and direct link to political participation. Different forms of legal documentation are often required in order to vote in elections, and to claim legal and political rights.²³ In Kenya, many forms of political participation are contingent on possession of a national ID card. An ID card or passport are required to lawfully vote, and in many cases an ID card is necessary to enter a government building or meet with government officials. Our survey results (Table 3) demonstrate that reported voting rates among people in Kibera who hold an ID card greatly exceed rates among the undocumented.²⁴ This association may again be endogenous: politically active individuals may also be more likely to apply for a national ID card.

The survey data also show that forms of political engagement beyond voting are also linked to documentation. In Kenya, constituents sometimes contact their Members of Parliament (MPs) to seek assistance with problems, ranging from seeking employment, to assistance enrolling a relative in school, to addressing government fees or fines.

Table 2: Employment levels and access to documentation
(frequency, row percentage, column percentage)

| Currently working for pay | No birth certificate or ID | Only birth certificate, no ID | Only ID, no birth certificate | Both birth certificate and ID | Total ²⁵ |
|---------------------------|----------------------------|-------------------------------|-------------------------------|-------------------------------|---------------------|
| No | 52 | 57 | 187 | 307 | 603 |
| | 8.62% | 9.45% | 31.01% | 50.91% | 100% |
| | 70.27% | 69.51% | 47.58% | 48.73% | 51.15% |
| Yes | 22 | 25 | 206 | 323 | 576 |
| | 3.82% | 4.34% | 35.76% | 56.08% | 100% |
| | 29.73% | 30.49% | 52.42% | 51.27% | 48.85% |
| Total | 74 | 82 | 393 | 630 | 1,179 |
| | 6.28% | 6.96% | 33.33% | 53.44% | 100% |
| | 100% | 100% | 100% | 100% | 100% |

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Table 3: Electoral participation rates by access to documentation (frequency, row percentage, column percentage)

| Voted in last general election | No birth certificate or ID | Only birth certificate, no ID | Only ID, no birth certificate | Both birth certificate and ID | Total |
|--------------------------------|----------------------------|-------------------------------|-------------------------------|-------------------------------|--------|
| No | 56 | 74 | 67 | 210 | 407 |
| | 13.76% | 18.18% | 16.46% | 51.6% | 100% |
| | 75.68% | 90.24% | 17.05% | 33.33% | 34.52% |
| Yes | 18 | 8 | 326 | 420 | 772 |
| | 2.33% | 1.04% | 42.23% | 54.4% | 100% |
| | 24.32% | 9.76% | 82.95% | 66.67% | 65.48% |
| Total | 74 | 82 | 393 | 630 | 1,179 |
| | 6.28% | 6.96% | 33.33% | 53.44% | 100% |
| | 100% | 100% | 100% | 100% | 100% |

Survey results (Table 4) indicate that while only a minority of respondents report having contacted their MP in the previous 12 months for help in resolving a problem, contact rates rise with levels of documentation, and are highest—approximately 15 percent—among the fully documented. Having a national ID card may facilitate access, or give people confidence to seek meetings with officials.

Table 4: Rates of Contact in previous 12 months with Members of Parliament
(frequency, row percentage, column percentage)

| | No birth certificate or ID | Only birth certificate, no ID | Only ID, no birth certificate | Both birth certificate and ID | Total |
|-------|----------------------------|-------------------------------|-------------------------------|-------------------------------|--------|
| No | 69 | 76 | 348 | 536 | 1,029 |
| | 6.71% | 7.39% | 33.82% | 52.09% | 100% |
| | 93.24% | 93.83% | 89% | 86.45% | 88.25% |
| Yes | 5 | 5 | 43 | 84 | 137 |
| | 3.65% | 3.65% | 31.39% | 61.31% | 100% |
| | 6.76% | 6.17% | 11% | 13.55% | 11.75% |
| Total | 74 | 81 | 391 | 620 | 1,166 |
| | 6.35% | 6.95% | 33.53% | 53.17% | 100% |
| | 100% | 100% | 100% | 100% | 100% |

3. Documentation and discrimination

People may face multiple challenges in accessing legal documentation. These emerge from the fact that even if legal identity is articulated as a right, accessing proof of legal identity is a complex bureaucratic process that generally requires some form of registration and the issuance of official documentation.

In many countries, people lack access to documentation that demonstrates their legal identity because the state does not have the administrative capacity to consistently and universally record birth and deaths,²⁸ or administer the necessary registration and documentation systems.²⁹ Gaps in legal identity arising from bureaucratic weakness can be particularly acute in countries that have experienced violent conflict, or where ongoing subnational violence or instability limits the reach of state administrative systems.³⁰

Gaps in nationality laws can also leave individuals at risk of statelessness. Contested jurisdictional claims over territory, or the transfer of territory between states, may leave the nationality of specific identity groups in dispute. Other groups, especially those living in contested border areas, may have difficulty accessing registration and documentation systems. Governments may also deny their access to these systems because of disagreement over which state administers the territory where they live. Migratory groups often face similar challenges, as states may contest their right to citizenship and its benefits.³¹

Groups may also face discriminatory practices in attaining documentation of their legal status. These range from acute forms of discrimination such as the selective denationalization of individuals or groups,³² to more subtle—yet no less abusive—practices that pose substantial, sometimes insurmountable burdens on marginalized identity groups.³³ Multiple barriers to legal identity are often present simultaneously. In particular, weak administrative systems for civil registration and documentation can mask—and sometimes accentuate—discriminatory and exclusionary practices and gaps in the law, by creating ambiguity and arbitrariness in the documentation process.

In Kenya, a 2015 report by the Office of the Ombudsman in the Commission on Administrative Justice declared a crisis in the issuance of legal documentation and provided evidence of widespread discrimination.³⁴ Discrimination is particularly acute for some ethnic groups. Some, including Nubians and ethnic Somalis, have since the late 1980s faced a discriminatory practice called “vetting.” Vetting consists of formal interview processes and committee hearings in which the applicant is required to answer questions and provide evidence of citizenship.³⁵

In the case of Nubians, tribal elders are required to vouch that Nubian individuals are in fact members of the local community. Nubians are required to attend vetting committee hearings at which local bureaucratic officials as well as members of the national security services may ask any questions of the applicant they deem appropriate. Officials are also free to require applicants (or their legal guardians) to reappear before additional committee hearings and provide any further documentation they may wish to see. The vetting process generally entails multiple stages, all of which increase opportunities for delay, corruption, and arbitrary influence by bureaucratic officials over the documentation process, and may impact the ability of an applicant to acquire documentation.

The critical point for this report is that important forms of discrimination such as vetting may be not observable even through differential rates of birth registration disaggregated by identity group, income, or region. In the case of Kenya, Nubians in Kibera demonstrate roughly comparable rates of access to national ID cards as non-Nubians in Kibera. However, survey data provide clear evidence of discriminatory practices targeted at Nubians.³⁶ Our data show that Nubians report being subjected to the burdensome process of vetting at dramatically higher rates than non-Nubians. As Table 5 shows, nearly half of Nubians who have applied for a national ID record having been vetted (in their most recent application for a national ID card), as compared to only 7.4 percent of non-Nubians. The selective application of vetting constitutes a significant burden on the Nubian community in terms of time and financial resources, and has created broad perceptions of group-based discrimination.³⁷

Table 5: Vetting rates, by ethnicity
(frequency, row percentage, column percentage)

| Vetted | non-Nubian | Nubian | Total |
|--------|------------|--------|--------|
| No | 471 | 324 | 795 |
| | 59.25% | 40.75% | 100% |
| | 92.72% | 52.94% | 70.98% |
| Yes | 37 | 288 | 325 |
| | 11.38% | 88.62% | 100% |
| | 7.28% | 47.06% | 29.02% |
| Total | 508 | 612 | 1,120 |
| | 45.36% | 54.64% | 100% |
| | 100% | 100% | 100% |

Our survey also provides evidence that Nubians experience a more burdensome vetting process than members of other groups who are required to go through vetting (Table 6). Nubians who experience vetting in the ID card process on average report having to provide roughly 4.5 supporting documents,³⁸ while non-Nubians who experience vetting in the ID card process on average report having to provide at least three (3.6) documents.

Table 6: Average number of vetting documents required

| | Observations | Mean | Std. Dev. | Min | Max |
|------------|--------------|------|-----------|-----|-----|
| non-Nubian | 37 | 3.62 | 1.85 | 1 | 10 |
| Nubian | 288 | 4.54 | 2.21 | 0 | 12 |

Table 7: Average time in weeks to receipt of ID documents

| | Observations | Mean | Std. Dev. | Min. | Max. |
|------------|--------------|-------|-----------|------|------|
| non-Nubian | 464 | 10.28 | 20.04 | 0 | 312 |
| Nubian | 569 | 17.76 | 42.13 | 0 | 520 |

It is not uncommon for vetting committees to require Nubians to return for multiple rounds of committee hearings: 38.8 percent of Nubians who report being vetted say that they have had to attend two or more vetting committee meetings.

Nubians also report experiencing far greater delays in attaining their documents, which can lead to missed employment opportunities or limits on the right to vote and exercise other rights and benefits of citizenship. As the data in Table 7 show, Nubians report a nearly 18 week lag in the delivery of their ID cards, as opposed to an average of just over 10 weeks for non-Nubians.

4. Lessons for Design and Implementation of Goal 16.9

A key implication of the complex challenges surrounding legal identity for the SDGs is that the practical implementation of the legal identity target at a national level will vary widely across countries. For some countries, the challenge will be to improve bureaucratic and technical capacity for civil registration. Many will also have to address complex histories, reform laws governing nationality and legal residency, and confront deeply embedded discriminatory practices. By extension, the impact of Goal 16.9 will vary widely as well, both across countries and across social groups impacted by changing access to legal status.

Current discussion has focused on the indicator for goal 16.9: universal birth registration for those 5 and under. Birth registration is a useful and important indicator because it is necessary for the construction of vital statistics systems, and because it is a right embedded in international law.³⁹ However, birth registration on its own it is an insufficient measure of legal identity. Universal birth registration cannot create universal or equitable access to documentation that demonstrates legal identity,⁴⁰ nor can it guarantee socio-economic and political development outcomes linked to legal identity. There are three primary reasons for this.

*The link between birth registration and outcomes associated with development and political participation varies widely across countries. Access to birth registration is a right embedded in international law, but its practical implications for people's quality of life and access to opportunity depends upon local legal and political contexts. In some countries, birth registration firmly establishes citizenship. In others, particularly countries that have *jus sanguinis* citizenship (citizenship through parentage), registration of birth is not in itself proof of citizenship,⁴¹ although it may still be necessary in order to acquire other forms of documentation.⁴² Equally, the degree to which birth registration unlocks access to goods and services such as education, health care and other social services varies widely.⁴³ In many countries, multiple registration and documentation frameworks govern access to different types of services and rights.⁴⁴*

Equal rates of birth registration can still mask deep inequities in accessing legal documentation. Many groups continue to face discriminatory practices in accessing legal

documentation around the world, based on ethnicity, region, religion, or other factors. Discriminatory practices in the application process for legal identity documents can place a heavy burden on some groups, even when their overall rates of documentation appear comparable to other similarly situated groups. As we discuss below, for this reason it is important that systems for monitoring Goal 16.9 include metrics capable of detecting prejudicial treatment.

Universal birth registration of children aged five and under will not resolve the challenges facing people who currently lack documentation. The millions of children and adults who already lack legal documentation may be left out of reforms that focus exclusively on birth registration. Many of those who are currently undocumented are among the most socially vulnerable, and most at risk of being left behind if their outcomes and needs are not tracked, measured, and improved. In short, legal identity should, like many of the other core SDGs, be conceptualized and measured as a “zero-based” goal: one which will only be considered completed when all people have access to legal identity.⁴⁵

Close attention to the design and strengthening of registration and documentation systems at the national level will be critical, if the intent of the legal identity target is to be met. As noted in the introduction, the potential for risks as well as benefits in articulating and implementing a legal identity goal are very real. In each national context, it will be important to study whether birth registration enables access to other forms of documentation that may be essential for demonstrating legal identity and accessing services.⁴⁶ Attention should also be paid to identifying and exposing discriminatory or arbitrary practices that create inequity in accessing legal documentation. Disaggregated registration data can play an important role in doing so, but is insufficient on its own.

In addition to capturing birth registration rates, supplementary and regionally or country-specific indicators tracking goal 16.9 could measure rates of documentation across other forms of legal identification that provide access to benefits or facilitate the exercise of political, legal, and human rights. Such measures should not focus attention on other forms of legal documentation to the exclusion of the global birth registration indicator.⁴⁷ They should rather provide additional data on access to other critical forms of documentation relevant to the local context, as well as discriminatory practices. This information will be essential for monitoring the progress of goal 16.9 implementation for all groups in society, as well as progress for children and adults who are currently without documentation that demonstrates their legal identity.

Regionally or country-specific indicators could be accomplished through national censuses or other periodic representative population surveys. At present, only UNICEF’s Multiple Indicator Cluster Surveys (MICS) systematically generate data on birth registration rates for children under age 5, while the possession of other forms of legal identity is tracked by only some national censuses.⁴⁸ National surveys such as the MICS and USAID-supported Demographic and Health Surveys (DHS) could include indicators tracking household

documentation, in order to draw inferences about the linkages between documentation and key health and socio-economic outcomes. Regional barometers such as the Afrobarometer or the Latinobarómetro could include questions about access to legal documentation in order to assess the relationship between legal identity, legal documentation and measures of political engagement other perception-based measures already included in these surveys. Regional or national surveys assessing specific issues, such as education, maternal health, or access to credit could also include a consistent set of questions to generate national “snapshots” and identify associations between legal identity, access to legal documentation, and key development outcomes. To accomplish these goals, the sampling designs for such surveys will need to be calibrated so as to provide a representative measure of documentation rates among marginalized and vulnerable populations.

As with other SDG metrics, it will be important to tailor these measures to the national context. In countries with multiple forms of legal documentation, multiple indicators will be needed. In Kenya, our research provides support for including distinct indicators to track rates of birth registration, coverage of the population with birth certificates, and rates of national ID card acquisition, as well as survey-based indicators documenting arbitrary or abusive practices such as vetting, which would make visible ongoing discrimination in the application process.

5. Conclusions

The inclusion of access to legal identity in the SDG framework is a major step forward. Universal access to legal identity has critical implications for peoples’ access to basic public services, economic opportunities, and ability to participate in governance. However, calls to measure and monitor legal access to identity through birth registration rates alone risk further marginalizing those who currently lack legal identity, and ignores the fact that different forms of identity govern access to public goods and exercise rights in different countries. As discussions over SDG 16.9 move towards nationally-tailored implementation and monitoring frameworks, it will be important to emphasize and measure *equality of access* to nationally relevant forms of legal identity, rather than birth registration alone. This will require that assessments of progress incorporate diverse perspectives including registration outcomes and equity in registration processes.

The new evidence from Kenya outlined in this policy report highlights both the clear link between legal identity and core development outcomes, as well as the importance of other forms of documentation that establish legal identity beyond birth registration in shaping access to services and political participation. The data also underline the impact of discriminatory practices in shaping access to legal identity: for the intent of the SDGs to be met, equality of access must also encompass equality of treatment and the elimination of discriminatory practices during the application process. As Goal 16.9 moves towards implementation, more research of this kind across a range of domestic contexts will be

needed on precisely how legal identity shapes access to development, and how contextual factors—social, institutional, legal—condition its effects.⁴⁹

Notes

¹ The High Level Panel on the Post-2015 Agenda described the provision of legal identity as “one of the most basic institutional responsibilities” for states to provide. See High-Level Panel of Eminent Persons on the Post-2015 Development Agenda “A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development”, 2013 pp. 50, 31. Accessed at:

http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf

² Hassane Cisse “Identification for Development” presentation at International Identity Management Conference, Seoul, Korea 23-25 September 2014, accessed at: <http://globalidm.org/wp-content/uploads/2014/06/Mr.-Hassane-Cisse-Director-Governance-and-Inclusive-Institutions-World-Bank.pdf>; see also: Technical Support Team “TST Issues Brief: Conflict Prevention, Post-conflict Peacebuilding & the Promotion of Durable Peace, Rule of Law and Governance” p. 6. Accessed at:

https://sustainabledevelopment.un.org/content/documents/2639Issues%20Brief%20on%20Peace%20etcFINAL_21_Nov.pdf

³ In cases where access to certain goods or services are denied to non-citizens, legal documentation that establishes a non-citizen’s legal status will not provide access.

⁴ Lucia Gonzalez Lopez, Tanja Brøndsted, Sejersen, Nicholas Oakeshott, Gaspar Fajth, Taimur Khilji and Nicoleta Panta, “Civil Registration, Human Rights, and Social Protection in Asia and the Pacific,” *Asia Pacific Population Journal*, Vol. 29, No. 1 (November 2014), p. 77, accessed online at:

<http://www.unescap.org/sites/default/files/APPJ-Vol-29-No-1.pdf>

⁵ Adapted from Principle 20(2) of the Guiding Principles on Internal Displacement, 30-09-1998 Article, International Review of the Red Cross, No. 324, accessed online at:

<https://www.icrc.org/eng/resources/documents/misc/57jvgl.htm>. See also UN High Commissioner for Refugees (UNHCR), A Framework for the Protection of Children, 26 June 2012, at 24 (“the necessary documentation related to nationality, travel, status (refugee, asylum-seeker, stateless), education, custody, property or other civil matters”), available at: <http://www.refworld.org/docid/4fe875682.html>; International Covenant on Civil and Political Rights, Article 16, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Convention on the Rights of the Child, Article 7, available at:

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

⁶ United Nations Statistics Division, Department of Economic and Social Affairs, Principles and Recommendations for a Vital Statistics System, Revision 2, United Nations, 2001, p. 50, cited in UNICEF “A Passport to Protection: A Guide to Birth Registration Programming”, 2013, p. 11. See also: “Birth registration and the right of everyone to recognition everywhere as a person before the law,” Report of the Office of the United Nations High Commissioner for Human Rights to the UN General Assembly, A/HRC/27/22 (June 17, 2014) Section II, Paragraph 4, accessed online at:

http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A_HRC_27_22_ENG.doc

⁷ See the 1954 Convention relating to the Status of Stateless Persons, Art. 1 (1), accessed online at:

<http://www.unhcr.org/3bbb25729.html>

⁸ See: Asian Development Bank, “Legal Identity for Inclusive Development,” 2007, accessed online at:

<http://www.adb.org/sites/default/files/publication/29046/legal-identity.pdf>; Cate Sumner and Santi Kusumaningrum, AIPJ Baseline Study on legal identity: Indonesia’s Missing Millions. DFAT, PEKKA and PUSKAPA UI (2014), accessed online at http://www.aipj.or.id/uploads/reports_publication/8_f_20140227-01003_FA_baseline_report_english.pdf; Debra Ladner, Erik G. Jensen and Samuel E. Saunders, “A Critical Assessment of Legal Identity: What It Promises and What It Delivers” *Hague Journal on the Rule of Law*, Vol. 6, No. 1, January 2014, pp. 49, 52-54; and Lucía González López, Tanja Brøndsted Sejersen, Nicholas Oakeshott, Gaspar Fajth, Taimur Khilji and Nicoleta Panta, “Civil Registration, Human Rights, and Social Protection,” *Asia and the Pacific Asia-Pacific Population Journal* Vol. 29, No. 1, November 2014, p. 75, accessed at:

<http://www.unescapsdd.org/file>.

Important research has focused on the link between vital registration and health outcomes, with evidence suggesting that documentation is associated with improved health outcomes. Notably: Ana Corbacho, Steve Brito, and René Osorio “Does Birth Underregistration Reduce Childhood Immunization? Evidence from the Dominican Republic” *Inter-American Development Bank Working Paper Series* No. IDB-WP-448, 2013; Sonja Fagnäs and Joyce Odame “Birth registration and access to health care: An assessment of Ghana’s campaign success” *Bulletin of the World Health Organization*, Vol. 91, 2013; David E Phillips, et al., “Are well functioning civil registration and

vital statistics systems associated with better health outcomes?" *The Lancet*, 2015.

⁹ The practice of vetting began in 1989 with Somalis in Kenya, in response to the Kenyan government's security concerns. It was soon applied to other ethnic groups such as Nubians (Balaton-Chrimes 2015, p. 69).

¹⁰ A birth certificate is important, providing access to basic education and can facilitate access to some health outcomes (such as vaccinations administered in schools). A birth certificate is necessary but insufficient to attain a national identity card.

¹¹ In the case of Indonesia, a birth certificate that does not include the father's name can be a lifelong source of stigma. See: Cate Sumner "Indonesia's Missing Millions: Erasing Discrimination in Birth Certification in Indonesia," Centre for Global Development (2015), accessed online at <http://www.cgdev.org/publication/indonesias-missing-millions-erasing-discrimination-birth-certification-indonesia>

¹² United Nations Millennium Declaration, 8 September 2000. Accessed at: <http://www.un.org/millennium/declaration/ares552e.htm>

¹³ Mariana Dahan and Alan Gelb, "The Role of Identification in the Post-2015 Development Agenda." Paper prepared for The Hague Colloquium on the Future of Legal Identity, 2015, p. 7. See also Casey Dunning, Alan Gelb, and Sneha Raghavan "Birth Registration, Legal Identity, and the Post-2015 Agenda" Center for Global Development Policy Paper No. 46, September 2014, p. 6

¹⁴ See Hussein, *ibid*, for a discussion of the implications of this law for some ethnic communities. These requirements are sometimes impossible to meet, for example if a grandparent was born before Kenyan independence.

¹⁵ Research on the issuance of national identity cards conducted by the Kenya National Commission on Human Rights in 2007 documented challenges faced by members of the Nubian community in accessing legal documentation due to the practice of vetting, as well as problems with corruption, delay, and the arbitrary denial of documentation. See: Kenya National Human Rights Commission, "An Identity Crisis? A Study on the Issuance on National Identity Cards in Kenya," 2007. Accessed at: <http://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf>

¹⁶ Balaton-Chrimes 2015, 60.

¹⁷ Research was funded by the Open Society Justice Initiative and the Open Society Foundation.

¹⁸ The Nubians are primarily the descendants of people from the Nuba Mountains in Sudan who arrived in Kenya in the late 19th and early 20th century with the British. See de Smedt, Johan "Kill Me Quick' A History of Nubian Gin in Kibera" *The International Journal of African Historical Studies*, Vol. 42, No. 2, 2009.

¹⁹ See Balaton-Chrimes 2015, p. 20; and Open Society Justice Initiative, 2011, "Nubians in Kenya: Numbers and Voices," accessed online at: http://www.opensocietyfoundations.org/sites/default/files/nubians-kenya-data-sheet-2010506_0.pdf

²⁰ The survey also included a sample of primarily Nubian clients of a program intervention designed to support access to legal identity. Survey results reported in this report do not include this sub-sample. The survey was administered across seven wards in Kibera: Gatwekera, Kambi Muru, Karanja, Laini Sabi, Lindi, Makina, and Mashimoni.

²¹ World Bank. 2014. "Global Civil Registration and Vital Statistics Scaling up Investment Plan 2015–2024," pp. xi, 2, accessed online at <http://documents.worldbank.org/curated/en/2014/05/109581045/global-civil-registration-vital-statistics-scaling-up-investment-plan-2015-2024>

²² For example, people who can work in the informal sector and are satisfied doing so may decide not to acquire an ID card.

²³ Mary Hilderbrand "Benefits and Costs of the Governance & Institutions Targets for the Post- 2015 Development Agenda Post-2015 Consensus" Copenhagen Consensus Center Working Paper 7 January 2015, p. 25, citing Matt Andrews 2013.

http://matthewandrews.typepad.com/the_limits_of_institution/2013/11/more-on-registration-as-a-governance-indicator.html. See also UNDP Commission on the Legal Empowerment of the Poor "Making the Law Work for Everyone" 2008, cited in Civil Registration Centre for Development, "Equity, Legal Identity, and Development", 2011 p. 6.

²⁴ Our data reflect self-reported rates of voting. The small number of individuals who report voting despite not holding a national ID card may be due to many factors including: unlawful voting; people who do not currently hold an ID card but did at the time of the last election, e.g. due to loss or theft of ID card; or misreporting.

²⁵ Five respondents who did not respond to survey questions on documentation status are omitted from this tabulation.

²⁶ Mary Hilderbrand "Benefits and Costs of the Governance & Institutions Targets for the Post- 2015 Development Agenda Post-2015 Consensus" Copenhagen Consensus Center Working Paper 7 January 2015, p. 25, citing Matt Andrews 2013.

http://matthewandrews.typepad.com/the_limits_of_institution/2013/11/more-on-registration-as-a-governance-indicator.html. See also UNDP Commission on the Legal Empowerment of the Poor “Making the Law Work for Everyone” 2008, cited in Civil Registration Centre for Development, “Equity, Legal Identity, and Development”, 2011 p. 6.

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²⁸ Death certificates can be critical for establishing inheritance rights and land transference. In Kenya, death certificates of deceased family members are often requested by state officials in the vetting process.

²⁹ Hilderbrand, *ibid.* p. 25

³⁰ Violence can also impact whether people choose to seek legal identity. In the aftermath of ethnic or identity-based conflict, members of some identity groups may not trust state institutions or feel safe registering with authorities.

³¹ Indira Goris, Julia Harrington and Sebastian Köhn “Statelessness: What it is and Why it Matters” *Forced Migration Review*, No. 32, 2009, pp. 4-6. Accessed at: <http://www.fmreview.org/en/FMRpdfs/FMR32/FMR32.pdf>

³² As in the case of ethnic Haitians in the Dominican Republic. See e.g. Liliana Gamboa and Julia Harrington Reddy, “Judicial denationalisation of Dominicans of Haitian descent” *Forced Migration Review* No. 46, May 2014, p. 52, accessed at: <http://www.fmreview.org/en/afghanistan/gamboa-harrington.pdf>

³³ Adam Hussein Adam “Kenyan Nubians: Standing Up to Statelessness” *Forced Migration Review*, No. 32, 2009, pp. 19-20; Goris et al. *ibid.* pp. 4-5

³⁴ Commission on Administrative Justice Office of the Ombudsman, August 2015, “Stateless in Kenya: An Investigative Report on the Crisis of Acquiring Identification Documents in Kenya.”

³⁵ In 1988, security concerns (particularly regarding instability in Somalia and border regions in Kenya) prompted the government to begin a system of vetting for some identification card applicants to ensure that non-Kenyans did not receive documentation. Between 1989 and 1991, the Kenyan government screened all Kenyan Somalis, and many had their ID cards confiscated by government officials. Following this the practice of vetting became more widespread, in border areas and also for Nubians in Nairobi, and Muslims in the coastal area of Kisumu. See KNCHR and UNHCR 2010, and Balaton-Chrimes 2015.

³⁶ Previous research conducted by the Open Society Justice Initiative suggests that Nubians living outside of Nairobi, in more rural regions, face even more difficulties accessing legal documentation. Open Society Justice Initiative, 2011, “Nubians in Kenya: Numbers and Voices,” accessed online at:

http://www.opensocietyfoundations.org/sites/default/files/nubians-kenya-data-sheet-20110506_o.pdf

³⁷ Hussein Adam 2009 and Balaton-Chrimes 2015.

³⁸ Documents that applicants are frequently required to produce include: parents and grandparents birth certificates and national ID cards or death certificates, school leaving cards, madrassa certificates, affidavits from chiefs or tribal elders, etc.

³⁹ Dunning, Gelb, and Raghavan, *ibid.*, p. 3. Convention on the Rights of the Child and International Covenant on Civil and Political Rights, *ibid.*

⁴⁰ *ibid.*, p. 1

⁴¹ Dahan and Gelb, “Reflections on the Future of Legal Identity” *ibid.*

⁴² UNICEF notes that “birth registration is part of an effective civil registration system that acknowledges the person’s existence before the law.” UNICEF 2013, *ibid.*, p. 11 (emphasis added)

⁴³ The 2007 Asian Development Bank study found that “in a number of instances, other identity documents, such as citizenship certificates or family and lodging books, proved to be more important than birth certificates in so far as access to benefits and opportunities are concerned,” ADB 2007, p. vii.

⁴⁴ Brewer et al., p. 3

⁴⁵ OECD “States of Fragility 2015: Meeting Post-2015 Ambitions” Paris. 2015, p. 38. Accessed at:

<http://dx.doi.org/10.1787/9789264227699-en>

⁴⁶ ADB 2007.

⁴⁷ Concern has been raised that investing in national identification systems prior to or at the exclusion of vital registration systems such as birth registration will create greater long-term gaps in access to documentation demonstrating legal identity than currently exist. We do not take a position here on the sequential ordering of registration and documentation systems. See Jaap Van der Straaten, “The Economics of Civil Identity Management in Africa,” The Hague, 2015, access to document provided by the author August 2015.

⁴⁸ Mia Harbitz and Maria del Carmen Tamargo “The Significance of Legal Identity in Situations of Poverty and Social Exclusion: The Link between Gender, Ethnicity, and Legal Identity” IADB, November 2009 pp. 9-11

For More Information

To find out more about the Open Society Justice Initiative and our work on legal identity and statelessness, please visit:

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The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.
