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# REPORT ON CITIZENSHIP LAW: SOUTH AFRICA

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# Report on Citizenship Law

## South Africa

*Christine Hobden*

### 1. Introduction

The geographical area we now know as the Republic of South Africa was first united as the Union of South Africa in 1910 under British Rule; in 1961 it became a republic independent of British rule, ruled by a white minority government. It was only however in 1994 that the fully democratic Republic of South Africa came into being. As such, South African citizenship, conferring upon all people freedom and equality before the law, in a post-independence democracy, is only at the beginning of its third decade. South Africa's history of racial inequality and harsh oppression informs many aspects of citizenship law: initial legislation was generous in scope and catered, specifically, for the many who had been deprived of their citizenship during Apartheid. Post-independence has witnessed high levels of immigration, and a slow tightening on access to citizenship. This reduced access is, at times, through legislative amendments but also, perhaps most interestingly, often through the Department of Home Affairs' increasingly strict interpretation of the law, and continued failure to create provision for certain cases protected under law. The chief challenge that South Africa faces in respect to citizenship law is thus ensuring the free, fair, and efficient application of the South African Citizenship Act (SACA).<sup>1</sup>

Historically there has been, and remains, a separation between the status of citizenship and the rights that go with it: for the majority of the Apartheid era, all races were granted citizenship but not all had the attending rights. In the new South Africa, many do not have citizenship but enjoy numerous Constitutionally enshrined rights that traditionally are attached to citizenship (Klaaren 2010:97). While non-citizens do not have political rights, they do have socio-economic rights enshrined in the 1996 Constitution of South Africa (No. 108 of 1996). In most cases, while the Constitution uses the term 'everyone', access to resources such as housing and social grants requires status as a permanent resident. As such, the political discourse and the average immigrant's desire centres more strongly on the achievement of permanent residence than citizenship. With respect to foreign nationals residing in South Africa, the very pressing concerns are preventing outbreaks of xenophobic violence and regulating the unknown, but presumed to be extremely large, undocumented migrant population. Non-governmental organisations, such as Lawyers for Human Rights

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<sup>1</sup> This acronym will be used throughout to refer to the South African Citizenship Act of 1995 (Act 88 of 1995), as amended (with amendments indicated by the addition of the relevant date). Where referencing the Apartheid-era legislation of the same name, it will be written out in full with the 1949 original date included.

(LHR), do bring citizenship law into the courts and the media, but this is chiefly focused on attaining clarity of, and action on, the provisions within the SACA to protect against statelessness.

This report will use the terms ‘citizenship’ and ‘nationality’ interchangeably. Historically the term citizenship has been relevant in South African law to distinguish between a South African *citizen* of the Republic and a British *subject* of the Empire. The new democratic regime has also used the idea of a shared common citizenship to underpin rhetoric of the ‘rainbow nation’, rather than a shared nationality which conjures connotations of shared language or ethnic background. The Constitution refers mostly to citizenship (§3;§20) with the exception of guaranteeing children the right to ‘a name and nationality from birth’ (§28).

Given the short history of South African democratic citizenship, the report will focus on the initial legislation created in 1993, 1994 and 1995 and the subsequent amendments that have created the current citizenship regime of 2017. It will begin however, with a brief overview of pre-independence citizenship law and the uses of citizenship status for the oppression of South African people, in order to highlight some legal consistencies and political motivations in the formulation of the post-independence citizenship. The report will end with a discussion of some of the current challenges, debates, and possible reforms to existing legislation.

## 2. Historical Context

### 2.1 Pre-Independence Legislation<sup>2</sup>

Prior to the constitutionally entrenched common citizenship established in South Africa on 27 April 1994, citizenship law was governed by the South African Citizenship Act (Act 44 of 1949). This 1949 Act used language of ‘any person’ when setting out the requirements for citizenship (§3(1); §6(1)). Yet the application of the term ‘citizen’ to all South Africans was purposively misleading, and was, in most respects an empty one (Klaaren 2000): the majority of the rights we understand to flow from having the status of citizen were in fact attached only to status as a ‘European’ or white person. Black, Indian and Coloured South Africans formally had the status of citizen but were not granted the vote, free movement, or any kind of equal status. It is also relevant to note that until 1961, South African citizens were both citizens of the Union of South Africa, *and* subjects of the British Empire. When the Union of South Africa declared independence from British rule in 1961, all individuals became “South African Citizens” and no longer British subjects, yet the disenfranchisement of the majority of the population remained in place.

In 1970, the Apartheid regime implemented legislation that sought to deprive black people of even this nominal citizenship. The Black Homeland Citizenship Act (No. 26 of 1970)<sup>3</sup> began the process of creating independent ‘homelands’ based on ethnic groupings. In the initial phases, individuals were forcibly moved to their respective homelands (eg. Xhosas to Transkei; Zulus to KwaZulu) and acquired citizenship of that homeland in addition to their

<sup>2</sup> For a more extensive analysis of the history of citizenship in South Africa, see Klaaren (2000).

<sup>3</sup> This Act is also known as the “Bantu Homeland Citizenship Act” or the “Black States Citizenship Act.”

South African citizenship. Once a homeland was formally declared independent, citizens of that homeland then lost their South African citizenship. While ten homelands were established, only four were declared independent: these were the Transkei in 1976, Bophuthatswana in 1977, Venda in 1979, and Ciskei in 1981.<sup>4</sup>

In reality, as suggested, this citizenship was already an empty ascription which did not include any political rights or basic protections. In addition, citizens of homelands already had only restricted travel into and around South Africa based on a system of work and travel passes. So, while the initial removal into homelands had significant economic consequences, the loss of South African citizenship was chiefly a symbolic move on the part of the Apartheid government. To be sure, the symbolism was significant and one of the final legislative blows in dispossessing people from their own land and country.

The Apartheid government passed the Restoration of South African Citizenship Act (No 73 of 1986) with the purported intention of restoring citizenship to those who had lost it due to the Black Homelands Act yet this 1986 Act is widely considered not to have met this end; it is thought instead to have chiefly been an attempt to assuage international pressure for reform (Klaaren 2010, Anderson 1994). It was therefore necessary in 1993 to pass another restoration act, the Restoration and Extension of South African Citizenship Act (No. 196 of 1993) to ensure all South Africans had the citizenship needed to vote in the 1994 election. The homelands were only formally abolished in April 1994 and the final remnants of citizenship law promulgated by independent homelands were repealed in the 1995 SACA.

## 2.2 Post-Independence Legislation

The SACA was not an amendment to, but a replacement of, the existing Apartheid-era citizenship law: it formally repealed the 1949 South African Citizenship Act as well as all remaining laws established by homelands, such as the Citizenship of Transkei Act (No 26 of 1976).<sup>5</sup> As of 1994, all citizens were entitled to a common citizenship, enshrined in the South African Constitution (§3). The SACA set out with clarity how this citizenship status could be acquired: by birth, by descent and by naturalisation. Klaaren argues that there were only five main changes to the citizenship regime upon independence: 1) the repeal and national application of the citizenship law; 2) aspects of dual citizenship; 3) adjustments to naturalization; 4) the declaration of allegiance was amended and 5) citizenship by birth for stateless children was introduced (2010: 223). Klaaren argues that from a legal perspective the SACA ‘did not make far-reaching substantive changes to the pre-existing South African rules of citizenship—except in the significant aspect that it made citizenship rules uniform through the Republic’ (2000:221). Nevertheless, the SACA was extremely significant, as it created the legal framework in which to ensure the common citizenship guaranteed in the interim Constitution (1993).

Of the changes that were made, it is clear that many were a reflection of the current circumstances of South Africans in these early years of independence. A number of people had lost their citizenship during the Apartheid years, for a number of different reasons: a) being forcibly relocated to an independent homeland; b) acquiring and making use of a foreign citizenship without permission from the minister whilst in exile; c) being a naturalised citizen who lived abroad for more than seven years; d) being children of those who had left

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<sup>4</sup> See, “The Homelands” *South African History Online: Towards a People’s History* for a brief explanation of the concept of homelands.

<sup>5</sup> In total the Act repealed, in whole or in part, 25 pieces of legislation (Klaaren 2010:234)

the country illegally and were living in exile. The SACA ensured that there were a number of provisions available for re-acquisition of citizenship for these individuals. Allowing dual citizenship was controversial given the extent to which it had historically been in place to favour white people and would continue to allow for this dual European-South African allegiance.<sup>6</sup> Yet it remained in place precisely to allow lenience for returning exiles who had built substantial connections in other states. The provision for stateless children was also seen to be responding to the large number of undocumented individuals within South Africa. Note that immediately after independence, amnesty was granted to mine workers, members of the South African Development Community (SADC), and Mozambicans who had been illegally residing in South Africa (Klaaren 2000:222). This provision seems to speak to an understanding of the reality of the complexity and instability of the lives of many living within South African borders. Finally, the SACA also took careful consideration of those who had lost citizenship through forced removals into independent homelands. Recall the 1993 Restoration Act that sought to address this issue before the 1994 election. The SACA moved beyond this provision to make acquisition of citizenship automatic for individuals who had acquired homeland citizenship by naturalisation (§4(1)(a)(iii)). The 1993 Restoration Act required these individuals to naturalise in South Africa, and this was deemed to be unconstitutionally discriminatory toward this category of citizens (Klaaren 2000:234).

While in many ways these insights point to a fairly concessive citizenship regime, we should also note one change that leant in the opposite direction: Apartheid citizenship law granted automatic citizenship to white people residing in South Africa for five years. This was understood to be a tool to create a larger pool of those required to report for military duty (Klaaren 2000:235). This clause was removed from new legislation and not replaced with a non-racial version; thus creating in practice much stricter naturalisation laws. The SACA also contains no special exemptions for citizens from previous colonial states; while South African citizens remain Citizens of the Commonwealth, there is no special dispensation for British citizens who wish to attain South African citizenship.

## 2.3 Influences

On the whole, then, it seems that the decisions made in the creation of the SACA were chiefly motivated by internal political concerns: at the time, dual citizenship was, for example, not allowed, or only permitted in very particular cases, in South Africa's neighbouring states (Manby 2016:77-8)<sup>7</sup>; and many clauses to create special considerations for naturalisation were clearly directed at domestic concerns arising from the historic creation of independent homelands. There are however two areas of external influence to consider:

### 2.3.1 Legal Influences

The Constitution of South Africa was (and remains) the most vital legal document in ensuring the transition to democracy and an equal citizenship for all South Africans. While the Constitution allowed for wide consultation with the public, particularly in the creation of the interim Constitution, there were 'stringent deadlines' and 'limited practical knowledge of the

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<sup>6</sup> See Klaaren (2000) pp. 235 – 241, for an extensive discussion of the parliamentary debates surrounding this issue.

<sup>7</sup> Since SACA in 1995, many SADC countries have moved toward permitting dual nationality, either through legislation, constitutional amendments or court challenges. For a full discussion, see Manby (2016).

workings of a bill of rights’ (Davis 2003: 187).<sup>8</sup> As such, it has been widely argued that the technical experts drew heavily upon comparative constitutional law, most notably from the Canadian Charter of Rights and Freedoms (ibid: 186). Other influences include constitutional law of the United States of America, Germany, Malaysia and the European Convention of Human rights (ibid: 186-8). Significantly, the interim Constitution also explicitly allows for the interpretation to ‘have regard to comparable foreign case law’ (Ch 3, §35(1)). Judgments from the early cases in the Constitutional Court frequently included analysis of foreign case law.<sup>9</sup> While judges were ‘in no way bound to follow [public international law and foreign case law]’, there is no doubt that the extent to which it was used to derive assistance in interpreting constitutional law shaped early and foundational precedent in the new South Africa’s legal system.<sup>10</sup>

In addition, we should note that post-Apartheid legislation stayed within the mixed legal tradition of Roman-Dutch law and thus remained inspired by the external influence of their colonisers. Large parts of the wording of the SACA remained very similar to the 1949 South African Citizenship Act, while of course radically different in application. As such, it is clear that from a legal perspective, influences from British law and Apartheid-era law remain.

### 2.3.2 Gender

One other exception to this domestic focus may be the central place that issues of gender had in the creation of new citizenship law. Throughout the struggle against Apartheid oppression, the issue of racial inequality, perhaps understandably, trumped gender inequality concerns. It was imperative to remain unified in challenging the Apartheid regime and as such gender issues were often dismissed as divisive (Seidman 1999). Once negotiations for the transition to democracy began, however, gender inequality gradually grew in prominence. Upon the campaigning of women leaders in the ANC, initial negotiations were accompanied by a “gender advisory committee” but by 1993 this committee was replaced by a 50% quota for women in all committees. While there was not a unitary women’s voice (as many were chiefly loyal to their party’s line) it had significant impact that the negotiators who agreed to the final settlement were 50% female. Most significant, for our interest, was the insertion of the principle of gender equality over that of respect for customary law in the new constitution – a principle that enabled a substantive equal citizenship between men and women (Seidman 1999: 294). Without such a clause, it is possible that the patriarchal structures of much of customary law would have undermined women’s citizenship rights in real terms. This gender consciousness is largely attributed to the external influence of feminist debates internationally, that ‘altered their understanding of politics and gender inequalities’ (ibid: 295).

<sup>8</sup> See also, Spitz & Chaskalson, (2000). *The Politics of Transition: A Hidden History of South Africa’s Negotiated Settlement*. Wits Univ. Press.

<sup>9</sup> See Davies (2003) for a discussion of such comparisons in *S v Makwanyane 1995 (3) SALR 391 (CC)*; *Ferreira v Levin 1996(1) SALR 984 (CC)*; *Bernstein v Bester, 1996 (2) SALR 751 (CC)*.

<sup>10</sup> Chaskalson, Arthur. *Sv Makwanyane 1995 (3) SALR 391 (CC)*



### 3. Current Citizenship Regime

#### 3.1 Introduction

The current citizenship regime in South Africa is governed by the 1995 SACA, as amended in 2004, 2007 and 2010. The South African Constitution (1996) is the supreme law of the land, and as such all citizenship laws, in theory and application, need to respect the rights it enshrines. As a result, both the SACA and the Constitution need to be considered in understanding the reality of the citizenship regime, as well as its possible future developments. Concerns have been raised, for example, about the constitutional validity of the SACA's provision for deprivation of citizenship, and the withholding of citizenship for children of non-citizens until the age of majority.

On the whole, however, the SACA, as amended, contains relatively standard modes of acquisition and loss. In the majority of cases, citizenship is passed through parents, regardless of the territory of birth. Territory only plays a role in cases of non-citizen parents, and in the majority of cases, it is not a decisive role. Given the large numbers of non-citizens living in South Africa, this aspect of the SACA has significant implications. This is especially the case because many permanent resident non-citizens do not naturalise; on the whole, the step between temporary and permanent residence is more significant than between permanent residence and citizenship, given the striking number of clauses within the Constitution that apply to 'everyone' or 'all persons'. Most significantly socio-economic rights such as the right to adequate housing (§26); to healthcare, food, water and social security (§27); and to education (§29). Klaaren argues that judgments since have explicitly supported a residence-based nature for the Bill of Rights (2010:102). In practice, social grants can be attained by those with permanent residence or refugee status making the step between temporary and permanent residence of chief concern for many. In addition, restrictive laws around dual citizenship in neighbouring SADC countries discourages many from naturalising as South African citizens.

In what follows, the main provisions of the SACA will be detailed with specific reference to the changes instituted by the subsequent amendments:

#### 3.2 Acquisition

##### 3.2.1 *At Birth*

South African citizenship law distinguishes between 'citizenship by birth' (§2(2)) and 'citizenship by descent' (§2(3)). In the original 1995 Act, this distinction indicated the various modes of acquisition available to those born within the country's territory (by birth) and those born outside of the territory (by descent). Subsequent amendments, as discussed below, reformulated this distinction, such that it no longer reflects a distinction with regard to the country of birth. The current law reflects a change brought about by the 2010 Amendment Act (No. 17 of 2010).<sup>11</sup> The new provision, in §2(2)(b) succinctly states that 'any person who is *born in or outside* the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth' (emphasis added).

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<sup>11</sup> The original Act deemed a person born outside the country to at least one parent who was a South African citizen to be a citizen by descent §3(1)(b).

Citizenship ‘by descent’ is now only applicable to persons adopted by a South African citizen (§2(3)). In all cases it is required that the birth be registered in terms of the Birth and Death Registration Act (No. 51 of 1992) (hereafter referred to as ‘the BDRA’): for local citizens that requires registration at the Department of Home Affairs and for South African citizens living abroad, registration with the Head of the South African diplomatic or consular mission. Importantly the SACA removed any distinction between the gender of parents, a shift from previous Apartheid legislation that had numerous clauses referencing specifically the status or occupation of the child’s father (§3-6, 1949).

In recent years, amendments to the SACA have significantly restricted the acquisition of citizenship by persons born to non-South Africans on South African soil. The original legislation (SACA 1995) held that all who are born within the country to at least one parent who is a legal resident or citizen, and who is registered at birth according to the BDRA, is entitled to South African citizenship by birth (§2(1)(b); §2(2)(b)). Note that this precludes citizenship being granted to those whose parents are not lawfully admitted to the republic. In order to gain citizenship, a child had to be born to at least one parent who is legally permitted to be resident in South Africa. In fact, the SACA, according to some legal scholars was stricter than the practice allowed: Section 2(2)(b) states that “No person shall be a South African citizen by virtue of subsection (1)b if at the time of his or her birth, one of his or her parents – (b) had not been lawfully admitted to the Republic for permanent residence therein, and his or her other parent was not a South African citizen’. Legal scholars argue that this required either two parents with permanent residence or at least one parent with South African citizenship (Klaaren 2010; Keightley 1998). In practice, however, under the original SACA, the Department of Home Affairs interpreted this clause loosely, granting citizenship to children where there is one parent with permanent residence (Klaaren 2000:230).

The 2010 amendment was therefore a significant shift in this respect: the amendment restricts acquisition of citizenship by birth for persons born in South Africa to non-citizen, but permanent resident parents, *only upon reaching the age of majority*, if they have lived in the Republic from the date of their birth (§2(3)).<sup>12</sup> Under the current citizenship regime, children of permanent residents are therefore not citizens, which can have some consequences for their access to education and healthcare.<sup>13</sup> In 2016 Lawyers for Human Rights (LHR) challenged the Department of Home Affairs’ interpretation that this clause did not hold retrospectively and so only applied to children born after 2013 (when the Act came into force). This case, *Miriam Ali vs The Minister of Home Affairs*<sup>14</sup> found that the clause ought to apply ‘irrespective of whether they were born before or after 1 January 2013’.

One exception, known as the “statelessness exception”, to these requirements is that citizenship can be granted to individuals born in South Africa who do not ‘have the citizenship or nationality of any other country, or has no right to such citizenship or nationality’ (SACA §2(2)), so long as the birth is registered according to the BDRA. This is in line with §28 of the Constitution that guarantees for every child the right to a ‘nationality from birth’.<sup>15</sup> Children who acquire citizenship through this channel are citizens ‘by birth’.

These two forms of acquisition illustrate a *jus soli* element to acquisition of South African citizenship: children of non-citizen permanent residents (upon majority), as well as stateless children, are entitled to citizenship by virtue of having been born on South African

<sup>12</sup> Note that, as of 2005, the age of majority is 18, as amended from 21 by the Children’s Act (No. 38 of 2005)

<sup>13</sup> Lawyers for Human Rights details a number of cases where a lack of a birth certificate prevents children from attending school (LHR 2017).

<sup>14</sup> (*case 15566/2016*) [2017] ZAWCHC 94 (*Wille AJ*).

<sup>15</sup> See Klaaren (2000) for the argument that this provision was established on principles of *jus soli*, suggesting South Africa relies on *jus soli* to a greater extent than many other states (230, fn 49).

territory. These forms of acquisition are however exceptions to the norm of acquisition presented in §2(2)(b), which is acquisition by virtue of having at least one parent with South African citizenship.

In all cases, registration of birth in terms of the BDRA is required. While on the surface this requirement appears to be easily met, one should note that current regulations of the BDRA require parents to register the birth within 30 days (or else pay a fee for late registration), and to be able to produce a certified copy of a South African identification document (Regulation 3(e)) or, for foreign parents, of a valid passport and visa or permit to be in the country (Regulation 3(f)). For the many living in severe poverty in South Africa, this can be a restrictive burden: those who are entitled to citizenship, but have not acquired an identification document, are likely to not register the births of their children, thus delaying and complicating their acquisition of citizenship. Parents who are illegally in the country will also fail to register their children, thus severely curtailing the applicability of the ‘statelessness exception’ (LHR 2013).

### ***3.2.2 Naturalisation***

In the SACA, the basic requirements for naturalisation stayed largely unchanged from the Apartheid-era legislation with only minor word changes in §5(1) to change references to ‘the Union’ to ‘the Republic’ and to indicate more than two official languages. The requirements set out in 1995 were: (1) being of the age of majority, (2) admitted legally for permanence residence, (2) ordinarily a resident with continuous residence the year before application and for not less than four of the previous 8 years; (3) good character, (4) intends to stay in the republic; (5) can communicate in one of the official languages and (6) understands the privileges and responsibilities of South African Citizenship (§5(1)). Time in prison does not count toward the residency requirements (§5(3)(a)) and being a spouse or widower of a South African citizens decreased the residency requirement to two years (§5(5)).

The main requirements of naturalisation have remained largely the same as initially set out in the SACA but subsequent amendments have resulted in a number of important changes: (i) change in the age of majority; (ii) residence requirements; (iii) the naturalisation of children; (iv) ministerial powers and (v) children of non-citizens. First, for naturalisation as an individual (and not as a child of a parent naturalising), one has to be of the age of majority (§5(a)). This clause has remained the same, but the age of majority has changed from twenty-one to eighteen through the passage of the 2005 Children’s Act (No. 38 of 2005) (§17). Second, there has been a significant change in the residence requirements for naturalisation. Again this points to a tightening of citizenship laws: original post-independence legislation required that a person had been ‘ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than one year immediately preceding the date of his or her application, and that he or she has, in addition, been resident in the Republic for a further period of not less than four years during the eight years immediately preceding the date of his or her application’ (§5(1)(c)).

The current citizenship regime requires a continuous period of ‘not less than five years immediately preceding the date’ of application (§5(1)(c)). There is some lack of clarity on this restriction however: the regulations attached to this SACA, as amended in 2010, as well as the Department of Home Affairs public information, explicitly require ten years of residence (Regulation 3(2)(a)) as well as no absence longer than 90 days in any year during the five years preceding application (Regulation 3(2)(b)). It is not (legally) possible for the Department regulations to be stricter than the Act itself, and some have suggested that this needs to be challenged (Reed 2017). One interpretation that may account for this seeming

difference is that the SACA could be interpreted to require five years of ‘ordinary residence’ *as a permanent resident*. Given that it ordinarily takes five years of residence to acquire permanent residence (§25 Immigration Act, No. 13 of 2002), this would result in the norm being a ten year residence requirement. Even so, both Acts allow for the Minister’s discretion in reducing this residence requirement in granting permanent residence (§27, Immigration Act) and naturalisation (§9 SACA). It is unclear, therefore, what might be the case for an individual who achieved a fast-tracked permanent residence due to ‘exceptional skills’ or another of the many exceptions listed in §27 who then applies for naturalisation after five years of residence as a permanent resident. See Section four of this report for a further discussion of the challenges of implementation of citizenship law.

Individuals seeking naturalisation through marriage also face increased residency requirements under the current citizenship regime. There has been a shift from a requirement of two years of marriage and residence (which could be concurrent) to the unspecified ‘a prescribed period’ (§5(5)(c)). The current regulations specify the same residence requirements as those following non-spousal routes: residence for 10 years preceding, with no absence longer than 90 days in the 5 years immediately preceding application. In terms of the §26 of the Immigration Act, permanent residence through spousal routes requires five years of marriage or residence. The Department parliamentary briefing on the new regulations suggest that this shift was explicitly to prevent marriages of convenience and the noticed practice of South Africans being paid to marry foreigners to facilitate naturalisation (2013).

Third, minor changes have been made to the wording of the subsection on the naturalisation of children: the provision has been split into two parts, with the reference to the need for an application to be made by the ‘responsible parent or legal guardian’ now emphasised in part (b). Regulations now clearly specify individual forms for children and the need for each individual to qualify for naturalisation (Regulation 3 (4)). The Department briefing to the Home Affairs parliamentary committee cited that “this expectation would combat the smuggling of children and would help solve the problem of bloating South Africa with children that were not South African” (2013).

Fourth, the 2010 amendment (No. 17 of 2010) to SACA allows for significant Ministerial discretion: under ‘exceptional circumstances’ the Minister may grant a certificate of naturalisation to an applicant who does not meet the residency requirements (§5(9)(a)). The only limitation is that the Minister is required to table the names of those who have been granted citizenship through this channel at Parliament each year, within 14 days of the opening of parliament (§5(9)(b)). The definition of ‘exceptional circumstance’ was queried by opposition parties in the Departmental briefing on the Amendment and regulations (2013). Such circumstances were defined as individuals with ‘scarce skills’ and were cited as necessary in order to ensure the 10-year process did not put off individuals with scarce skills (2013). See section four of this report for a discussion of the use of this discretion power.

Finally, in a step toward more inclusive citizenship, the SACA now also allows children of non-permanent residents to acquire citizenship upon reaching majority, if they have lived in the Republic from birth to majority, and their birth was registered in terms of the BDRA (§4(3)). Note that this will only apply to individuals whose parents were legally in the country, given that evidence of a valid permit or visa is required to register the birth. This provision goes beyond the “statelessness exception”, which grants citizenship by birth to children without access to any other citizenship. Upon reaching majority, children of non-permanent resident, non-citizens can acquire citizenship through naturalisation, even if they have entitlement to another citizenship.

### 3.3 Loss

Current South African law continues to allow for the loss and deprivation of citizenship, for citizens by birth, descent or naturalisation.

#### 3.3.1 *Voluntary Renunciation*

A South African citizen who has, or intends to accept, the citizenship of another country may renounce their South African citizenship by declaration ‘in the prescribed form’ (§7(1)). Currently, regulations require the submission of a signed form including a statement of renunciation and reasons for renunciation. Where the co-parent is not a South African citizen, or also renounces citizenship, children under the age of 18 years will also cease to be citizens (§7(3)).

#### 3.3.2 *Lapse/ Automatic Loss*

As previously noted, upon independence, citizenship law allowed for dual citizenship, after extensive debate (Klaaren 2010:234). Importantly however, the SACA holds that South African citizens have to apply to the Minister for an exemption, should they wish to acquire another citizenship or fight in the armed forces of another country against South Africa (§3(6)(b)). Those who fail to do so will automatically lose their citizenship, as will their children under the age of 18. The 2010 Amendment added an additional form of loss of citizenship status applied only to naturalised citizens: §6(3) holds that a “person who obtained South African citizenship by naturalisation in terms of this Act shall cease to be a South African citizen if he or she engages, under the flag of another country, in a war that the Republic *does not support*.” This clause is not covered by the ministerial exemption and is stricter in specification: it is not just a war directly against the republic, but one that the republic does not support. There is thus, in this respect, a clear distinction between naturalised and ‘by birth’ citizenship.

#### 3.3.3 *Deprivation*

A South African citizen by naturalisation can be deprived of such citizenship if it was obtained by fraud (§8(a)) or it was granted in conflict with the provisions of the SACA or any prior law. Section 9 of the original SACA also controversially allowed the minister to deprive a South African (with another citizenship) of their citizenship if they have at ‘any time made use of the franchise or passport facilities of that country or performed such other voluntary act which, to the satisfaction of the Minister, indicates that such citizen has made use of the citizenship or nationality of that other country.’ This clause was perhaps a concession to the initial reluctance to allow dual citizenship for concern of a lack of loyalty to the Republic.<sup>16</sup> This controversial clause was repealed in a 2004 Amendment (Act No 17 of 2004).

The minister is also entitled to deprive a citizen of citizenship, only if they have another citizenship (as is required by international law), if they have been imprisoned for over 12 months for a crime in any country or significantly, if the minister is satisfied that it is in the public interest that an individual should no longer be a citizen (§8(2)). This provision has not

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<sup>16</sup> For an extensive discussion of the parliamentary debate around this issue, see Klaaren (2000). Klaaren suggests that ‘the debate over the dual citizenship issue was scattered to the point of confusion’ (2000:238).

yet been legally challenged, but concerns have been raised that it is not in line with the Constitution, that holds in §20: ‘no citizen will be deprived of citizenship’. This provision has been utilized by the Minister: media revealed in early 2017, for example, that the Department of Home Affairs had revoked the citizenship of naturalised Janusz Walrus, who is the convicted killer of Chris Hani and of Polish origin (Bateman 2017).<sup>17</sup> Current laws have also tightened the punishment for not surrendering documents of naturalisation upon having citizenship revoked: it is now punishable by fine, imprisonment up to five years (an extension from two) or a combination of both a fine and imprisonment. As mentioned previously, the overall powers of deprivation have been significantly reduced by the repealing of §9 by the 2004 Amendment. While there is still allowance for deprivation of citizenship, this deprivation is no longer able to target those merely making use of two citizenships.

### 3.4 Dual Citizenship and Rights of Citizens Residing Abroad

The current citizenship regime allows for dual citizenship for South African citizens. The key requirement is an application for an exemption of the loss of citizenship *before* acquiring a new citizenship. In this case, the Minister is authorised to order a retention (§6(2)). Citizens living abroad frequently fall foul of this regulation, seemingly through ignorance of the requirements: many do not apply for the retention of citizenship before claiming another. This error can only be rectified by those who return to live in South Africa through re-naturalisation or in some cases, application for resumption of citizenship (§13(3)): both require permanent residency in South Africa and so are not open for those who wish to re-acquire South African citizenship but to reside outside of the country. Dual citizenship is no longer threatened by the Minister’s ability to deprive citizens on the basis of the use of another citizenship; as mentioned above, §9 of SACA was repealed in the 2004 amendment. This 2004 amendment also included a requirement that dual citizens always enter and exit South Africa on their South African passports; violation of this requirement can result in a fine or imprisonment of up to 12 months (§26(b)).

While, in general, there has been a gradual opening toward dual citizenship (through the repeal of §9), for those acquiring South African citizenship as their second citizenship, new legislation has closed off previously available options. The 2010 amendment to the SACA created a requirement that individuals wishing to naturalise have to either be from a country that allows dual citizenship or provide evidence of renunciation of their other citizenship (§5(1)(h)). It was argued that this was a correction of ‘an anomaly’ in the existing law that allowed for the acquisition of dual citizenship, whether the other country allowed it or not (Parliamentary briefing 2010). This addition was controversial because it seems that this loophole was widely used by citizens of neighbouring SADC countries. The Department of Home Affairs reported that it was an issue that SADC citizens were claiming South African citizenship which was not declared to their home state, thus allowing them to illegally acquire social grants and benefits from both states (ibid. 2010). Given the close proximity and porous borders with countries such as Lesotho and Swaziland, this deception is more plausible than it may ostensibly appear. Opposition parties objected on the grounds that it made it difficult for those from collapsed states to provide evidence of renunciation (Masondo 2010). The amendment is likely to significantly reduce the numbers of SADC citizens naturalising as the

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<sup>17</sup> Chris Hani was the leader of the South African Communist Party and Chief of Staff of the ANC’s armed wing Umkhonto we Sizwe. He was assassinated in April 1993, in an act that many feared would completely derail negotiations.

majority have family in their home state and, frequently, hopes of returning, if stability is achieved and work opportunities are available. Particularly in light of recent xenophobic violence (discussed below), African citizens are unlikely to want to put all their proverbial eggs in the South African basket.

South African citizens living abroad retain the constitutional right to return (§21(3)) and to a South African passport (§21(4)). Citizens living abroad are also entitled to pass on their citizenship (§2(1)(b)), so long as the birth is registered at the South African consulate in the country of birth. The legislation does not currently specify a limit to this method of passing on citizenship; as such, generations of South African citizens living abroad can continue to receive South African citizenship. In order for the child to have dual citizenship, parents would have to ensure that depending on the order of acquisition, they either had applied on behalf of their child for the exemption from the South African minister in terms of (§6(2)) or that they had provided evidence of the permissibility of dual allegiance from their country of residence (§5(1)(h)).<sup>18</sup>

Citizens living abroad are also entitled to vote in national elections, as established by *Richter v Minister of Home Affairs*, which held that the provisions of the Electoral Act and its regulations that prevented citizens living overseas from voting in national elections were unconstitutional and invalid.<sup>19</sup> The Electoral Amendment Act (No. 18 of 2013) updated legislation to reflect this precedent; regulations require that the individual have a South African Identity Document and passport, be registered on the electoral role, and submit an intention to vote abroad (VEC10) within 15 days from the date the election is proclaimed.<sup>20</sup> Voting takes place in the embassy or consulate: for example, in the United Kingdom South African citizens may only vote in London or Edinburgh. In large countries, the location of the voting process only in main centres can create a large travel burden to the exercise of this right.

## 4. Current Debates and Reforms

There are no current legislative reforms tabled nor country-wide campaigns on issues of citizenship. There are however a number of challenges to the implementation and interpretation of the law by the Department of Home Affairs through legal and political channels. A number of NGOs and individuals are frequently in court challenging practices that are not consistent with the current citizenship law or the Constitution.

### 4.1. The Stateless Child

While, legally, the SACA allows for the ‘statelessness exception’ the Department of Home Affairs has not included any guidance on this in the Regulations, thus making it unclear how

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<sup>18</sup> It seems that, in some cases, it is strictly enforced that the registration should take place at the embassy or consulate in the country of birth; and citizens who attempt to later register their child in South Africa are turned away (LHR 2015).

<sup>19</sup> (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC) (Langa CJ, Moseneke DCJ, O’Regan, Cameron, Mokgoro, Ngcobo, Nkabinde, Sachs, Skweyiya and Yacoob JJ).

<sup>20</sup> As set out by the Electoral Commission of South Africa. “How to Register and Vote Abroad”.

such a child may go about acquiring citizenship through the exemption. Simply put, if the regulations have not created a form or procedure for the application, it becomes de facto impossible to make the application, without the help of a third-party organisation such as Lawyers for Human Rights (LHR), and frequently, court action. The Department of Home Affairs recently settled one such case and agreed to both grant ‘citizenship by birth’ to the stateless child of Cuban parents<sup>21</sup> and to add regulations to §2(2) within 18 months to enable stateless children to acquire citizenship as allowed through the Act (Evans 2016).<sup>22</sup> This settlement was agreed upon in September 2016, and according to LHR, the child has yet to be granted citizenship by the Department over a year later (LHR 2017). The regulations with regards to the ‘statelessness exemption’ are due to be added by early 2018.

#### 4.2. The Challenge of Registering Births

In addition to the above-mentioned failure to create regulations for stateless children, Regulation 12 of the BDRA has also created a serious barrier to registering birth in certain cases, thus making children in those cases ineligible for citizenship given that registration is a requirement of acquiring citizenship by birth (§2(2)(b)).

The issue is that when a child is born out of wedlock, Regulation 12 of the BDRA allows only mothers to register the birth. The mother has to have a valid identity document or passport with a valid permit to register the child’s birth (Regulations 3,4,5). As such undocumented mothers cannot register their children. Even if the father of the child is a South African citizen, he cannot register the child or pass on his citizenship. This regulation effectively leaves children born out of wedlock to undocumented or absent mothers unable to become registered, regardless of the status of their father. As a result, children in these cases remain undocumented, and so effectively unable to acquire or make use of their citizenship.<sup>23</sup>

#### 4.3 Minister’s Discretion:

In recent times, controversy has arisen over the Minister’s discretion to grant naturalisation without fulfilment of residency requirements (§5(9)). It has become apparent that the Minister (when this role was filled by Malusi Gigaba) has used this discretion to grant citizenship to the now infamous Gupta brothers in 2013 (McKaiser 2017). Given the large corruption scandal surrounding them, and accusations of foreigners ‘capturing the state’, the fact that they were granted citizenship through an exemption has come under fire (McKaiser 2017). Most significantly, the Minister did not declare this exemption in parliament as required by the SACA (§5(9)(b)). This scandal highlights possible concern for the scope of discretion allowed to the Minister of Home Affairs in naturalisation (§5(9)(a)).

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<sup>21</sup> Cuba has very strict citizenship laws: Cuba does not allow children to obtain citizenship by birth if they are born outside Cuba to parents who are considered permanent immigrants (a status which is acquired after only 11 months) (Evans 2016).

<sup>22</sup>The Department settled after initially applying for leave to appeal the Pretoria High Court decision *DGLR & KMRG v Minister of Home Affairs and Others* (38429/13) GNP [2015] (Motajane).

<sup>23</sup> For more detailed explanations of a number of problem cases, see “Childhood Statelessness in South Africa (LHR 2016).



#### 4.4 Immigration and Xenophobia:

The generous scope of the South African Constitution is sharply contrasted with widespread incidents of xenophobia, in South Africa, throughout its independence. These incidents range from xenophobic comments from leading political figures<sup>24</sup> to widespread outbreaks of xenophobic violence, most notably in 2008 and 2015. Explanations for this xenophobia are varied: most commonly the poverty of South Africans is cited, with reference to foreigners usurping work opportunities; others point to a politics of fear cultivated by the state and media frequently pointing to mass immigration and using foreigners as a scapegoat for high crime and poor service delivery (Neocosmos 2008:588-9). Given the often mob-like nature of xenophobic violence, it appears that the legal status of the individuals is not commonly salient: to the xenophobe, being a naturalised citizen, or not, seems to make little difference to the perception of one being a ‘foreigner’. Even so, the previous discussion highlights that South Africa has in the first 20 years of independence chiefly tightened laws around acquiring citizenship. While statistics on naturalisation were not available, census data suggests that the number of individuals ‘born outside the republic’ is increasing rapidly: from 2.3% in 2001 to 4.4% in 2011 (STATSA 2003, 2012). In real numbers this is around 2.2 million (known) immigrants living in South Africa in 2011. A quarter of these immigrants were naturalised, with only 3.3% of the then population reporting to be ‘non-citizens’ (STATSA 2011). These non-citizens have faced increasing barriers to naturalisation in terms of residence requirements as well as restrictions on the children’s acquisition of citizenship by birth. It is also widely understood that there are a large number of undocumented migrants, chiefly from other African countries, residing and working illegally in the country.

The large influx of immigrants between 2001 and 2011 can be largely explained by the large influx of Zimbabweans in 2004 (and surrounding years). There is no reliable data on the numbers of Zimbabweans living in South Africa but it is widely cited as somewhere between 1 and 3 million (Chiuma 2013). As one police report bluntly states, “it is a well-known fact that the border line between South Africa and Zimbabwe is at a state of complete collapse.” The report points to large numbers, under resourcing and “weak border management systems” (Meetsi nd). Concessions have been made to enable Zimbabweans to regularise their status: most notably, a special 3-year dispensation visa granted in 2010 to working Zimbabweans within South Africa. These visas were renewed in 2013 for four years, and again in 2017 for another four years (Child 2017). This residency does not however count toward permanent residence, and as such there are large numbers who have lived and worked in South Africa for up to 12 years without security of being able to remain. This is exacerbated by the lack of organisation and communication by the government: the possibility of second renewal was only announced in early September 2017, a mere three months before expiry (Child 2017).

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<sup>24</sup> For example, see comments by Mangosotho Buthelezi (previously Home Affairs Minister) on competing for resources with ‘millions of aliens’ and the criminality of Nigerians (Neocosmos 2008:588)

## 5. Conclusion

The founding provisions of the South African Constitution (1996) hold that ‘there is a common South African citizenship’ (§3). All citizens are (a) equally entitled to the rights, privileges and benefits of citizenship and (b) equally subject to the duties and responsibilities of citizenship (§3(2)). In moving from an oppressive regime characterised by extreme inequality, this guarantee of an *equal*, common citizenship is the cornerstone of the new, democratic republic. The national legislation that is required by §3(3) of the Constitution does much to ensure that this founding provision is enacted: the legislation ensures that there is no discrimination on the bases of race, ethnicity, or gender and sets out uncontroversial principles of acquisition of citizenship by birth, descent, and naturalisation. There remains however, a number of areas where legislation and regulations arguably do not fully live up to the Constitutional rights: first, the SACA permits the deprivation of citizenship in a number of cases, despite §20 stating that ‘no citizen may be deprived of their citizenship’. Second, reforms to the SACA now only allow children of non-citizen, permanent residents to acquire citizenship upon reaching majority, arguably against the spirit of §28(a) that guarantees every child the right ‘to a name and nationality at birth’. Third, despite the ‘statelessness exception’ (§2(2)), the Department of Home Affairs has yet to provide regulations to set out the path to acquisition through this provision. Fourth, citizenship by birth requires registration in terms of the BDRA, which in a number of exception cases has proved to be a high bar to overcome for parents in irregular situations. It is likely, as has already been the case, that the Department of Home Affairs’ interpretation of the SACA will continue to be challenged in court, thus allowing for a gradual accumulation of juridical precedent that sets out the required interpretation of the SACA, and allowed regulations, in line with the Constitution.

South African citizenship law has been fairly stable since independence in 1994. While the law radically changed to create a common citizenship with no racial inequality, the nature of citizenship law has also remained relatively stable from its inception in the 1949 South African Citizenship Act. Recent years have begun to show signs of a tightening of the requirements for citizenship, particularly in increased residency requirements for naturalisation and reduced *jus soli* provision for children of non-citizen permanent residents. This tightening is likely in response to the rapid increase in immigration to South Africa post-independence. On the whole, however, the push back against immigration in the form of xenophobic violence is not concerned with provision for naturalisation but rather (i) the extent to which immigration is not sufficiently regulated; (ii) social grants and other perceived benefits available to immigrants and (iii) the lack of regulation around illegal (without permits) work by immigrants. Citizenship law is therefore largely immune from current debates around immigration, and tends to only come to the fore of public discourse around issues of statelessness. As such, while it is likely that the law will continue to be refined through legal precedent and changes to the Department of Home Affairs Regulations, it is unlikely that the stability of the Citizenship regime will be unsettled in the foreseeable future.

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