

## MANUFACTURING STATELESSNESS THROUGH EXCLUSIONARY CITIZENSHIP LAW: A COMPARATIVE STUDY ON KENYA AND SOUTH AFRICA

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**Abstract.** Citizenship is an essential aspect of nationality; it is formed by the laws of a country and influences an individual's rights and freedoms. This article compares statelessness within the Kenyan and South African legal systems, and discusses case law and the views of legal scholars on statelessness in these jurisdictions. The article also reviews international laws that are supposed to ensure citizenship and protect stateless people. Its aim is to strengthen the legal framework of these countries in delivering people's rights to citizenship or nationality. The reviewed legal framework includes the Constitution of the Republic of Kenya, Kenya's Citizenship and Immigration Act of 2011, the Constitution of the Republic of South Africa, and the Citizenship Act of 1995. The article also interrogates the memberships of Kenya and South Africa in various international treaties related to the fight against statelessness and ensuring human rights, including the rights of minorities. The article draws similarities between aspects of the Kenyan and South African legal systems which impact statelessness, including discrimination through colonial rule, ethnicity, and gender.

**Keywords:** citizenship, statelessness, minorities, exclusion, Kenya, South Africa

### Introduction

Citizenship is an essential part of a person's identity as it not only defines their legal status in society, but also defines their participation in the political and economic spheres and provides autonomy (Dronkers & Vink, 2012). However, citizenship laws in some countries can be discriminatory and exclusionary, can deny individuals the opportunity to acquire nationality, and may prolong their statelessness.

A stateless person is subject to discrimination, which results in the infringement of their fundamental human rights (Blitz, 2009). This article focuses on the impact of citizenship legislation on stateless individuals in Kenya and South Africa. Both countries have constitutional provisions and legislation regarding the right to citizenship. Notwithstanding these provisions, there are instances of statelessness and discrimination regarding citizenship rights in both countries.

Discriminatory citizenship laws directly cause barriers to legal recognition and protection. Those without citizenship face numerous challenges due to their precarious legal standing: they have limited access to education, healthcare, and employment because they lack a recognized nationality (Goris et al., 2009). Moreover, discrimination, exploitation, and the violation of human rights are daily realities for stateless individuals. Their

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inability to obtain citizenship also prevents them from voting or participating in decision-making procedures within their host countries.

Global action to end statelessness – a campaign advocated for by the United Nations High Commissioner for Refugees (UNHCR), with 66 participating states including Kenya (UNHCR, 2020) – reflects global concern about the persistence of statelessness issues. The Global Plan for Action 2014–2024 was implemented in order to commit to ending statelessness by the end of this period (UNHCR, 2014). However, globally, the number of stateless persons has since increased, and a significant increase in displacement and forced relocation, a major cause of statelessness, was observed between 2011 and 2019 (UNHCR, 2019). The UNHCR has estimated the number of stateless persons to be 10 million (UNHCR, n.d.-a; see also, Rajan, 2023); however, some studies (Cole, 2017; Sköld, 2023) estimate the total number of stateless persons worldwide to be as high as 15 million. Although statelessness is a global issue common to many countries, the cause of the statelessness problem in African countries, such as Kenya and South Africa, has some similarities.

It is very difficult, if not impossible, to obtain demographic records from the region or country of origin. This is the first step in proving one's identity. For instance, in Kenya, many Makonde, Nubians, Galjeel, Pemba Waata, Coastal Arabs, and Shona descended from Somalia, Burundi, Congo, and Rwanda are second- or third-generation refugees fleeing from wars and conflicts in their countries of origin. In practice, these people are stateless since they are not entitled to citizenship in Kenya, notwithstanding the fact that they were born and raised there. This is because they cannot register their birth, or even their existence, in their parents or grandparents' country due to local instability, inaccessible local bureaucracy, and state succession or restoration. Moreover, their country of origin may no longer exist.

Article 14(1) of the Constitution of the Republic of Kenya (2010) guarantees the right to citizenship by descent to those born in Kenya, who must at least have one parent who is a citizen of Kenya. Article 15 of the Constitution outlines the acquisition of Kenyan citizenship through naturalization: a non-citizen of Kenya can register to become a Kenyan citizen if they have lived in the country for 7 years, or have been married to a Kenyan citizen for 7 years (see also, Kenya Citizenship Act, 2010; Kenya Citizenship and Immigration Act, 2011). However, Shona men and women who are married into other Kenyan ethnic groups cannot attain citizenship by naturalization because Shona is not a recognized Kenyan ethnic community (Wagalla, 2019), and applicants for naturalization must be from a recognized ethnic community. Many people from unrecognized ethnic communities, particularly those of Nubian and Shona descent, face significant challenges in obtaining Kenyan citizenship (Abuya, 2021).

Similarly to Kenya, birth within South Africa does not grant an automatic right to South African citizenship. For a person to be registered as a South African citizen at birth, at least one parent must be a South African citizen (South Africa Citizenship Act, 1995, Article 3(1)). Citizenship by naturalization requires one to have been a resident in the Republic for at least 8 years (Article 5(1)). While South Africa is a party to international agreements and regional protocols aimed at eradicating statelessness, there remains a pressing need for a comprehensive legislative framework to address the problem effectively. The country's citizenship regulations prioritize nationality based on bloodlines, making it difficult for stateless groups, such as children born to foreign parents, to obtain legal recognition. Therefore, stateless people in South Africa frequently risk arbitrary arrest, restricted access to healthcare and education, and significant challenges in finding and maintaining stable employment.

Through desktop research, this article reviews the legal frameworks in Kenya and South Africa that establish the exclusivity of the citizenship laws that contribute to statelessness. The implementation of the current legal systems in both countries leads to poor registration, discrimination, and exclusion. There are similarities when it comes to discrimination against gender, ethnicity, and historical colonial rule. The situations in Kenya and South Africa

highlight the urgent need for comprehensive legislative changes to address statelessness and ensure stateless individuals' protection and social inclusion. Making progress requires coordinated effort at the international, regional, and national levels.

Thus, the article focuses on how the existing laws in Kenya and South Africa discriminatively and exclusively contribute to statelessness, and in what ways they differ or are similar in their contribution.

## **1. Historical and theoretical background**

Citizenship legislation has been shaped by historical, social, and political factors, and significant changes have been made to accommodate evolving notions of identity, belonging, and rights. Everyone possesses the right to choose their nationality, and the freedom to choose, alter, and keep one's nationality is implicit. States do not hold an absolute right to determine citizenship within their borders; they are bound by human rights obligations when granting or revoking citizenship. Discrimination based on minority status, religion or belief, age, gender identity or expression, disability, language, race, ethnicity, sex, sex traits, or sexual orientation is one of the leading causes of statelessness (Peden, 2021; Petersen, 2019; Kochovski, 2013; Lyapina, 2019; Akstinienė, 2017). More than three quarters of the projected global stateless population consists of members of minority groups, and the hardships currently faced by these groups are exacerbated by statelessness.

Inaccessibility and limitations in the acquisition, alteration, or retention of nationality and the passing of nationality to one's children may all be sources of discrimination for women from disadvantaged backgrounds (Lopez Oggier, 2022; Peden, 2021). While granting citizenship is crucial for ensuring the equal enjoyment of human rights and freedoms, it is not a panacea for the stigma and prejudice that stateless people endure. In the lead-up to the October 2021 Roundtable on Equality and Non-Discrimination in Nationality Matters to End Statelessness, the Office of the High Commissioner for Human Rights (OHCHR) and the UNHCR 'undertook a stocktaking on national laws, policies and practices in this area' (UNHCR, n.d.-b).

The situation of the Rohingya in Myanmar serves as an example of statelessness resulting from discriminatory citizenship rules. Parashar and Alam (2019) assert that the systematic religious discrimination against the minority Rohingya in the national laws of Myanmar has contributed to the formation of statelessness. The plight of the Rohingya demonstrates how citizenship rules may be exploited to prolong ethnic-based exclusion and statelessness via legal procedures such as the 1982 Citizenship Law, which denied them citizenship and subjected them to persecution (Ahsan Ullah, 2016; Kyaw, 2017). This example also shows how citizenship rules can be altered to exclude specific racial, religious, or political groups, further underscoring the potential for discriminatory practices within citizenship frameworks.

The concept of birthright citizenship finds its roots in ancient civilizations. As Ramsey (2020, p. 3) explains, birthright citizenship originates in the Roman legal doctrine, where it was known as *jus soli*, or the 'right of the soil'. Other civilizations later embraced this concept, including medieval England, where children born within its borders were considered English subjects. The emergence of nation-states in the 18th and 19th centuries brought significant changes to the concept of citizenship. The French Revolution was influential in popularizing citizenship as a fundamental right, emphasizing equality and universality over birthplace or social status (Siegelberg, 2020). However, while citizenship was expanding in specific ways, exclusionary citizenship rules also surfaced.

Birthright citizenship is the subject of ongoing legal interpretation and debate in the U.S. The concept of birthright citizenship was established by the U.S. Constitution's Fourteenth Amendment, enacted in 1868 (Ramsey, 2020, p. 5). According to the amendment, 'All persons born ... in the United States, ..., are citizens of the United States'.

However, differing interpretations of this clause have led to disagreements. Ramsey (2020, p. 7) charts the evolution of interpretations of birthright citizenship in the U.S. In *United States v. Wong Kim Ark* (1898), the Supreme Court upheld birthright citizenship for children of non-citizen residents. Based on the *jus soli* concept, the court ruled that children born to lawful permanent residents, regardless of their parents' citizenship, are entitled to birthright citizenship. The matter of birthright citizenship has remained controversial in recent years. Ramsey (2020) highlights the rise of originalist arguments, which claim that birthright citizenship should exclusively apply to individuals born to citizens or legal permanent residents. Proponents of this perspective argue that granting citizenship to the children of undocumented immigrants was not intended by the Fourteenth Amendment.

However, through these two doctrines, the majority of States have yet to come up with procedures, laws, and regulations that ensure that they protect stateless persons. The available laws and procedures are embedded with discriminatory rules that contain several gaps in attaining nationality. Stateless persons are thereby denied the right to citizenship (Songa, 2021). As was previously mentioned, citizenship by birth in Kenya and South Africa is not automatic; the child must have at least one parent entitled to citizenship in these countries.

Focusing on Alberta, Canada, Onciul's (2018) study examined the intersection of community involvement, curatorial practice, and museum ethos. While this material does not directly address citizenship regulations, it does shed light on the historical context of museum procedures. By examining the role of museums in local communities, we can gain insights into the evolving understanding of citizenship. Onciul (2018) argues that the effects of colonial history on Alberta museums have profoundly impacted indigenous people: 'Colonialism had a lasting impact on indigenous communities, as their citizenship rights were often suppressed, resulting in the marginalization of their cultural heritage within museum spaces' (p. 720). This underscores the historical power dynamics that have shaped indigenous groups' citizenship and cultural representation within mainstream Canadian society. As is highlighted below, colonialism also impacted the Nubian community of Sudanese descent who came to work in Kenya, where they experienced discrimination by the post-colonial government.

Mohsin (2020) highlights the indifference that stateless individuals encounter, emphasizing the importance of citizenship and its legal frameworks in preserving peoples' rights and well-being by arguing that 'the emergence of statelessness can be traced back to historical events such as the dissolution of empires, armed conflicts, and discriminatory citizenship laws' (p. 3). These historical factors have led to the creation of stateless communities, leaving them vulnerable to exclusion and discrimination and limiting their access to fundamental rights. In a similar vein, Latham-Sprinkle et al. (2019) explored the vulnerabilities of migrants, including their susceptibility to forced labour, modern-day slavery, and human trafficking. Understanding the systemic issues faced by migrant populations requires an examination of the historical background of migration and its relationship to citizenship legislation. The authors contend that 'historical migration patterns, economic disparities, and inadequate legal protections have created conditions that facilitate human trafficking, modern slavery, and forced labor' (p. 5). This demonstrates how historical events and changing legal systems have influenced immigrant experiences and citizenship status.

The roots of citizenship legislation can be traced back to ancient societies such as Athens and Rome, where membership in a political organization entailed certain rights and benefits. However, it was only in the modern era that citizenship became crucial for nation-state formation. Harpaz and Mateos (2019, p. 844) argue that 'citizenship has become a central field of struggle over the allocation of rights, privileges, and resources'. During the Enlightenment, with the development of liberal political theory, the concept of citizenship underwent significant transformation, becoming increasingly associated with fundamental rights, inclusion, and equality. Jelin (2019) affirms that 'Enlightenment thinking proclaimed the existence of universal natural rights, as well as the principle

that the people are the ultimate source of political power' (p. 103). This period laid the foundations for the development of contemporary citizenship legislation.

Citizenship and national identity have been closely interrelated since the emergence of nation-states in the 18th and 19th centuries. Citizenship has come to symbolize inclusion and belonging within a particular country. Harpaz and Mateos (2019) argue that 'citizenship has been the main tool for defining the boundaries of the political community, and as such, it has become an essential strategic resource in the era of globalization' (p. 843). Citizenship regulations during this time often exhibited exclusionary and discriminatory tendencies. Jelin (2019) points out that 'in many cases, citizenship was only granted to individuals who belonged to the dominant ethnic, cultural, or racial group' (p. 104). This exclusionary approach aimed to maintain the homogeneity and cultural cohesion of nation-states. However, in recent decades there has been a growing trend towards expanding citizenship rights and recognizing diverse national identities.

In the same study, Harpaz and Mateos (2019) also discuss the increasing prevalence of dual nationality as a strategic tool for individuals and nations. They observe that 'the growing incidence of dual nationality has facilitated the coexistence of multiple national identities, blurred the boundaries of national citizenship, and challenged the idea of exclusive allegiance' (p. 846). This development draws attention to the ways in which citizenship evolves and can threaten to undermine traditional ideas of allegiance and belonging. Jelin (2019) further highlights that citizenship encompasses civil and political rights as well as social, economic, and cultural rights; it is a multidimensional concept that goes beyond legal status, and 'citizenship must be defined not only in terms of civil and political rights but also as a set of social, economic, and cultural rights' (p. 105). Recognizing this broader perspective is essential in defending individual rights within democratic societies and promoting social inclusion.

Exclusionary citizenship regulations not only impact individuals directly, but also have far-reaching consequences for communities of stateless people. The intergenerational nature of statelessness, in which stateless parents are more likely to have stateless children, perpetuates cycles of vulnerability and marginalization. Stateless people may be unable to flourish socially and economically due to a lack of access to healthcare and education, leading to persistent socioeconomic inequalities. Recognizing the significance of resolving statelessness, international and regional organizations, such as the African Union and the UNHCR, have called for the revision of exclusionary citizenship laws and the protection of stateless individuals. In addition, international campaigns such as the UNHCR's *Belong Campaign* have attempted to eradicate statelessness by 2024 through legislative reforms, streamline nationality verification processes, and increase public awareness. Stateless individuals are impacted by adverse effects stemming from exclusionary citizenship policies, including limited access to basic necessities and heightened vulnerability.

Sutton (2018) discusses statelessness and the rights of stateless children in Kenya and South Africa, describing how children become stateless due to arbitrary laws that discriminate against them. These laws create a situation of trans-generational statelessness, which, if not addressed urgently, will ensure that vulnerable children have no remedy either today or in the future. The author observes that despite both countries being members of various international treaties that address statelessness, discrimination against stateless children is still present in these countries (Sutton, 2018, p. 1).

To summarize, various perspectives on individual rights and entitlements have significantly contributed to the development of citizenship law. However, despite these advances, the issue of statelessness persists for millions of people worldwide. Discriminatory and exclusive citizenship regulations and armed conflicts perpetuate statelessness. Urgent action is required from policymakers and practitioners to tackle this problem by implementing and enforcing inclusive citizenship laws and policies.

## 2. The human rights infringed by a lack of citizenship

The United Nations Universal Declaration of Human Rights (1948), the African Charter on Human and Peoples' Rights (1981; hereinafter – the African Charter), Chapter 4 of the Constitution of Kenya, and Chapter 2 of the Constitution of South Africa give various rights to all people, the infringement of which results in tangible life consequences for victims. Therefore, the protection of these rights is very important. The Universal Declaration of Human Rights provides for the protection of human rights and the substantial exercise of these rights in various aspects of life. To expound on this, the African Charter provides for the exercise of personal rights even to minority groups. The UN declaration also obligates member states to allow minorities to participate in the economic and political progress of a nation, while at the same time requiring that a state should provide an environment that allows the development of culture and heritage.

Stateless persons are denied the privileges set forth in the Universal Declaration of Human Rights. The rights provided for by international treaties are designed to protect the rights of minority groups, including stateless individuals. The enforcement of these rights is sometimes a challenge since the declarations do not bind non-member states. However, these statutes are important since they provide a basis in the implementation of human rights. The Universal Declaration on Human Rights allows countries to become aware of the minority groups within their borders and grant them their rights under the document.

Stateless people are faced with infringements of their basic rights. The most commonly infringed human rights include freedom from discrimination, which is provided for under Article 2 of the Universal Declaration of Human Rights, Article 2 of the African Charter, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966) and Article 2 of the Discrimination (Employment and Occupation) Convention (1958). Under the Constitution of Kenya (2010), Article 27 gives all people the right to equality and freedom from discrimination, and the same applies to Articles 9–11 of the South African Constitution (1996). International law requires that every person is protected against discrimination, irrespective of their nationality. Subsequently, through the principles of international law, states parties are obliged to remove all discriminatory barriers and ensure the equality of all persons in all spheres of life (Opiyo, 2017). A core tenet of human rights is that, as a matter of principle, no human being should be rendered a stateless person, as statelessness limits the enjoyment of human rights. The vulnerability that comes from being stateless can lead to the expulsion of an individual from a country and from their habitual place of residence (Batchelor, 1998).

The statelessness of marginalized persons has been raised in courts of law in a number of cases that set precedents that contribute to the adjudication of such matters. This section discusses several cases that have been decided in Kenya and South Africa, and also reviews cases that have been discussed in international forums. Case law associated with human rights is crucial in the transformation and formulation of social progress. The litigation of these cases has become an important tool in the interpretation, promotion, and protection of fundamental human rights and freedoms.

The case of the *Nubian community in Kenya v. Kenya*, as referred to by Songa (2021), was fundamental for the parties concerned. This case was lodged by the Open Justice Initiative before the African Commission on Human and People's Rights (hereinafter – African Commission). The dispute revolved around the question of the origin of the Nubian community, despite them having lived in Kenya for over a century. Members of the Nubian community faced challenges in attaining citizenship and related identification documents despite having been born in Kenya. When the complaint was lodged, there were over 100,000 Nubians in Kenya (Open Society Justice Initiative, n.d.). The origins of the Nubian community are in Sudan, and they were brought to Kenya as soldiers by the British government under colonial rule. These community members were not taken back to their homes, and most ended

up residing in Kibera, Nairobi. Issues regarding their nationality were never resolved by the British government or the post-colonial Kenyan government. Members of the community were denied identification documents as well as political participation rights, and the same discriminatory and exclusive actions regarding their citizenship rights still apply today. The case was frustrated at the high court in Kenya on the grounds of procedure and on substantive grounds.

The frustration of this case was based on the exclusivity of Kenyan laws, as can be seen from the rules of civil procedure. After its institution in the high court in 2003, the case was objected to on grounds of administration and based on establishing the legality or capacity of the complainants. Secondly, in terms of the administrative powers of the court, high court judges lacked the capacity to address the matter since there had not been a response to correspondence sent to the chief justice on the administration of the case.

Other frustrations were met on substantive grounds, including that the constitution at the time only provided for individual rights and failed to provide for collective rights. Therefore, the grievances raised by the community did not have a remedy in law since they were group rights. In 2006, the case was brought to the African Commission, having failed in the Kenyan judicial system after the high court found the application to lack foundation under Kenyan law.

Ultimately, the Nubian case failed in the Kenyan courts due to the failure of the Constitution as it existed then to acknowledge cultural, social, and economic rights. These rights have since been recognized and established under Article 43 of the Constitution of Kenya (Songa, 2021, p. 258). The African Commission held that the Kenyan judicial system had violated various rights under the African Charter, including freedom from discrimination under Article 2, equal protection of the law, and equality under Article 3. Kenya had also breached Article 14, which provides for the right to property. The Commission held that the rights conferred to the Nubian community to use land in Kibera were sufficient to allow Nubians to hold property in Kenya; it was sufficient that the land was communal land, not government land. The African Commission held Kenya liable for subjecting the Nubian community to an arbitrary vetting process that lacked foundation in Kenyan law and for subjecting the community to marginalization, which was irrational and unjustifiable. In regards to identification documents, the Kenyan government was held liable for infringing the following rights of Nubian community members: movement, participation in political processes, work, education, protection of the family, and protection of vulnerable groups.

The second case related to statelessness in Kenya was the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative on behalf of children of *Nubian descent in Kenya v. Kenya*. The case was brought before the African Committee of Experts on the Rights and Welfare of Children of Nubian descent. The case was founded on the prejudice that Nubian parents experienced regarding the right to nationality for their children, a situation created by the exclusivity and discrimination of the laws of Kenya. Parents had difficulty obtaining birth certificates at birth, and Kenyan law also provides that a birth certificate is not proof of citizenship (Songa, 2021, p. 259). Since birth is not automatically a qualification for citizenship, there were additional requirements such as descent – at least one parent must be a qualified Kenyan citizen. This meant that the Nubian children also had to undergo a vetting process to attain citizenship. These acts and laws violated Article 6 of the African Charter on the Rights and Welfare of the Child (1990); the state was also found to have violated Article 3 of the same Charter in that the vetting process had failed to meet legitimate expectations and eroded the dignity of the Nubian children. Other rights the state was found to have violated include the right to health and the right to education. The Committee also set out several remedial measures, including requiring the Kenyan state to institute legislative and administrative strategies for ensuring that Nubian children who had been rendered stateless could attain citizenship. The legislation was thus to ensure that any discriminatory provision of the law was amended.

### 3. Kenyan citizenship laws and statelessness

A comprehensive understanding of Kenyan perceptions of citizenship laws and statelessness requires the consideration of historical, legal, and social factors. The legal framework for citizenship in Kenya was established by the Citizenship Act (2010) and amended by the Citizenship and Immigration Act (2011). Furthermore, academic works by Muimi (2021), Ng'weno and Aloo (2019), and Birkvad (2019) shed light on the intricate matrix of issues surrounding citizenship.

The complex history of Kenya's citizenship rules requires careful examination. Article 14 of the current Constitution of Kenya, ratified in 2010, guarantees citizenship at birth for individuals born in Kenya or to a Kenyan parent outside the country, provided that they do not acquire citizenship of another nation. However, this provision has repeatedly been challenged, and the Kenya Citizenship and Immigration Act was passed in 2011 to address these concerns. This Act provides detailed guidelines on citizenship and immigration matters in Kenya. Article 6 of the Act defines citizenship by birth, stipulating that at least one parent must be a Kenyan citizen at the time of the child's birth.

Nonetheless, the law acknowledges that a child born in Kenya may still be stateless and offers provisions for their registration as a Kenyan citizen in specific circumstances. According to Section 7 of the Act, 'a person born in Kenya after the effective date shall be a citizen by birth if, at the time of delivery, that person has at least one parent or grandparent who is or was a citizen of Kenya by birth' (see also, Constitution of Kenya, 2010, Article 14). These legal provisions demonstrate Kenya's efforts to address citizenship issues while recognizing the potential vulnerability of individuals at risk of statelessness.

The statute provides detailed guidelines for the registration and naturalization processes by which one may acquire Kenyan citizenship. As outlined in Section 8, the applicant must have been a permanent resident of Kenya for at least 7 years and have a valid work permit or exemption from requiring one. Similarly, Section 9 stipulates that an applicant must have been a resident of Kenya for at least 7 years, possess a valid work visa or exemption, and exhibit good character: 'A person who has been lawfully resident in Kenya for a continuous period of at least seven years and who satisfies the prescribed requirements may apply to be naturalized as a citizen of Kenya' (Citizenship and Immigration Act, 2011, Article 13). Despite these efforts, many individuals in Kenya remain without citizenship. Research conducted by the Kenya National Commission on Human Rights (KNCHR) reveals that approximately 18,500 people lack a nationality, with a further 6,000 individuals at critical risk of statelessness (Albarazi, 2014; KNCHR & UNHCR, 2010). This study brings to light various factors contributing to statelessness, including a lack of paperwork, inter-ethnic marriages, and a dearth of constitutional safeguards protecting citizenship rights.

The hardships faced by stateless individuals in Kenya extend beyond the absence of citizenship, as they are systematically denied access to vital services such as employment, healthcare, and education. Stripped of legal protections, stateless individuals are at risk of being detained and deported. The KNCHR study puts forth a range of actionable recommendations to address this pressing issue. These include the establishment of a formal process for determining statelessness, the provision of documentation to those affected, and the introduction of explicit provisions for citizenship within the constitutional framework.

Kenya has made commendable progress in addressing statelessness. In 2016, the government launched a campaign to identify stateless people and provide them with identification cards, thereby giving them access to essential services and protecting them from incarceration and deportation. Remarkably, the campaign successfully registered more than 12,000 stateless people. However, challenges persist, and further steps are required to solve Kenya's



statelessness issue. The KNCHR research underlines the necessity of establishing a clear and precise process for determining statelessness, as the lack of such a framework hampers stateless individuals' ability to assert their rights.

As highlighted above, the idea of descent, whereby citizenship is transferred via blood relations, is a significant feature of Kenyan citizenship legislation. According to the Citizenship and Immigration Act of 2011, a person born in Kenya is a citizen if 'at the time of the person's birth, at least one parent is a citizen'. This clause honours the heritage of colonial governance, wherein obtaining citizenship was often dependent on racial and ethnic factors. Ng'weno and Aloo (2019) state that such descent-based citizenship legislation may support discriminatory behaviours and further marginalize specific communities.

Kenya's approach to citizenship is shaped by its immigration history, with considerations extending beyond legal status to include social acceptance and a sense of belonging within the community, as highlighted by Birkvad (2019). The Kenyan viewpoint acknowledges the significance of mobility and stability for immigrants seeking citizenship. An essential component of integration is the capacity to settle and establish roots in a new nation. However, newcomers without ancestry in Kenya may face difficulties due to the state's inflexible, descent-based citizenship requirements. Moreover, the interplay between ethnicity, conflict, and citizenship is relevant in Kenyan contexts. Deng's (2018) examination of the experiences of South Sudanese refugees in Nairobi underscores the impact of internal conflict on their sense of identity and belonging. This analysis reveals tensions amongst the Nairobi refugee population, marked by competition and racial conflict. Due to the complexity of their claims to nationality, many South Sudanese refugees encounter challenges in pursuing Kenyan citizenship.

The denial of equal opportunities for stateless children has far-reaching consequences, as they are systematically excluded from accessing free education, healthcare, and unrestricted travel, as highlighted by Alfasi and Fenster (2014, p. 411). Such deprivation violates the fundamental principles enshrined in children's rights, leaving stateless children exceptionally vulnerable: 'It hinders their ability to find future employment that is both meaningful and significant' (see Article 2 of the African Charter). The right of children to express themselves without fear of reprisal should be universal. However, it is clear that governments routinely disregard the needs of children without citizenship. A state that does not take steps to end statelessness is, according to Rawls's view, founded on unfair institutions that are not working to rectify existing inequities (Convention on the Rights of the Child, 1989, Article 3; Preložnjak, 2021). Adopting this approach allows for a more comprehensive assessment of the progress made in Kenya concerning the implementation of nationality legislation and the protection of minority rights for stateless individuals.

The issue of statelessness in Kenya mainly affects ethnic minorities, who are unjustly labelled as 'un-Kenyan' due to their connections to other states, as noted by van Waas and De Chickera (2017, p. 32). The historical context reveals that the presence in Kenya of immigrants from various parts of the world can be traced back to the colonial era, when the British brought them to work in agriculture and factories (see, for example, the UNHCR study by Manby, 2018b, p. 47). As newly independent republics like Kenya emerged, they faced the challenge of defining citizenship criteria during the post-colonial transition period. According to the Second Schedule of the Kenya Citizenship Act of 1963, residents were required to register and pay a fee to be recognized as Kenyan citizens. Since many in the Nubian community are not Kenyan citizens, they are unjustly denied equal access to public healthcare and education. In addition to facing the challenge of statelessness, half of all Nubian households have an annual income of less than 10,000 Kenyan Shillings, making it difficult to afford even the most basic necessities such as shelter, food, and water. Furthermore, educational opportunities for the Nubian population are limited, with only 2% having completed post-secondary education (Balaton-Chrimes, 2013, p. 331).

The Kenyan Citizenship and Immigration Act of 2011 recognizes stateless persons under Article 15, and the Kenyan Constitution has taken steps to eliminate gender discrimination in the naturalization process. However, the Act is notable for the critical lack of information explaining the vetting process that must be completed in order to acquire citizenship. This omission has hindered the effective implementation of the law in dealing with the problem of stateless individuals. The Kenyan Citizenship and Immigration Regulations of 2012 also provide limited guidance on how to apply to the Cabinet Secretary when seeking citizenship through registration, as highlighted by the African Committee of Experts on the Rights and Welfare of the Child (2017, p. 8).

According to Masabo (2021), Kenya's citizenship laws are primarily based on the principle of *jus soli*, granting citizenship to those born on Kenyan land. For those who cannot prove that they were born on Kenyan land, determining their citizenship can be daunting. Masabo further argues that Kenya's lack of a comprehensive legislative framework for the prevention of statelessness and the protection of stateless people exposes many individuals to risks. He points out that 'Kenya's legal regime falls short of adopting international standards on the prevention of statelessness and the protection of stateless persons, as set out in various international and regional instruments' (p. 514). The historical legacy of an 'ancestor-centric' approach in Kenya's citizenship regulations, prioritizing lineage from Kenyan citizens over place of birth, continues to impact citizenship rights, particularly for vulnerable individuals. Masabo highlights the challenges faced by individuals born in Kenya to non-Kenyan parents, who often find themselves at risk of statelessness or who are themselves stateless. Hunter (2019) also examines the statelessness issue in Kenya, shedding light on the situation of undocumented nationals who have lived in Kenya for many generations but lack official citizenship. Hunter points out that the Kenyan government passed the 2011 Refugees Bill and the 2011 Citizenship and Immigration Act to combat statelessness. However, practical flaws and administrative delays have hindered the effective protection of stateless people. Hunter (2019) emphasizes that 'Kenyan law lacks the necessary clarity and specificity to provide sufficient protection to undocumented nationals, leading to their ongoing marginalization and exclusion' (p. 157).

The CESF Consortium (2021) conducted a study on the impact of the COVID-19 pandemic on stateless individuals in Kenya. The pandemic exposed the lack of access to healthcare, social security, and necessary documentation experienced by stateless people, rendering them even more vulnerable. The research revealed the inadequacies of Kenya's legal and administrative frameworks, which fail to provide meaningful assistance and recognition to stateless individuals. It also emphasized 'the urgent need for Kenya to address the legal and administrative barriers that perpetuate statelessness to ensure that stateless individuals can access healthcare, employment, and social protection' (p. 12). Lockdown measures and travel restrictions further marginalized these communities, leaving them without sufficient support and safety measures. It is crucial to include stateless people in national crisis response plans that safeguard against events such as the COVID-19 pandemic, and to implement legislative reforms urgently to protect their rights and well-being.

Kenya has undertaken efforts to address the issue of statelessness. Masabo (2021) highlighted that the passage of laws such as the 2011 Citizenship and Immigration Act and the 2011 Refugees Bill demonstrates Kenya's commitment to protecting and preventing statelessness. These legislative frameworks outline processes for birth registration, nationality determination, and, in some instances, granting citizenship. However, challenges related to administration, lack of awareness, and implementation flaws hinder the effectiveness of this legislation.

*Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2009; hereinafter – the Endorois case) is a pivotal legal battle that directly relates to the issue of statelessness and citizenship legislation in Kenya. This case brings to light the alleged violation of Articles 17(2) and 17(3) of the African Charter and highlights the disturbing reports of violations inflicted upon the Endorois community, an indigenous people, including forced displacement from their ancestral land, inadequate

compensation for the loss of their property, disruption of their community's pastoral activities, and infringements on their rights to practice their religion and culture.

In a similar case, the African Court on Human and People's Rights firmly rejected the notion put forth by the respondent that cultural rights would diminish in significance due to cultural change. It decisively dismissed the respondent's position that advocated for restricting minority rights for the common good. Indeed, the judges remained unconvinced by Kenya's argument that the Ogiek, another indigenous group, had evolved to such an extent that their distinct cultural identity had been lost. As stated in the Court's opinion, '[...] the Respondent has not sufficiently demonstrated that this alleged shift and transformation in the lifestyle of the Ogieks has entirely eliminated their cultural distinctiveness' (*African Commission on Human and People's Rights v. Kenya (merits)*, 2017, p. 53). Similarly, the Endorois case holds immense significance in the context of citizenship rights in Kenya, underscoring the critical need to protect the cultural rights of minority communities and the imperative of addressing statelessness as a fundamental issue.

Kenya is home to several groups of stateless individuals. Recently, progress has been made in granting citizenship to two of these groups. The first group consists of individuals who were rendered stateless by gender-discriminatory nationality laws. As written by Baird (2020), under the Constitution of Kenya, dating back to 12 December 1963 (and amended in 2008), although women could confer nationality to their children born in Kenya on an equal basis with men, if a child was born overseas, only a Kenyan father could confer nationality. Kenyan women who gave birth outside Kenya to a child with a non-Kenyan father were not able to transfer their nationality to their child. In practice, according to Baird (2020), this discriminatory approach to citizenship for children born outside Kenya 'contributed to discriminatory attitudes and restrictions on the transmission of nationality by women who gave birth inside Kenya'.

Furthermore, the 2010 Constitution introduced provisions allowing dual nationality, overturning the previous prohibition. Despite this constitutional amendment, practical barriers remain. These include a chronic 'lack of awareness of the new law among both potential beneficiaries and officials tasked with the implementation of the law' (van Waas et al., 2019, p. 198).

#### **4. The legal framework in Kenya**

##### **4.1. The Registration of Persons Act of 2012**

This is the most recent law in Kenya regarding citizenship and the rights of stateless people. The Act introduced a new digital system called the National Integrated Identification Management System (NIMS). This system was meant to be a single source of information for all Kenyans and foreigners in the country, and was therefore meant to include all persons resident in Kenya. The enactment of this law faced opposition from various human rights forums and like-minded individuals and institutions, with opponents arguing that it was in violation of the Constitution and in bad faith. The primary question concerned the safety of the data that could be collected and the assurance of the safety of the data under NIMS. The Act is crucial and material in the protection of data safety; however, the exclusivity of the data that the act requires is questionable in light of the fundamental rights of a human being. These rights include the right to privacy, the dignity of a person, the right to equality, and non-discrimination. This is based on the type of information that the act prescribed should be collected: identity cards, refugee cards, foreigner certificates, and several personal documents. This leaves open the question of whether people who lack such identifiable rights would be discriminated against in accessing government services, and thus remain stateless.

#### **4.2. The Kenya Citizenship and Immigration Act of 2011**

This act provides several channels for becoming a Kenyan citizen. Sections 6 and 7 provide for citizenship by birth, and sections 13 to 16 provide for citizenship by registration. Being born in the country is the easiest way in which stateless children born in Kenya can acquire citizenship. Article 14(4) gives protection to children born in Kenya when the nationality of their parents is unknown. These legal provisions protect the citizenship of stateless people. However, from this legal provision, there are other provisions that seem to limit the provision of nationality when it is applied to minority groups of people. An example of this is the Kenyan court case of *Hashmukh Devani v. Cabinet Secretary of Interior and Coordination and Others* (2016), where the court examined the petitioners' case regarding the Kenya Citizenship and Immigration Act as read together with Article 14 of the Constitution. The court held that every individual who approaches the court based on the interpretation of a human right should be heard. In this case, the petitioner was an Indian born to Indian parents who resided in Kenya. The petitioner's mother acquired Kenyan citizenship in 1969, and she died in 2005. The petitioner was born in 1949. The case was based on the provision of Article 14(2) of the Constitution of Kenya (2010): a person is a citizen of Kenya if, at the time of their birth, one of their parents was a citizen of Kenya. The court ruled against the petitioner because the Constitution was not in existence at the time of his birth, and he had already been born at the time of his mother's attainment of citizenship. The petitioner failed to acquire citizenship by both naturalization and by birth. His only remaining remedy was to gain citizenship by registration. In the question of statelessness, the court assumed that because the parents of the petitioners were Indian before they resided in Kenya, he automatically had Indian nationality, and thus his right to nationality was to be barred.

#### **5. South African citizenship laws and statelessness**

Since the end of apartheid in 1994, South Africa has undergone substantial changes to its citizenship regulations. Nevertheless, ensuring that stateless communities attain citizenship alongside the accompanying rights and protections remains challenging. The Citizenship Act of 1995 provides many routes to acquiring South African citizenship, including naturalization, descent, and birth. However, stateless individuals often encounter legal and practical obstacles in their pursuit of citizenship. Thus, a comprehensive examination of the nation's citizenship legislation and the consequences of statelessness is required to address these pressing issues.

Mbiyozo (2019) shed light on the urgent need to prevent statelessness rather than support it, emphasizing the violation of human rights that statelessness constitutes: 'Statelessness prevents individuals from enjoying fundamental human rights, including the right to education, healthcare, employment, and freedom of movement' (p. 4). To safeguard these rights, Mbiyozo advocates in favour of comprehensive citizenship regulations that ensure inclusivity and universal protection. Hobden's (2018) study of South African citizenship law reveals that the country has made great strides in redressing past citizenship injustices and promoting equality (p. 6), highlighting the country's perception of citizenship rules as a means to address historical inequities. Ndimurwimo and Jahnig (2022) examined the impact of climate change on statelessness in the Southern African region. They argue that climate change-induced displacement may increase statelessness, creating new categories of vulnerable individuals (p. 103). This viewpoint emphasizes the interconnection between environmental factors and statelessness, highlighting the importance of proactive and preventative measures.

Mbiyozo (2019) acknowledged the progress made by South Africa in combating statelessness while highlighting areas for improvement. The author commends the South African government's efforts to create legislation that streamlines the citizenship application process for disadvantaged groups, such as children born in South Africa to foreign parents. Mbiyozo also points to several areas where South Africa can improve its response to and treatment of statelessness. The author critiques the absence of a comprehensive national strategy to combat statelessness,

noting that South Africa lacks a national action plan or strategy on statelessness, which hinders the effective implementation of existing legislation (p. 3). This criticism reflects the South African viewpoint on the necessity of a deliberate and coordinated strategy to address statelessness effectively. In the context of climate change, Ndimurwimo and Jahnig (2022) emphasize the need for a regional approach to addressing statelessness. They contend that collaboration amongst nations in this area is required to create and put into effect comprehensive policies that address climate change-related displacement and the potential rise of statelessness (p. 120). This perspective underscores the significance of regional cooperation and collective efforts in tackling statelessness due to climate change.

While some African nations have enacted laws to prevent statelessness, the implementation of these laws remains inconsistent. Having well-developed legal and policy frameworks is essential; the application of these laws, however, determines their effectiveness. In many cases, nationality rules are applied arbitrarily despite provisions in legislation designed to prevent such practices. Access to the necessary documents to prove or obtain nationality is often intentionally withheld or hindered throughout the region. Consequently, the authorities frequently disregard legitimate claims, perpetuating an endless cycle of denial. Like other regions, Southern Africa faces numerous legal gaps that contribute to the prevalence of statelessness. However, it is equally vital to address issues related to civil registration. The challenges often lie not in a formal denial of nationality, but in the practical difficulties of obtaining documentation.

As Mbiyozo (2019) writes,

statelessness across Southern Africa is primarily linked to colonial histories, border changes, migration, gender, ethnic and religious discrimination, and poor civil registry systems. Colonial occupiers across Africa established arbitrary borders that frequently divided communities. Their need for labor, and their policy of land dispossession resulted in the movement of unprecedented numbers of people (p. 11).

Documentation has been utilized as a means of population control in various countries, with South Africa serving as a prominent example. Under colonial and apartheid authority, indigenous people were denationalized and sent to 'homelands', with the thinly disguised pretence that these regions were sovereign territories. Through extensive paperwork, such as registrations and permits, the mobility of these native peoples was tightly restricted, leading to the curtailment of their rights. The legacy of immense inequality and dispossession left by colonial powers led to deep-rooted anger during post-colonial transitions. The impact of this historical context is evident in the citizenship legislation enacted after the end of colonial rule. Despite the fact that many post-colonial states in Southern Africa modelled their nationality laws after those of their previous colonial masters, several also attempted to undo the system of discrimination. Mozambique is only one country that has implemented citizenship laws that give precedence to independence fighters and penalize those who oppose it (Manby, 2018a, p. 11).

The tightening of government restrictions regarding claims in other countries has had significant consequences. Stringent requirements have been imposed for the submission of citizenship renunciation statements, and rigid deadlines have been set for submitting foreign evidence to prove ineligibility for citizenship. Unfortunately, these rules have disproportionately affected individuals born in or with parents born in neighbouring countries, making it nearly impossible for them to comply. The gulf between the law and its implementation in South African administration remains substantial. Despite relatively liberal legal immigration regulations, the formal representation of these policies falls short. Migrants in South Africa have reported widespread bigotry and corruption inside the Department of Home Affairs, which has been accused of purposefully erecting bureaucratic hurdles to hinder and dissuade illegal immigrants.

Erasmus (2022, p. 293) sheds light on the profound impact of statelessness on the right to health in South Africa. According to her study, stateless individuals face significant barriers when seeking healthcare services due to their lack of legal status. She argues that without the necessary identification documents, stateless people cannot access vital healthcare services. This impediment restricts their ability to receive essential medical treatment, including medication, therapy, and preventive care.

The South African government has acknowledged and taken steps to address the issue of statelessness. Mahleza (2022) writes about the South African legal system and its compliance with international commitments regarding statelessness. Their study focuses on the South African Citizenship Act, which established a legal framework for obtaining citizenship. As Mahleza (2022) writes, the South African Citizenship Act contains provisions for the acquisition and loss of citizenship, which indirectly aims to prevent and reduce statelessness. The legal developments in South Africa underscore the importance of addressing statelessness and ensuring the protection of the rights of stateless individuals in South Africa. Efforts to prevent and reduce statelessness through legal provisions and constitutional obligations are crucial in promoting equitable access to healthcare and upholding human rights.

Despite these initiatives, South Africa still needs help in order to address statelessness successfully. As Erasmus (2022) points out, there is a need for a comprehensive legal framework to explicitly define statelessness and establish a clear procedure for determining statelessness (p. 293). Ensuring precise standards for proving statelessness and facilitating access to citizenship rights and privileges is crucial for stateless individuals. However, South Africa's legal system falls short of adequately addressing gender bias within its citizenship regulations. Particularly concerning is the disparity in treatment based on gender for children born outside of marriage, where the acquisition of citizenship through ancestry depends on whether the father or mother is South African. This gender-based disparity raises concerns of fairness and discrimination. Mahleza (2022) states that South Africa's legal reforms regarding citizenship law should be aiming for the elimination of gender-based discrimination. Aligning South Africa's legislation with international obligations is essential, and the nation must establish transparent mechanisms for identifying and safeguarding stateless people. Signing the 1961 Convention on the Reduction of Statelessness and the 1954 Convention on the Status of Stateless Persons, as suggested by Erasmus, would be necessary steps towards addressing statelessness and upholding the rights of stateless individuals. In *Minister of Home Affairs v. Ali and Others* (2018), the court held that the biggest challenge in South Africa is in the implementation of the laws on acquiring citizenship.

Sutton (2018) explains that the two states have integrated international instruments meant to protect stateless individuals. However, the implementation of these laws and regulations has not been successful. The author outlines several groups of persons that are vulnerable to statelessness, including children from stateless parents, ethnic minority groups, people who have renounced their citizenship, and people seeking asylum in a state. The author goes on to describe South Africa, despite being a state with a democracy based on shared values and non-discrimination, as a place where the statelessness epidemic is felt most keenly by homeless children, most of whom are orphaned, and adult asylum seekers (p. 64).

## **Conclusions**

Kenya and South Africa face challenges and concerns regarding their citizenship rules and definitions of statelessness, and have adopted distinct viewpoints and approaches. In Kenya, the Citizenship and Immigration Act of 2011 establishes citizenship based on birth and registration. Nonetheless, instances of statelessness persist, and birth is no guarantee of citizenship unless one parent is a Kenyan citizen. Conversely, South Africa's Citizenship Act outlines clear requirements for acquiring and losing citizenship, with the recognition of birthright citizenship

regardless of parental nationality. The divergent strategies employed by these nations underscore their differing approaches to citizenship.

Kenya and South Africa have recognized the issue of statelessness and have initiated measures to address it. In Kenya, a government initiative was launched in 2016 to find stateless individuals and provide them with identity cards so that they can receive essential services. Challenges remain, however, including the need for precise methods for identifying statelessness. While statelessness is less prevalent in South Africa than in Kenya, administrative hurdles and a lack of documentation can pose difficulties for immigrants and refugees.

Notably, gender plays a contrasting role in the legal frameworks of these nations. Kenya has taken steps to rectify gender discrimination, particularly concerning women's rights. Children born outside Kenya to non-Kenyan fathers could not previously be granted nationality by their mothers. However, this prejudice has been corrected by various constitutional revisions. South Africa, on the other hand, ensures equal citizenship rights for both sexes, irrespective of birthplace and parental nationality.

Despite their legislative frameworks, Kenya and South Africa encounter administrative and implementation-related challenges in enforcing their citizenship rules and addressing statelessness. Kenya would benefit from further support in translating legal requirements into effective practices, including enhancing understanding among authorities and prospective beneficiaries and establishing a clearly defined procedure for identifying statelessness. Similar administrative complexities might arise in South Africa, especially for immigrants and refugees who need help in order to obtain documents and navigate the system.

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