

# Hague Journal on the Rule of Law

<http://journals.cambridge.org/ROL>

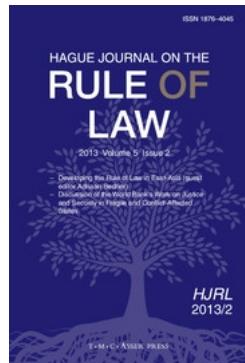
Additional services for **Hague Journal on the Rule of Law:**

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



## A Critical Assessment of Legal Identity: What It Promises and What It Delivers

Debra Ladner, Erik G. Jensen and Samuel E. Saunders

Hague Journal on the Rule of Law / *FirstView Article* / November 2013, pp 1 - 27

DOI: 10.1017/S1876404513000043, Published online: 04 November 2013

Link to this article: [http://journals.cambridge.org/abstract\\_S1876404513000043](http://journals.cambridge.org/abstract_S1876404513000043)

### How to cite this article:

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, Available on CJO 2013 doi:10.1017/S1876404513000043

Request Permissions : [Click here](#)

# A Critical Assessment of Legal Identity: What It Promises and What It Delivers\*

Debra Ladner,\*\* Erik G. Jensen,\*\*\* and Samuel E. Saunders\*\*\*\*

Universal provision of legal identity, most commonly birth registration, is viewed as both an intrinsic human right and an instrumental development necessity. Legal identity is commonly associated with citizen access to certain benefits and opportunities, protection of human rights, and generation of vital statistics to inform development planning. Research conducted in Nepal, Cambodia, and Bangladesh demonstrates that significant obstacles to obtaining legal identity include financial and procedural barriers, discriminatory laws and policies, institutional incapacity, and citizens' lack of knowledge and motivation. Robust alternative markets for legal identity reveal the true public demand for identity documents. In the developing country context, the provision of legal identity alone does not necessarily deliver desired development outcomes. Thus, universal civil registration is a necessary and worthy goal, but focus should remain on the ultimate development goals behind universal registration.

The term 'legal identity' generally refers to an official, state issued document that includes basic information attesting to the holder's identity, status, and legal rela-

\*This paper was inspired by and based on research conducted in Bangladesh, Cambodia, and Nepal by The Asia Foundation with funding from the Asian Development Bank (ADB). The study was conducted with the help of Asia Foundation consultants and numerous focus group participants and key informants. A report of the original research was published by the ADB (*Legal Identity for Inclusive Development*, 2007). We thank Caroline Vandenabeele and the ADB for their assistance with the original research. The views expressed in this paper are not necessarily those of The Asia Foundation.

\*\*Director, Program Strategy, Innovation and Learning, The Asia Foundation, Q. House Convent Bldg., Floor 6D, 38 Convent Road, Silom Bangkok 10500, Thailand, [debra.ladner@asiafoundation.org](mailto:debra.ladner@asiafoundation.org).

\*\*\*Professor of the Practice of Law and Director, Rule of Law Program, Stanford Law School, Senior Research Scholar, Center on Democracy, Development and the Rule of Law at the Freeman Spogli Institute for International Affairs, Stanford University, Senior Advisor for Governance and Law, The Asia Foundation, 559 Nathan Abbott Way, Stanford, CA 94305, [egjensen@stanford.edu](mailto:egjensen@stanford.edu).

\*\*\*\*JD Candidate, Stanford Law School, 559 Nathan Abbott Way, Stanford, CA 94305, [samuels4@stanford.edu](mailto:samuels4@stanford.edu).

tionships. Most countries have a range of identity documents that serve a variety of purposes, such as marriage certificates, passports, driver's licenses, and death certificates. The international community emphasizes the importance of birth certificates, administered through a civil registration system, as the preferred standard in legal identity.<sup>1</sup> The primary advantage of a birth certificate is that it documents age, familial relationships, and place of birth from the very beginning of life.

In more developed countries, where birth certificates are nearly universal, many do not consider the governmental capacity required to issue birth certificates or the impact these documents have on daily life.<sup>2</sup> Yet in less developed countries, these issues generate significant interest from governments, IGOs, NGOs, and human rights advocates. For example, the UN Human Rights Council adopted a resolution in March 2012 entitled 'Birth registration and the right of everyone to recognition everywhere as a person before the law,' and in December 2012 the WHO and UNESCAP co-hosted (along with 18 other IGO, NGO, and governmental partners) a high-level meeting on improving civil registration and vital statistics in Asia and the Pacific.<sup>3</sup> According to UNICEF data (2000-2010),<sup>4</sup> only 51 percent of children less than five years old in developing countries were registered, including only 38 percent in Sub-Saharan Africa and 36 percent in South Asia. Aggregate numbers paint only a partial picture, as registration among certain populations such as marginalized ethnic groups and the rural poor can be significantly lower than national averages.<sup>5</sup>

<sup>1</sup> The United Nations defines civil registration as the 'continuous, permanent, compulsory, and universal recording of the occurrence and characteristics of vital events pertaining to the population as provided through decree or regulation in accordance with the legal requirements of each country'. UNSD, *Handbook on Training in Civil Registration and Vital Statistics Systems*, 2002.

<sup>2</sup> Deficiencies in the provision of legal identity are not, however, confined to less developed countries. Illegal and legal immigration in North America and Europe has led to millions of undocumented or under-documented residents. Decentralized (state-by-state) identity regimes add confusion and encumber internal migration in the United States. Voter ID laws and access to benefits such as higher education and, ultimately, citizenship for residents lacking legal identity remain hotly-contested topics in the US.

<sup>3</sup> UNESCAP, 'High-Level Meeting on the Improvement of Civil Registration and Vital Statistics in Asia and the Pacific', 2012, <[www.unescap.org/stat/vital-stat/high-level/index.asp](http://www.unescap.org/stat/vital-stat/high-level/index.asp)> (last accessed on December 13, 2012).

<sup>4</sup> UNICEF, *The State of the World's Children*, 2012, p. 123.

<sup>5</sup> Suzanne Duryea et al., 'The Under-Registration of Births in Latin America', *Inter-American Development Bank Working Paper #551* (2006), pp. 14-18; 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', *Inter-American Development Bank Technical Note* (2009), pp. 10-16; UNICEF, 'The "Rights" Start to Life: A Statistical Analysis of Birth Registration', 2005, pp. 5-23.

Legal identity has potential implications for a diverse and expansive range of development issues. Three goods commonly associated with legal identity, particularly in the form of a birth certificate, are: 1) establishment of citizens' eligibility to access certain benefits and opportunities, 2) protection of human rights, and 3) generation of demographic statistics to inform development planning so that resources are directed to where they are most needed. Legal identity reform is thus as much an issue of improving administrative and bureaucratic effectiveness as it is a rights-based issue of 'access to justice.' Unfortunately, while substantial research has been conducted on the technical 'best-practices' of administering universal birth registration in various countries,<sup>6</sup> the downstream effects of these interventions are unclear. The question remains, does delivering legal identity improve the delivery of its associated social goods?

Here we pragmatically review and assess the relationship between legal identity and development and consider how improving legal identity may or may not improve development outcomes. We first frame the case for legal identity according to the prominent viewpoints in academia and practice. Then based on our own field research from Bangladesh, Cambodia, and Nepal,<sup>7</sup> we explore what legal identity promises and what it actually delivers in the developing country context that typically includes scarce resources, weak institutions, widespread corruption, and competition among various needs and interests. We highlight the significant obstacles to obtaining legal identity and the role alternative markets often play in satisfying demand for legal identity.

Based on our research, we conclude that universal civil registration is ultimately a necessary and worthy goal, but, for a wide range of reasons, the provision of legal identity does not necessarily deliver desired development outcomes. The relative costs and benefits of civil registrations must be considered in the context of other development priorities, with the objective of achieving the greatest material improvements in quality of life. For example, increased use of biometrics offers hope of more widespread and accurate delivery and use of legal identity but the need for sufficient administrative priority and capacity remains.<sup>8</sup>

<sup>6</sup> Claire Cody, 'Count Every Child: The Right to Birth Registration', 2009, pp. 30-69; Mariana Muzzi, 'UNICEF Good Practices in Integrating Birth Registration into Health Systems (2000-2009)', 2010, UNICEF Working Paper, pp. 5-43.

<sup>7</sup> The Asia Foundation, in collaboration with the Asian Development Bank, conducted in-depth case studies of legal identity in Bangladesh, Cambodia, and Nepal. Research was led by in-country consultants who conducted desk research of legal frameworks and available statistics and led focus groups and interviews of key informants, including central and local government officials and key players in alternate markets. The detailed findings of these studies were first reported by the ADB (*Legal Identity for Inclusive Development*, 2007). This paper distills the results of this research in the broader context of the continued global interest in universal civil registration.

<sup>8</sup> See, e.g., Alan Gelb and Julia Clark, 'Identification for Development: The Biometrics Revolution', 2013, Center for Global Development Working Paper 315.

This paper stresses throughout that both the conferral of and benefits from various instruments of legal identity are contingent upon the political economy of countries where such interventions are contemplated. In a wave of publications over the last several years, the mainstream of the development industry found and then highlighted the importance of political economy analysis in prioritizing interventions.<sup>9</sup> The rule of law industry, just like other parts of the development industry (such as civil service reform), historically have paid insufficient attention to the complex political economy of prospective treatment areas. This is the single greatest reason for failures across development interventions. It is not, as has been argued and recited in a broad swath of literature critiquing law and development, that such interventions *per se* will fail. Rather, too often projects are designed and implemented without adequate (or any) consideration of the political, social or economic equilibrium with which such projects interact, and without serious consideration of the cost and benefit of such interventions. This paper is an original contribution to the literature on legal identity and a modest example of analysis that should be engaged in rule of law projects.

## DIVERSE PERSPECTIVES ON THE NEED FOR LEGAL IDENTITY

Multilateral and national aid organizations, intergovernmental organizations (IGOs), non-governmental organizations (NGOs), academics, and human rights advocates approach legal identity from a diverse set of perspectives, most of which have universal civil registration as their ultimate goal. Each perspective holds a somewhat different view on why legal identity is a necessity and what improved access to identity can achieve. At least four different perspectives can be defined.

### *Legal identity as a human right*

The rights-based approach to legal identity is rooted in Article 7 of the Convention on the Rights of the Child (CRC), which states, ‘The child shall be registered immediately after birth and shall have the right from birth to a name [and] the right

<sup>9</sup> See, e.g., Huma Haider and Sumedh Rao, *Political and Social Analysis for Development Policy and Practice: An Overview of Five Approaches*, 2010; Department for International Development (DFID), *Political Economy Analysis How to Note*, 2009; Verena Fritz et al., *Problem-Driven Governance and Political Economy Analysis: Good Practice Framework*, 2009; SIDA, *Power Analysis – Experiences and Challenges*, 2005; Tom Dahl-Østergaard et al., *Lessons Learned on the Use of Power and Drivers of Change Analyses in Development Cooperation*, 2005. Yet, political economy has been a prominent part of social science literature for over a hundred years, made prominent by Max Weber, among others. See, e.g., Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, 1978, Guenther Roth and Claus Wittich (eds.), 2 vols.

to acquire a nationality.<sup>10</sup> Proponents of the rights-based approach view legal identity as a fundamental right, in and of itself, and as a key to other fundamental rights.<sup>11</sup> Legal identity has intrinsic value, according to this view, because official recognition of one's existence is integral to human dignity. Legal identity is also considered a gateway to other human rights which may be contingent on proof of identity, age, familial relationships, or place of birth, such as protection from child labor and the right to education. Based on this line of reasoning, international donor organizations, such as UNICEF and Plan International, have sought to reorient birth registration from solely a bureaucratic procedure to a child rights issue. Their efforts have focused primarily on advocating for and supporting universal birth registrations as a means to enforce the right to legal identity.<sup>12</sup>

#### *Legal identity to reduce statelessness and provide citizenship*

Perhaps a variant of the rights-approach, another approach to legal identity focuses on its role in citizenship, especially for 'stateless' individuals and children. 'Stateless' people are those individuals without a recognized nationality or citizenship and can include not only refugees, migrants, and victims of changing borders or trafficking but also marginalized populations denied citizenship by their native country.<sup>13</sup> From this view, achieving legal identity is not only necessary to access governmental services but more importantly is essential to establishing citizenship and the right to self-determination and democratic participation.<sup>14</sup> Advocates

<sup>10</sup> Art. 8 of the CRC requires states to respect the right of the child to preserve his or her identity, including nationality, name and family relations. The CRC has been ratified by 193 countries. A child's right to registration is also reflected in Art. 24 of the International Covenant on Civil and Political Rights (ICCPR). See Douglas Hodgson, 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness', in: *7 International Journal of Law and the Family* (1993), pp. 255-270.

<sup>11</sup> See, e.g., Yamilée Mackenzie, 'The Campaign for Universal Birth Registration in Latin America: Ensuring All Latin American Children's Inherent Right to Life and Survival by First Guaranteeing Their Right to a Legal Identity', in: *37 Georgia Journal of International and Comparative Law* (2009), p. 519, at pp. 532-537.

<sup>12</sup> Cody, 'Count Every Child: The Right to Birth Registration', p. 11; UNICEF, 'Child Protection from Violence, Exploitation and Abuse: Birth Registration', 2011, <[www.unicef.org/protection/57929\\_58010.html](http://www.unicef.org/protection/57929_58010.html)> (last accessed on December 11, 2012).

<sup>13</sup> See generally, Jacqueline Bhabha (ed.), *Children without a State*, 2011 for various perspectives on citizenship and statelessness. There are relevant international conventions on stateless persons, especially the Convention on the Reduction of Statelessness, which requires contracting states to grant nationality to persons born in its territory who would otherwise be stateless (Art. 1(1)). See Hodgson, 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness'.

<sup>14</sup> See, e.g., Joy K. Park et al., 'A Global Crisis Writ Large: The Effects of Being "Stateless in Thailand" on Hill-Tribe Children', in: *10 San Diego International Law Journal* (2009), p. 495, at pp. 505-518.

against statelessness may be less concerned about technocratic obstacles to achieving universal civil registration as much as the cultural and political obstacles to delivering citizenship and its accompanying rights and privileges to specific marginalized groups.

#### *Legal identity for vital statistics and health planning*

Like the rights-based approaches, the technocratic approach also aims to accomplish universal civil registrations, but rather than emphasizing the right to identity or citizenship, it focuses on the technical requirements of establishing a civil registration system and the benefits of collecting vital statistics. Accurate and comprehensive data on vital events has been recognized as essential to measuring at least six of the Millennium Development Goals (e.g., reductions in child mortality, maternal mortality, and disease prevalence).<sup>15</sup> Universal birth and death registrations are viewed as essential to evaluating and managing population health.<sup>16</sup> Various UN agencies (United Nations Statistics Division (UNSD), The Economic and Social Commission for Asia and the Pacific (UNESCAP), United Nations Children's Fund (UNICEF), and the World Health Organization (WHO)) have thus focused on the statistics that can be generated from a comprehensive civil registration system, and have provided technical expertise on every aspect of registration systems – from drafting legislation to training registrars to establishing standardized operating procedures and institutional infrastructure.<sup>17</sup>

#### *Legal identity as an important factor in achieving development outcomes*

Another approach to legal identity, one based on the research presented below, is a more pragmatic one that seeks ‘inclusive’ (or ‘equitable’) development and poverty eradication as ultimate end goals and views legal identity as one of many factors that can potentially affect that goal. Recognizing the historical role identity registration has played in development, especially its role in bureaucratic administration of benefits for the poor,<sup>18</sup> this approach acknowledges that legal

<sup>15</sup> See, e.g., Mia Harbitz and Bettina Boekle-Giuffrida, ‘Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality’, 2009, Inter-American Development Bank Working Paper, p. 10; Philip W. Setel et al., ‘A Scandal of Invisibility: Making Everyone Count by Counting Everyone’, in: 370 *Lancet* (2007), p. 1569, at p. 1573.

<sup>16</sup> Setel et al., ‘A Scandal of Invisibility’, at p. 1572.

<sup>17</sup> Muzzi, ‘UNICEF Good Practices in Integrating Birth Registration into Health Systems (2000-2009)’, pp. 5-18; UNSD, ‘International Programme for Accelerating the Improvement of Vital Statistics and Civil Registration Systems’, 2011, <<http://unstats.un.org/unsd/demographic/sources/civilreg/civilregprogramme.htm>> (last accessed on December 11, 2012).

<sup>18</sup> See generally Simon Szreter, ‘The Right of Registration: Development, Identity Registration, and Social Security – A Historical Perspective’, in: 35 *World Development* (2007), p. 67.

identity is often necessary for marginalized groups to gain access to services and opportunities such as property ownership, jobs, education, health care, and access to courts.<sup>19</sup> Yet while fully recognizing legal identity as a human right and ultimately a technocratic necessity, this approach considers the relative costs and benefits of civil registrations in the context of other development priorities with the objective of achieving the greatest material improvements in quality of life.

## WHAT LEGAL IDENTITY PROMISES AND WHAT IT DELIVERS

Legal identity promises a host of social goods with tremendous potential to improve people's lives, yet research suggests that legal identity does not consistently deliver these promised goods in the developing country context. Here we review what legal identity promises and the limitations on fulfilling these promises. We focus on the three most commonly cited developmental benefits of legal identity: 1) demographic statistics for improved governance and development planning, 2) protection of human rights, and 3) greater access to services, benefits, and opportunities.

### *Demographic statistics for improved governance and development planning*

The most commonly cited state benefit of civil registrations is the generation of demographic statistics to guide more effective development planning. Compared to other data sources, a complete civil registration system collects vital statistics data on a continuous and universal basis and yields data on event incidence, not just prevalence.<sup>20</sup> Accurate and up-to-date information correlating trends in fertility and mortality rates with statistics on a population's size, age structure, and distribution can be analyzed to inform programs in public health, education, employment, and infrastructure development. To achieve this result, however, three critical components are necessary: 1) universal coverage of the civil registration system, 2) the technical and governance capacity to generate, compile, and analyze collected data, and 3) the political economy necessary to successfully link objective data to resource distribution decisions. Each of these components cannot be assumed in the developing world context.

<sup>19</sup> The mainstream 'legal empowerment' movement explicitly recognizes the role of legal identity in ensuring 'access to justice' and 'the rule of law'. See Naresh Singh, 'Fighting Rural Poverty, Inequality and Low Productivity through Legal Empowerment of the Poor', in: 36 *Journal of Peasant Studies* (2009), p. 871, at p. 881. However, typical legal empowerment approaches assume connections between access to justice and improved development outcomes without necessarily exploring whether these connections actually hold true.

<sup>20</sup> Setel et al., 'A Scandal of Invisibility', at p. 1570.

*Low registration rates, especially in vulnerable populations*

Due to low registration rates,<sup>21</sup> most developing countries are currently not in a position to rely upon civil registration systems for accurate, complete, and reliable population statistics. According to the UN, less than 10 percent of African countries and only 50 percent of Asian and South American countries have complete civil registration systems capable of generating accurate vital statistics.<sup>22</sup> Unfortunately, simply increasing overall civil registration coverage may not be the answer since the people most in need of government assistance tend to be the very people who are least likely to register. Empirical research has shown that registration rates are lowest in rural areas and among the uneducated and those living in poverty.<sup>23</sup> Development planning based on biased statistics could actually have the perverse result of directing resources away from where they are most needed. Recognizing this dynamic, many countries do not use vital statistics for development planning and instead rely on decennial population censuses, household surveys, and administrative records.<sup>24</sup>

*Problems with data verification, coordination, and distribution*

The statistical function of civil registration systems depends on standardized mechanisms and procedures for collecting, documenting, transmitting, storing, consolidating and analyzing the data collected as well as faithful and accurate observance of these procedures by local registrars. Unfortunately, fundamental problems arise with observing standards in the developing world context. Often registrars lack even the most basic facilities for maintaining registration files, most especially at the local level but also at the central level.<sup>25</sup> Yet even when state-of-the-art registration infrastructure exists, human factors can prevent accurate data collection and reporting. Registrars may be poorly trained in new equipment or simply fail to send reports to central authorities.

Coordination among various agencies responsible for statistical analysis and planning is necessary to prevent the duplication of efforts, leverage resources, and utilize statistics for development planning. Most countries have multiple identity

<sup>21</sup> UNICEF, *The State of the World's Children*, 2012, p. 123.

<sup>22</sup> UNSD, 'Availability of Vital Statistics', 2010, <[http://unstats.un.org/unsd/demographic/CRVS/VS\\_availability.htm](http://unstats.un.org/unsd/demographic/CRVS/VS_availability.htm)> (last accessed on December 12, 2012).

<sup>23</sup> UNICEF research (2005), covering 65 countries, indicates that unregistered children are generally delivered without the assistance of a health professional; they tend to be poor, live in rural areas, have limited access to health care and education, and suffer from higher levels of malnutrition and higher mortality rates. Their mothers tend to be uneducated and lack knowledge regarding the signs of childhood illness and the transmission of HIV. See also Duryea et al., 'The Under-Registration of Births in Latin America', pp. 14-18; Harbitz and Tamargo, 'The Significance of Legal Identity in Situations of Poverty and Social Exclusion', pp. 10-16.

<sup>24</sup> UNSD, 'Availability of Vital Statistics'.

<sup>25</sup> War and violence may destroy local facilities, as occurred in Nepal during the Maoist conflict.

documents that serve a variety of purposes, including not only birth, marriage, and death certificates, but also citizenship cards, national ID cards, and passports. Typically, the agencies responsible for issuing these documents each have their own systems for collecting and processing applications with no mechanisms for sharing, cross-checking, or consolidating the information they receive. In addition, government agencies responsible for planning and resource distribution often do not receive or analyze the data collected and thus cannot use it for development planning.<sup>26</sup>

#### *Political reality of budgeting allocation and policymaking*

Claims that disaggregated population data will ensure resources are allocated where they are really needed within different geographical areas or different groups in society ignore the political and economic realities of policy-making and budget allocation processes. The typical political economy of developing countries dictates the distribution of services, benefits, and opportunities based on political pressures, power dynamics, and special interests, not demonstrated need.<sup>27</sup> Even without detailed statistics, government officials may be aware of existing needs but constrained by competing demands for scarce resources. International donors may also define program priorities based on their own domestic political agendas, rather than an empirical analysis of competing needs. Nevertheless, accurate statistics may be a useful advocacy tool to aid government agencies in lobbying for international assistance or an increased share of the national budget. Similarly, civil society groups can use statistics as a basis to demonstrate pressing needs and to demand improved services for disadvantaged communities. Thus, statistics can serve an important function in negotiations with governments and donor agencies.

#### *Protecting human rights*

Another often-cited benefit of legal identity is that it can facilitate the safeguarding of human rights.<sup>28</sup> UNICEF, for example, has claimed that ‘child exploitation

<sup>26</sup> For example, ministries responsible for statistics collection and planning in Nepal and Bangladesh collected their data through surveys instead of civil registration systems.

<sup>27</sup> See generally, Thomas Parks and William Cole, ‘Political Settlements: Implications for International Development Policy and Practice’, *The Asia Foundation Occasional Paper No. 2* (2010).

<sup>28</sup> A converse human rights issue with legal identity is the concern that registration lists and sensitive information may be used to facilitate human rights violations such as genocide or other discriminatory treatments. See generally William Seltzer and Margo Anderson, ‘The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses’, in: 68 *Social Research* (2001), p. 481.

and abuse appears to be on the rise and thrive on non-registration.<sup>29</sup> The logic behind such statements is that registrations provide the evidentiary link essential to the enforcement of legislation intended to protect minors. Without a birth certificate to serve as proof of age, victims may not be able to avail themselves of legally defined rights and protections. Unfortunately, in the complex social, economic, political, and cultural context of children's welfare, it is unlikely that distributing birth certificates will alone have a meaningful impact on reducing incidences of child abuse without significant complementary reforms.

### *Child labor*

All countries generally express, at least nominally, an interest in restricting child labor (see, e.g., Article 32 of the widely ratified Convention on the Rights of the Child); yet in reality, prohibitions against child labor often do not extend beyond the realm of aspiration.<sup>30</sup> Failure to enforce child labor laws has been blamed, in part, on the fact that it can be difficult to establish the age of working children since many lack birth certificates. However, economic and political forces often work against the enforcement of child labor standards, which is not only a costly endeavor, but may face opposition from powerful interests. In the absence of powerful constituents (e.g., international consumers) pushing the issue, governments have little incentive to allocate the resources necessary for monitoring and enforcement. Due to widespread poverty, employment is generally viewed as a more desirable option than the alternatives, regardless of the working conditions. Research in Nepal and Cambodia found that even if child laborers did have birth certificates, they would be disinclined to reveal their true age and risk losing their jobs. Companies interested in self-monitoring their compliance with applicable labor standards (typically due to pressure from international watchdog groups and socially conscious consumers) use substitute means to verify age in the absence of birth certificates, such as certified medical examinations.

### *Juvenile justice*

Nearly all countries have made at least general commitments on juvenile justice rights (see, e.g., Article 37 of the CRC), with most excluding criminal liability below certain ages and otherwise offering juveniles reduced sentences, separate detention facilities, and procedural safeguards. Verifying the age of the alleged offender is often a critical factor in enforcing laws aimed at protecting minors. Accordingly, birth certificates could play a key role in protecting children facing

<sup>29</sup> UNICEF, 'The "Rights" Start to Life'; see also Cody, 'Count Every Child: The Right to Birth Registration', p. 21.

<sup>30</sup> According to the International Labour Organisation (ILO), 215 million children are still employed, with 115 million in hazardous work. The overwhelming majority of child laborers are family farm workers. International Labour Office, *Accelerating Action against Child Labour*, 2010, p. 5.

criminal charges. In practice, however, most courts accept a range of identity documents and conversely, a birth certificate is not always accepted as proof of age since fraudulent and counterfeit documents may be readily available. Besides documents, courts may accept testimony of family members or neighbors or seek expert medical opinions. Unfortunately, police and courts often seek to avoid using these alternate procedures and instead rely on subjective impressions of the person's appearance. Even when medical examinations are conducted, it is left to the courts' discretion to accept or reject the age determinations provided by medical experts.<sup>31</sup>

For legal identity to make a practical difference to juvenile offenders under these conditions, a host of complementary reforms are required to address other fundamental problems, such as weak institutions, low human resource capacities, and rampant corruption. For example, courts are often understaffed and lack the capacity to handle their current caseloads. As a result, juvenile offenders languish in detention beyond the maximum allowable period (even decades, as in one Bangladesh case<sup>32</sup>). Moreover, due to a lack of juvenile detention facilities, even when the offender's status as a minor can be established beyond doubt, more often than not, children are incarcerated with adults.

#### *Child marriages*

Early marriages have been recognized as a human rights violation that results in serious physical, psychological, and emotional harms, including increased risk of dangerous pregnancies, reduced opportunities for education, and increased risk of abusive situations and trafficking.<sup>33</sup> While generally prohibited by law, child marriages remain a widely accepted customary practice.<sup>34</sup> Lack of accurate and reliable birth registrations has been identified as a major impediment to the implementation of laws that regulate the age of marriage. Low-income parents, eager to rid themselves of the economic burden of an unmarried daughter, often conceal her true age to facilitate her marriage. Although often legally required to, registrars rarely demand proof of age and instead rely on the guardians' declarations. Alternately, child marriages are simply not formally registered. Indeed, even adult mar-

<sup>31</sup> In one case from Nepal, a boy claiming to be 14 years old faced charges for rape and murder. Attempting to prove that he was a minor and therefore, entitled to reduced sentencing guidelines, he produced not only his birth certificate, but also his school admission records, and a school certificate. Due to a slight discrepancy between his testimony and one of his documents, the court ordered a medical examination, which determined his age as sixteen, still below the age of majority. The court, nevertheless ordered him incarcerated in a regular prison, rather than sending him to a juvenile reform home. *HMG Nepal v. Samodh Mandal*, Kathmandu District Court, Criminal Case registration No. 367/729 (November 28, 2001).

<sup>32</sup> Md. Nazrul Islam, 45 DLR (HCD), 643 (1993).

<sup>33</sup> UNICEF, *The State of the World's Children*, 2009, pp. 33-34.

<sup>34</sup> UNICEF, *The State of the World's Children*, 2012, p. 123.

riages are rarely registered in many countries. In most cases, marriage tends to be a private, family affair that falls outside the scope of the state's reach. Truly combating child marriages would require addressing the pervasive issues of poverty and corruption. As long as there is a strong incentive to marry off young girls and identity documents are easily falsified, regulating the age of marriage is likely to remain a serious challenge.

#### *Other crimes victimizing minors*

Certain laws recognize the vulnerability of children and provide heightened protections to prevent their exploitation and abuse. For example, statutory rape laws criminalize sex with a minor under the age of consent. Other laws provide harsher sentencing guidelines for crimes committed against minors. In all such cases, the age of the victim is key, and legal identity could play a critical role in successfully prosecuting child abusers. However, as a result of low reporting rates, the majority of offenders escape punishment altogether. The usual barriers to justice, such as distrust of the courts and the high costs of filing a complaint, are compounded for child victims of sexual violence, who face threats of retaliation, shame and stigmatization, and dismissive attitudes from officials. Due to these formidable barriers, only a small fraction of cases are handled by the judicial system. Among those cases that do find their way into the courts, issues with age verification (even when a birth certificate is produced, as discussed above) can preclude the court from applying the correct law. Courts are also simply inconsistent in implementing the law, even with acceptable proof-of-age.<sup>35</sup>

#### *Conclusion*

Our findings indicate that on an individual basis, birth certificates provide little protection against human rights violation. Due to complex institutional and political problems, birth certificates are not a panacea to abuse. In many cases the possession of a birth certificate will make little difference to individuals facing abuse, but as law enforcement and courts become more reliable and robust, accurate birth certificates can serve a necessary role. On a macro scale, the widespread lack of registration can help perpetuate human rights violations by undermining efforts to monitor and document patterns of abuse, such as child labor and early marriages. For example, NGOs and governments seeking to address these violations face difficulties in verifying the extent of the problem. Without an empirical baseline, it is difficult to develop and advocate for appropriate solutions. Thus,

<sup>35</sup> See *HMG v. Jamindar Kurmi*, NKP, at 50-59 (1971), where a Nepalese court ignored a medical determination that a rape victim was 12-13 years old and ruled the sex was consensual, even though the age of consent was 16 years old.

widespread delivery of legal identity may improve overall efforts to understand and reduce human rights abuses.

#### *Access to services, benefits, and opportunities*

A third major advantage generally associated with birth registration is that it enables access to a broad range of benefits and opportunities, from school enrollment to employment authorization to social security. UNICEF (2005) has empirically established that unregistered children tend to have limited access to health care and education and suffer from higher rates of malnutrition and mortality.<sup>36</sup> Nevertheless, this correlation does not connote causation. The nexus between legal identity and access to benefits and opportunities depends on the following underlying assumptions, which often are not explicitly acknowledged: 1) the services, benefits, and opportunities actually exist, 2) laws, policies, or practices make access strictly contingent on the possession of a birth certificate, 3) easily available alternatives are not acceptable, and 4) other more fundamental economic, political, and social obstacles do not impede access, particularly for vulnerable groups. When these assumptions hold true, legal identity is a valuable commodity capable of making a meaningful difference in people's lives. Here we examine these assumptions for several specific benefits and opportunities.

#### *Education and health care*

Education and health care are perhaps the most important benefits citizens, especially children, can receive to improve their quality of life. Thus, reducing denials of access to education and health care due to a lack of legal identity is a key argument in favor of increasing registration rates. Research in Nepal, Bangladesh, and Cambodia indicates that children are rarely denied free primary education because they do not have birth certificates, though in some cases legal identity requirements for school enrollment are inconsistent, confusing, or unclear. For example, policies may mandate the production of a birth certificate, but substitutes are actually readily accepted.<sup>37</sup> This flexible approach likely reflects governments' recognition that education is an essential service and that stricter requirements could result in the exclusion of vulnerable populations.<sup>38</sup> Generally, birth certificates play a more prominent role in urban than in rural areas and for educational opportunities that

<sup>36</sup> UNICEF, 'The "Rights" to Start Life', pp. 5-25.

<sup>37</sup> For example, in the absence of any formal proof of age, a Cambodian child's eligibility to attend school may be determined by his or her ability to reach a hand over the head to touch the opposite ear. However, currently most Cambodian children have been registered so birth certificates are widely available as formal proof of age.

<sup>38</sup> A developed world analogue is the ongoing debate over access to higher education (and other benefits) for illegal or undocumented immigrants in the United States. See generally Stephen H.

are usually unavailable to vulnerable groups regardless of whether or not they possess legal identity, such as admission to private schools and higher education.

Similarly, access to essential health care is generally not contingent on presenting a birth certificate or other formal documentation of identity. While imposing such a linkage might motivate some to register, governments recognize that from a public health perspective, the danger of deterring unregistered individuals from accessing essential health services far outweighs the potential benefit of increasing registrations. Instead, some governments and donors have undertaken efforts to introduce birth registrations through avenues where public benefits, such as childhood vaccinations, vitamin drops, or anti-retroviral drugs, are already offered.<sup>39</sup> This ‘one-stop-shop’ strategy of utilizing essential services as a platform to register births is a promising approach for promoting registrations without threatening further exclusion of marginalized groups.

The evidence suggests that legal identity is not the key to improving access to education and health care. Instead, underlying economic and social factors must be addressed. Most countries lack the resources and capacity to deliver free education and health care to all citizens. For many families, especially rural subsistence farmers, education costs are the highest expense faced annually. This financial burden often results in low-income parents opting not to send their children to school (especially girls) or funding them only through primary levels, at which point they enter the work force to help support their families. In some limited instances, such as a marginalized ethnic group, a lack of legal identity may preclude receipt of even basic education services. Nevertheless, these instances are more likely due to the lack of recognized citizenship and out-right discrimination, not solely due to the lack of an official identification document.<sup>40</sup>

#### *Formal sector economic opportunities*

Legal identity is typically required to access a number of formal sector economic opportunities ranging from applying for government jobs to establishing professional credentials to opening a bank account. For example, in Nepal formal sector economic opportunities are reserved for Nepali citizens. Submission of a citizenship certificate is required to enter the army, the armed police, and the civil police force and to gain entrance and sit for licensing examinations for law, the civil service, and medicine. Obtaining permission to publish a newspaper or operate a

Legomsky ‘Undocumented Students, College Education, and Life Beyond’, in Bhabha (ed.), *Children without a State*, p. 17.

<sup>39</sup> Cody, ‘Count Every Child: The Right to Birth Registration’, pp. 39-43; Muzzi, ‘UNICEF Good Practices in Integrating Birth Registration into Health Systems (2000-2009)’, pp. 9-18.

<sup>40</sup> See also Park et al., ‘A Global Crisis Writ Large: The Effects of Being “Stateless in Thailand” on Hill-Tribe Children’, at pp. 518-530.

printing press is contingent on submitting the citizenship certificates of the publisher, editor, and members of the board of directors. Submission of a citizenship certificate is required to incorporate a company, to serve on a board of directors, to establish a private firm, and to purchase shares or debentures of a company. The internal rules of most banks require the submission of a citizenship certificate to open an account or to access credit. Other countries have similar requirements but may accept a broader range of legal identity documents such as birth certificates or student IDs.

Unfortunately, in many developing nations these types of opportunities tend to be remote for the vast majority of the population, who instead rely on agriculture and the informal economy for their livelihoods. However, with economic growth and urbanization, legal identity may take on greater significance for greater numbers of people. If legal identity requirements are consistently enforced, the access to formal sector opportunities could significantly drive demand of legal identity. Consequently, if the supply of birth certificates or other acceptable legal identity cannot keep pace with increasing demand, there is a risk that rent seeking will increase and vulnerable populations will face further exclusions.

#### *Mandatory retirement*

Enforcement of mandatory retirement ages for government officials and other formal sector employees also requires accurate age verification. In the absence of a reliable system of birth registrations, determining the exact age of elderly workers can be challenging. Dates recorded in identity documents obtained later in life, such as citizenship certificates and national identity cards, are often just an educated guess. Moreover, employees facing mandatory retirement have an economic incentive to falsify their birth dates, thereby prolonging their earning potential.<sup>41</sup> The residual effects of incomplete registration in older populations may be seen for many years, regardless of how well birth registration systems currently operate.

#### *Social welfare benefits*

Legal identity requirements for accessing social welfare benefits such as retirement assistance could present a serious obstacle for the disadvantaged populations these benefits are aimed at assisting. Those vulnerable groups most in need of government assistance tend to be the same groups least likely to have registration docu-

<sup>41</sup> One comical example from an interview in Bangladesh: a driver and his son were both employees of a well-known hospital in Dhaka. In order to get around the mandatory retirement age and ensure several more years of productive employment, the father stated his age to be in the thirties, thereby making him officially younger than his son.

ments. Since developing countries typically offer little in the way of social welfare assistance, ensuring that these scant resources reach those most in need is essential. Conversely, because resources are limited, simply providing legal identity to all eligible individuals will not necessarily guarantee the neediest will receive welfare benefits. Still, while some countries take a more flexible approach towards age and identity verification for welfare benefits, some countries do strictly condition access on presenting legal identity,<sup>42</sup> and in these instances, supplying identity to vulnerable groups is a necessary step towards providing them access to welfare benefits.

#### *International travel and migration*

Overseas travel and migration for employment are among the most tangible and highly-desired opportunities with clear-cut and direct links to identity documentation. Many workers in developing countries look overseas for the chance to earn a better living, and for developing nations, economic migration has significant implications for GDP growth and poverty alleviation, with overseas remittances generating desperately needed capital inflows. The desire for international travel is high among the reasons people are motivated to apply for registration documents, and robust markets for falsified and counterfeit travel documents, discussed below, further attest to the instrumental value of these documents.

For overseas travel, the ultimate document required is invariably a passport. In some cases (Nepal for example), additional documentation is needed even for domestic migration and short-term travel within the country. Obtaining a passport, may depend on other prerequisite legal identities, typically a driver's license, a citizenship certificate, and/or a birth certificate. Official passport fees can be a significant burden, and the use of middlemen and frequent demands for bribes and speed money also increase costs to passport seekers. Thus, in addition to documentary hurdles, the high cost of obtaining passports also limits access.

#### *Property rights*

Many economists assert that insecure property rights constrain business opportunities and restrict economic growth, as unregistered land cannot serve as collateral to access the credit needed to finance entrepreneurial endeavors.<sup>43</sup> Land concessions and urbanization throughout the developing world are raising property rights concerns in rural communities previously unconcerned about the se-

<sup>42</sup> For example, like other advantages in Nepal, social welfare benefits such as senior citizenship and widowhood allowances are limited to those who can prove their citizenship status.

<sup>43</sup> See, e.g., Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, 2003.

curity and fungibility of their land.<sup>44</sup> Currently, only a fraction of property in developing countries is formally registered. The likely reasons are numerous and diverse, including lack of demand, alternative views of land ownership, inefficient and costly land registration systems, complex and opaque land laws, governmental sovereignty concerns, and corruption.

Clearly legal identity alone cannot solve this complex and multidimensional problem, but it is a necessary prerequisite to implementing a system for secure property rights. Recording and documenting property transactions, including inheritance rights, requires a reliable means to establish identity and familial relationships. Many countries formally condition property registration or property transactions on the production of legal identity such as birth certificates or death certificates, although laws are often unclear and frequently revised. Awareness of these formal requirements is generally low among most citizens, and the desire to transfer land is often a primary reason for seeking legal identity. Particularly in inheritance cases, the lack of identity documentation often results in lengthy and expensive litigation, which delays case disposal and contributes to court backlogs.<sup>45</sup> However, litigating one's case in court is usually beyond the reach of most developing-world citizens. Improvements in land administration and access to courts are therefore co-requisites with the provision of legal identity for any material improvement in citizens' property rights.

#### *Registering to vote*

Legal identity may facilitate the compilation of voter registration lists, and help ensure that eligible voters are not excluded from exercising this fundamental civil right. Conversely, recent debates in the United States over voter identification laws highlight the potentially critical role legal identity may play in excluding otherwise eligible voters that lack the necessary identification document.<sup>46</sup> Many developing countries have healthy voter turnout without strong civil registration systems.<sup>47</sup> Interestingly, among the opportunities and benefits linked to legal identity, voter registration often stands out as having the most lenient requirements.

<sup>44</sup> See, e.g., Ward Anseeuw et al., *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project*, 2012.

<sup>45</sup> In one typical case was related by a Nepalese widow who sought to claim a share of her deceased husband's property. The case was decided in her favor, but she needed proof of citizenship to transfer the property into her name. The widow requested her brother-in-law's assistance to establish citizenship, but he refused to help, recognizing that her lack of citizenship would mean he retained the entire parcel of land. As a result, the widow was denied her rightful share of the property, even after years of litigation and a judgment in her favor.

<sup>46</sup> See, e.g., Ethan Bronner, 'Voter ID Rules Fail Court Tests across Country', in: *The New York Times*, October 2, 2012.

<sup>47</sup> Rafael L. Pintor et al., *Voter Turnout Since 1945: A Global Report*, 2002, pp. 83-84.

Research in Bangladesh, Cambodia, and Nepal consistently found a flexible and broad approach to voter registration, with multiple forms of identity accepted and limited enforcement of identity requirements in rural areas.<sup>48</sup> The relaxed identity requirements for voter registration may reflect the fact that politicians have a strong incentive to ensure that constituents are able to participate in the electoral process. A more cynical explanation is that less stringent identity requirements for voters allow politicians greater ease in manipulating elections.

### *Conclusion*

A realistic look at the linkages between birth registration and access to benefits and opportunities illustrates that in some cases registration is a crucial factor, in some it is merely a contributing factor, while in others it is a non-factor. Currently, in the developing country context, few government services are typically available and those that are available can often be obtained without formal proof of identity or through easily-accessible substitutes. When it comes to more sophisticated benefits and opportunities, however, vulnerable groups are often excluded, even if they have identity documents. Nevertheless, initiatives to improve birth registrations are needed because numerous countries are now introducing or increasing enforcement of policies that link access to basic services to legal identity.<sup>49</sup> As governments improve their capacity to provide basic services, these policies will make vital registration documents increasingly valuable, and exclusion of vulnerable groups due to lack of legal identity will become even more of a concern.

## OBSTACLES TO OBTAINING LEGAL IDENTITY

Due to a range of obstacles, the registration process in countries characterized by weak human resources and institutions often entails more time, money, and effort than it is worth, if registration is even possible. The barriers are particularly acute for vulnerable groups. The sections below analyze the common obstacles faced by applicants. Due to the combined effect of these obstacles, many potential applicants decide against registering.

### *Financial barriers and burdensome procedures*

Our research revealed the process of obtaining identity documents entails a variety of financial expenses, including official fees, fines for late registrations, opportu-

<sup>48</sup> Including in Nepal, which has far stricter identity requirements for other services and opportunities.

<sup>49</sup> See, e.g., Harbitz and Boekle-Giuffrida, 'Democratic Governance, Citizenship, and Legal Identity', p 35; Cody, 'Count Every Child: The Right to Birth Registration', p. 39.

nity costs, transportation expenses, and bribes. The extent to which these expenses deter registrations varies from family to family, depending in large part on their available resources. This is consistent with empirical research which found that disparities in household wealth are highly correlated with disparities in registration rates.<sup>50</sup>

For the most disadvantaged groups, official registration fees alone may be prohibitively expensive. The common perception, whether true or not, is that registration requires too much money and other basic needs take precedence. The rural poor are especially disinclined to register given their limited cash flow. Fines for late registrations add to the financial burden, and local registrars are inconsistent and arbitrary in levying late fines. Low-level bureaucratic processes regularly involve paying bribes, further inflating the cost of identity documents. Officially-free legal identities are routinely subject to bribery requirements, often on a sliding scale based on what the applicant can pay.

Beyond direct financial burdens, the registration process also presents procedural obstacles, bureaucratic hurdles, and burdensome evidentiary requirements. Surmounting these barriers translates into additional time and money, deterring many from registering. For example, applicants often incur significant opportunity costs in forgone wages since registering takes time away from work. For those who live in remote areas, the journey to the nearest registration office could be difficult, time consuming, and expensive. Moreover, inconsistent requirements for supporting documentation, shortages of registration forms, and irregular and inconsistent office hours sometimes result in applicants needing to make multiple trips.<sup>51</sup> Evidentiary requirements, including ad hoc extralegal requirements, often mandate that the applicant produce numerous other documents to register and/or require testimony by a family member. These requirements hinder refugees and migrants most especially.<sup>52</sup>

#### *Discriminatory law, practices, and attitudes*

Discriminatory laws, practices, and attitudes present a barrier to registrations, particularly for women and minority groups. Laws related to citizenship, birth registration, marriage, property, and inheritance may all contain discriminatory provisions which undermine the goal of universal registrations. For example, Nepalese law and practice, while undergoing recent changes, continues to discriminate against women with respect to foreign spouse citizenship and birth registration of

<sup>50</sup> UNICEF, ‘The “Rights” Start to Life’, pp. 7-10.

<sup>51</sup> Mobile registration campaigns are specifically designed to relieve these burdens.

<sup>52</sup> It should be noted that lengthy and burdensome procedures in obtaining legal identity are not restricted to developing countries, and under-registration of the poor and marginalized in developed countries also occurs as a result.

children out-of-wedlock.<sup>53</sup> Refugee children may be denied birth registration, in clear violation of human rights law. Beyond discriminatory laws, bigoted attitudes and beliefs pervade administrative institutions, further deterring registrations. For example, due to the rigid hierarchy of Nepal's caste system, registration officials often respond to certain groups with disdainful attitudes and condescending treatment. Those most likely to face outright harassment include single mothers, transsexuals, rural people, members of lower castes, and ethnic minorities. Single mothers especially report reluctance to register their children because of the stigma attached to having a child out-of-wedlock.

### *Institutional deficiencies*

Limited state capacity to deliver civil registration services is a fundamental barrier to the establishment of legal identity. Establishing and maintaining a complete, effective, and accessible civil registration system requires sufficient resources, political priority, enforcement capacity, and administrative infrastructure. These essential inputs, however, can be hard to come by, especially in countries characterized by weak institutions, infrastructure, human resources, and governance. In an environment of competing demands for scarce resources, a civil registration system may be a low priority item.

Unsurprisingly, civil registration systems are often poorly managed, under-funded, deficient in full-time professional staff, and lack adequate infrastructure and supplies. Lack of institutional independence at the central level can lead to political interference and under-funding.<sup>54</sup> At the local level, registrars often have other responsibilities perceived as more important (or lucrative), receive minimal oversight and training, and, as in Nepal, may be held criminally-liable for improperly issuing registrations. Registrars are thus disinclined to issue certificates. Service in rural districts is typically worse than urban areas given geographic burdens and reduced financial support.<sup>55</sup> Case studies of biometric identification programs suggest accurate and inclusive systems can be implemented, even in poor Asian and African countries, but challenges with institutional capacity remain.<sup>56</sup>

<sup>53</sup> Presentation of Sajana M. Amatya at The Asia Foundation Staff Justice and Security Workshop, Bangkok, August 30, 2012. See also Mona Laczko, 'Deprived of an Individual Identity: Citizenship and Women in Nepal', in: 11 *Gender & Development* (2003), pp. 76-82.

<sup>54</sup> Harbitz and Boekle-Giuffrida, 'Democratic Governance, Citizenship, and Legal Identity', pp. 25-26.

<sup>55</sup> Resource-intensive mobile registration campaigns, usually donor-funded, have yielded impressive results but raise concerns about sustainability. Muzzi, 'UNICEF Good Practices in Integrating Birth Registration into Health Systems (2000-2009)', p. 2.

<sup>56</sup> Alan Gelb and Julia Clark, 'Performance Lessons from India's Universal Identification Program', *Center for Global Development Policy Paper 020* (2013). See also, Gelb and Clark, 'Identification for Development: The Biometrics Revolution'.

### *Lack of knowledge and motivation*

Obtaining identity documents requires a basic level of knowledge, capacity, and motivation on the part of the applicant. For many potential applicants, the fundamental steps of acquiring information on the registration process and filling out the application forms present a formidable challenge due to illiteracy and language barriers.<sup>57</sup> Complete lack of awareness of the very notion of birth registrations may be a more fundamental barrier. While knowledge and information barriers can be addressed through awareness raising interventions, such as outreach campaigns,<sup>58</sup> unless the concrete benefits of obtaining identity documents are apparent, many will remain unmotivated to register. As discussed previously, the benefits and opportunities associated with legal identity can be speculative and remote, limiting demand. Most simply 'get it when they need it.'

New laws and policies making birth certificates compulsory for accessing benefits and opportunities may increase citizen motivation, but certain vulnerable groups are so excluded and marginalized that they are likely to remain outside the compass of legal identity. These include hermaphrodites, migrant workers, child domestic servants, floating populations, and groups living in inaccessible or politically sensitive areas. Racial and religious minorities also report a reluctance to register, due to fears that they could be targeted based on information collected through birth registrations, even if ethnicity or religion is not actually included in the identity documents.

## ALTERNATIVE MARKETS FOR LEGAL IDENTITY

Lack of demand and easy access to alternatives are two important obstacles to achieving universal legal identity. Public demand for legal identity depends on an analysis of the costs and benefits of obtaining legal identity documents as well as the availability of alternatives. If less expensive, more accessible, and equally effective substitutes are available, demand for official registrations will be significantly reduced. As noted above, a wide range of *legitimate substitutes* for legal identity documents may be accepted in practice, depending on the intended purpose. Legitimate alternatives to identity documents vary in their degree of formality, from family testimonials to religious documents, certified physical examinations, and alternate formal documents. The specific practices vary considerably by country. Beyond legitimate substitutes, alternatives from 'black' markets are also prevalent in developing countries. These alternative markets and their 'going-rates' for various identity documents are perhaps the truest gauge of both public demand

<sup>57</sup> UNICEF, 'The "Rights" Start to Life', pp. 10-12.

<sup>58</sup> Cody, 'Count Every Child: The Right to Birth Registration', pp. 31-35.

for legal identity and the barriers to obtaining it. Thus, a careful understanding of a country's alternative markets is important for any program seeking to increase legal identity.

The most common reasons applicants enter an alternative market are: 1) the applicant is eligible in principle, but excluded from the official system; 2) the alternative market provides more efficient service; 3) the applicant is ineligible to receive an official document; or 4) the applicant needs a false document to facilitate illicit activities. The first and second categories are a result of the obstacles of burdensome procedures, institutional incapacity, and discriminatory policies outlined above.<sup>59</sup> The third and fourth categories capture a graduated scale of culpability and deceit in terms of the intended use of falsified documents, from illegal migration to working beyond mandatory retirement ages to serious, violent crimes, such as human trafficking.

#### *Modes of operation and cost structures*

Through collaborative working relationships, sound incentive structures, and well-organized procedures, alternative markets are able to deliver fast and efficient services. Key players in the alternative markets are middlemen or 'fixers,' who work together with corrupt bureaucrats and/or criminal rings of counterfeiters to produce illicit identity documentation for a large and diverse clientele. The falsification of documents that are increasingly difficult to replicate (e.g. passports and driving licenses) is more likely to involve public officials. The most basic service of alternative markets simply involves paying a bribe, commonly known as 'grease' or 'speed' money, to bypass official procedures and get faster delivery of an otherwise legal document. Such expediting is routinely seen as legitimate by all involved. Outright false documents (based on false information) are also issued, facilitated by poor record-keeping and bribes paid to the officials in charge of processing.

Comparative research of alternative legal identity markets reveals pricing is a simple reflection of supply and demand. Both the pervasiveness and the price of fraudulent identity documents vary, depending on the particular document involved. Documents that take a long time to obtain, impose burdensome evidentiary requirements, and facilitate access to more opportunities are more likely to have robust markets.<sup>60</sup> Some of the most common examples of documents that

<sup>59</sup> For example, a Nepalese woman reported having a child as the result of incestuous rape. After the birth of the child, she decided to leave the country to avoid the ensuing stigmatization. The local registrar refused to register the child's birth, however, because the application was missing the father's citizenship certificate. The case went up to the Ministry level, but the authorities refused to issue the child a passport without a birth certificate. As a result, the mother was compelled to turn to the alternative market, where she managed to get a birth certificate for 6,000 rupees.

<sup>60</sup> For example, there are robust alternative markets in Nepal because so many benefits and opportunities are conditioned on possessing a citizenship certificate even though these certificates

meet these criteria are passports, academic certificates, and driving licenses. The cost of false documents generally depends on the urgency and means of the service seeker, the nature of the document, and the risks associated with the specific type of document falsification. Rates tend to be higher if the document yields significant benefits or if obtaining it entails considerable risks.

#### *Challenges to preventing alternative markets*

Despite adequate laws and even special governmental units dedicated to dealing with alternative markets, the likelihood of detection, prosecution, and conviction can be low. For example, Nepal has a range of legal provisions criminalizing fraudulent identity documents and holding various authorities responsible for initiating legal action. A special commission also has jurisdiction to prosecute corrupt officials involved in identity fraud (the Commission for the Investigation of Authority (CIAA)). Nevertheless, case filings in Nepal were strikingly low. Challenges to combating alternative markets for identity documents include the lack of systematic record keeping; unsophisticated investigative techniques; inadequate human resources; and the mutually beneficial web of relationships binding politicians, bureaucrats and black market document brokers to one another. In addition, according to informants in Nepal, the following are major factors that perpetuate alternative markets there:

##### *Low reporting*

Procuring false modes of legal identity through the alternative market is a mutually beneficial transaction between the buyer and seller that produces seemingly few negative externalities. It is, therefore, generally considered to be a 'victimless crime' and few cases are reported. Interestingly, those cases that are reported are frequently due to internal family disputes over property.

##### *Low penalties and impunity*

Only light punishments may be imposed for participating in the production and sale of fake identity documents. Even when harsh sentences are permissible, they may be rarely imposed. False document cases are often treated with outright impunity.

##### *Burdensome procedures and high standards of proof to establish corruption*

Filing charges in fake document cases may involve lengthy and burdensome procedures, including verification of the documents and an inquiry with the concerned

are difficult to obtain. In contrast, alternative markets in Cambodia are less prevalent because more identity documents are available and legitimately interchangeable. It is estimated that Nepal's alternative identity markets generate millions of rupees annually.

agency. These cases are also frequently delayed or lost due to high standards of proof<sup>61</sup> and the non-availability of records, since officials involved often destroy the original registration records to obstruct investigations.

#### *Involvement of organized crime syndicates*

The alternative markets in Nepal for fraudulent identity documents were found to be highly organized, based on well-established, mutually beneficial relationships among varying levels of government officials and external brokers. Alternative markets operating through organized crime syndicates make it difficult to pinpoint the actual persons responsible and the exact modes of operation.

### CONCLUSIONS

Legal identity is a critical and multifaceted issue with far reaching and pervasive implications, ranging from the distribution of public resources to human rights protections to accessing economic opportunities. The concrete value of legal identity is limited, however, by fundamental obstacles, such as weak institutions, limited resources, low political priority, and widespread poverty and corruption. Nevertheless, as global economic growth and development continues, legal identity will play an important role in ensuring effective and efficient administrative and judicial delivery of social benefits and basic rights on an equitable basis. What follows are concluding insights from our research.

#### *Birth certificates are an intermediate outcome*

Too often programs aimed at increasing civil registrations are based on an inadequate problem analysis that fails to differentiate between intermediate and ultimate outcomes. The ultimate goal is not simply to increase registration rates, but rather to improve access to services, benefits, protections, and opportunities. Program interventions are often based on the assumption that the distribution of birth certificates will lead to human rights protections and better distribution of resources and opportunities.<sup>62</sup> For the many reasons highlighted above, this eventuality is not certain; the goods often associated with legal identity do not automatically flow from the possession of a birth certificate. Given this reality, initiatives to increase birth registrations should be pursued, but these efforts should

<sup>61</sup> In one Nepal case, an assistant level employee, who was the custodian of twenty passports 'lost' in the process of distribution, admitted to selling the passports for 70,000 rupees. Despite this confession, the court found that the prosecution lacked sufficient evidence of guilt and dismissed the case.

<sup>62</sup> Rigorous analysis of the problem and proposed solutions is now commonly referred to in development practice as developing a 'theory of change' for a program intervention.

be coordinated with complementary reforms that aim to improve the delivery of essential services and make birth certificates more relevant to people's lives.

*Mainstream development projects must consider legal identity*

When designing mainstream development projects in areas such as education, health, land rights, and small-business development, donors need to analyze the domestic legal identity regime to identify how registration requirements could potentially limit the range of project beneficiaries. For example, donors funding education sector projects in Nepal should be aware that legal identity requirements may exclude those beneficiaries most in need of assistance, such as women and minorities. In cases where legal identity requirements do have an exclusionary impact on unregistered individuals, mitigation measures should be incorporated into the project design.

*The importance of understanding country context and system sustainability*

Establishing and maintaining a complete, effective, and accessible civil registration system requires sufficient funding, human resources, political priority, enforcement capacity, and administrative infrastructure. These essential inputs can be hard to come by, particularly in developing countries characterized by weak institutions, scarce resources, and widespread corruption. Given this reality, technical approaches that work in developed countries will not necessarily transfer unless adjustments are made to address critical issues and impediments. This challenge should not be underestimated. For example, if responsibility for registrations falls upon over-worked, underpaid, low-level officials, without any thought to developing performance-based incentive structures, it is unrealistic to expect high quality, customer-service oriented work standards. In some cases, government officials may have personal interests in maintaining a dysfunctional system that can easily be manipulated by insiders.

Nevertheless, international pressure and donor support have engendered an increased level of political priority, domestic attention, and government engagement on the issue of legal identity throughout the developing world.<sup>63</sup> Many legal identity projects have benefited from the involvement and dedication of proactive government officials, who have demonstrated a seemingly genuine interest in improving registration rates.<sup>64</sup> The more developed Latin American countries present case studies of successful civil registration services that have been established

<sup>63</sup> Cody, 'Count Every Child: The Right to Birth Registration', pp. 8-13; Muzzi, 'UNICEF Good Practices in Integrating Birth Registration into Health Systems (2000-2009)', pp. 1-9.

<sup>64</sup> For example, the Brazilian state of Bahia implemented successful 'one-stop shops' for the provision of citizen documents under the leadership of newly-elected governor Paulo Souto. See

and maintained before donor intervention and/or after donor support has ended.<sup>65</sup> It remains unclear how much these success stories are due to broader trends in economic development (e.g., increases in hospital births) and improvements in governance (e.g., reduced corruption) or due to specific institutional measures that donors might be able to transfer regardless of a country's development stage.<sup>66</sup>

#### *Sequencing issues: Generating both supply and demand for legal identity*

A functioning civil registration system relies on both state supply and public demand. Imposing strict identity requirements to access important benefits and opportunities will incentivize citizens to register and increase demand.<sup>67</sup> However, at least in the short term, this strategy risks further excluding unregistered individuals and increasing rent seeking. Alternatively, focusing on supply by building the necessary infrastructure to accomplish universal registrations is resource intensive and makes little sense unless registration documents have a concrete instrumental value. Even if the registration process is affordable, straightforward and user-friendly, citizens will lack the motivation to register if the practical value of doing so is not apparent. In response to these problems, current 'good practices' integrate birth registration and the provision of health services, either placing registrars in health institutions or tasking community health workers with dual roles of providing health care and registering children.<sup>68</sup> This approach can both reduce the burden of registering and increase the demand.

#### *Biometrics promise improved identity accuracy but challenges remain*

Countries are increasingly using unique biometric data such as fingerprints and iris scans for identification and authentication systems. Gelb and Clark recently surveyed 160 cases of biometric data use in developing countries for financial services, social transfers (compensation and cash transfers), civil service reform (monitoring payrolls and attendance), health programs, and elections.<sup>69</sup> Some

Michael Schareff, 'A Higher Standard of Service in Brazil: Bahia's One-Stop Shops, 1994-2003', Innovations for Successful Societies working paper (2013).

<sup>65</sup> See Schareff, 'A Higher Standard of Service in Brazil' and Harbitz and Boekle-Giuffrida, 'Democratic Governance, Citizenship, and Legal Identity', pp. 31.

<sup>66</sup> The likely answer is both factors are at play. Civil registration coverage and per capita GDP are mildly correlated but with many outliers (Setel, 'A Scandal of Invisibility').

<sup>67</sup> An interesting inverse to this policy is when access to identity and other recording services is conditioned upon payment for public goods such as water, incentivizing service payment using demand for legal identity (S.E. Saunders, personal observation of aid project in rural Madagascar, 2010).

<sup>68</sup> Cody, 'Count Every Child: The Right to Birth Registration', pp. 39-43; Muzzi, 'UNICEF Good Practices in Integrating Birth Registration into Health Systems (2000-2009)', pp. 9-18.

<sup>69</sup> Gelb and Clark, 'Identification for Development: The Biometrics Revolution'.

countries have applied biometrics for limited, specific programs whereas others are moving towards a foundational, nation-wide ID system. For example, India's Unique Identification (UID) project, currently underway, is a foundational ID system seeking to enroll India's entire 1.2 billion residents.<sup>70</sup> Indeed, the potential for less developed countries to 'leap frog' more developed countries in biometrics identity delivery and use is substantial given the political, privacy, decentralization/fragmentation, and cost hurdles of ID systems in many developed nations.

Use of biometrics can decrease or foreclose the possibility of counterfeiting, greatly increase system accuracy, and reduce the need for paper documentation. By increasing system accuracy, institutions may increase their use and reliance on legal identity, which may in turn reduce the opportunity for arbitrary or discriminatory decision-making but may also increase the harm to populations lacking identity. Thus, the fundamental problems of legal identity outlined above largely remain with biometric technology. The delivery and inclusive use of biometric identification systems requires governmental priority, resources, and capacity.

*Complementary reforms are needed to make legal identity meaningful*

The value of a civil registration document is only as far reaching as the state's capacity to provide services and enforce laws intended to protect citizens' rights. In countries characterized by poor governance, weak institutions, and resource constraints, legal identity may make little practical difference without complementary reforms. For example, if education and health departments are operating on meager budgets, the services they can provide will remain limited, regardless of the number of people carrying birth certificates. In the best case, governments will respond to increased demand by reallocating resources to meet citizens' needs. But experience demonstrates that increased demand can also lead to the creation of new barriers intended to limit access. Similarly, links between legal identity and human rights protections are based on the assumption that courts have the capacity, resources, and determination to decide cases fairly and the legitimacy and power to have their decisions enforced. If laws are regularly violated with impunity, the ability to establish one's legal identity will do little to help those whose rights have been violated. This is not to say that an effective civil registration system is not worth pursuing, but only to be realistic about what it can and cannot accomplish. Alone legal identity documents can accomplish little, but they can be an essential piece of a larger reform agenda for promoting social inclusion.

---

<sup>70</sup>Gelb and Clark, 'Performance Lessons from India's Universal Identification Program'.