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Beyond ratification: reimagining policy and legislative frameworks to address childhood statelessness in South Africa

Takalanga Nokwanda Maziya[1], Emma Charlene Lubaale[2,3,*]

[1]Department of Law, University of Mpumalanga, Corner Road, Mbombela, Nelspruit, Mpumalanga, South Africa
[2]Department of Law and Criminology, University of Greenwich, Old Royal Naval Park Row SE10 9LS, London, United Kingdom
[3]Faculty of Law, Rhodes University, Makhanda, Eastern Cape, South Africa

[*]Corresponding author. Department of Law and Criminology, University of Greenwich, London, United Kingdom.
E-mail: e.lubaale@greenwich.ac.uk

Abstract

Statelessness disproportionately affects children and undermines their access to basic rights, including education, health care, and dignity. Despite South Africa's ratification of core international treaties and its constitutional guarantee of every child's right to a name and nationality at birth, the operationalization of these norms reveals a paradox. This article conceptualizes and evidences what it terms the operationalization gap: the phenomenon whereby states appear normatively compliant through treaty ratification and constitutionalization yet reproduce exclusion through legislative and administrative practice. In South Africa, this manifests in four interlocking barriers: gaps in nationality legislation, onerous evidentiary burdens, restrictive interpretations, and broad discretion vested in officials—mechanisms that perpetuate childhood statelessness despite South Africa's constitutional and international commitments. Drawing on the African Committee of Experts on the Rights and Welfare of the Child's General Comment 2, the article advances original, context-sensitive recommendations that translate constitutional supremacy and treaty obligations into actionable reforms. These include legislative amendments, administrative presumptions, and policy firewalls designed to dismantle systemic barriers. While grounded in South Africa's socio-legal context, the analysis offers transferable insights for other jurisdictions grappling with migration pressures and the conflation of nationality law with immigration control. By

bridging the gap between normative frameworks and administrative realities, this article contributes a novel lens and a practical blueprint for eradicating childhood statelessness in South Africa and beyond.

1. Introduction

Statelessness is often described as a silent pandemic.[1] It is an age-old phenomenon[2] and a global human rights crisis that erodes the foundations of dignity, equality, and belonging.[3] While its legal definition is deceptively simple, being unrecognized as a national by any state under the operation of its laws,[4] the lived reality is profound: stateless persons lack the legal relationship that anchors individuals to a state, a relationship that unlocks access to education, health care, freedom of movement, political participation, and other fundamental rights and freedoms. For children, this deprivation is particularly devastating, shaping life trajectories from birth and foreclosing opportunities for development and protection.[5] Despite decades of international norm-building, statelessness persists as a structural injustice, affecting an estimated 10 million people worldwide, many of whom remain invisible in official statistics.[6] It is not merely a legal anomaly; it is a condition that reproduces vulnerability across generations, often silently and systematically.

On the African continent, the phenomenon is deeply rooted in historical and structural factors: arbitrary colonial borders, contested transitions to independence, and contemporary patterns of migration intersect with deficiencies in nationality laws and their implementation.[7] Hundreds of thousands live in Africa without a recognized nationality, and many more exist in a liminal space of disputed or doubtful status.[8] South Africa exemplifies this paradox. Despite its progressive constitutional framework, the country lacks reliable data on statelessness within its borders.[9] Reports suggest that 15 million people are undocumented, including three million children, a significant proportion of whom are at risk of

[1] C Quah, 'Pandemic in a Stateless Society' in V Bobek and CH Quah (eds), *Emerging Markets* (IntechOpen 2020); V Neluvhalani 'Statelessness and COVID-19 in South Africa' (2022) 37 Southern African Public Law 2.

[2] P Weiss, *The Problem of Statelessness* (World Jewish Congress 1944); W Hanley 'Statelessness: An Invisible Theme in the History of International Law' (2014) 25 European Journal of International Law 321; A Mbiyozo 'Statelessness: An Old Problem with New Threats' (2019) Institute of Security Studies <https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats> accessed 26 October 2025; L Van Waas, 'Are we there yet? The Emergence of Statelessness on the International Human Rights Agenda' (2014) 32 Netherlands Quarterly of Human Rights 342; N Kyaw, 'Unpacking the Presumed Statelessness of Rohingyas' (2017) 15 Journal of Immigrant & Refugee Studies 269.

[3] M Forster and H Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 International Journal of Refugee Law 564; L Kingston, 'Conceptualizing Statelessness as a Human Rights Challenge: Framing, Visual Representation, and (Partial) Issue Emergence' (2019) 11 Journal of Human Rights Practice 52; L Kingston, 'A Forgotten Human Rights Crisis: Statelessness and Issue (Non)Emergence' (2013) 14 Human Rights Review 73.

[4] Art 1(1) Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, 360 UNTS 117 (entered into force 6 June 1960).

[5] M Foster and H Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 International Journal of Refugee Law 564; WT Worster, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law' (2019) 24 Tilburg Law Review 204.

[6] UNHCR, 'Statelessness Around the World' <https://www.unhcr.org/uk/who-we-protect/statelessness-around-world> accessed 15 December 2025.

[7] ACRWC Committee, 'General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth and to Acquire a Nationality' (2014) para 4 (Hereinafter General Comment 2).

[8] ibid.

[9] StatelessHub, 'South Africa' (2024) <https://www.statelesshub.org/country/south-africa> accessed 22 December 2025.

statelessness.[10] While not all undocumented persons are stateless, the absence of documentation creates a precarious legal vacuum, exposing children to exclusion from rights guaranteed under both domestic and international law.[11]

South Africa's normative architecture appears exemplary. At the international level, the United Nations Conventions on the Rights of the Child (UNCRC) and the International Covenant on Civil and Political Rights (ICCPR) enshrine the child's right to acquire a nationality, obligations elaborated in the Human Rights Committee's General Comment 17.[12] Regionally, Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC),[13] as interpreted in General Comment 2 by the African Committee of Experts on the Rights of the Child (ACRWC Committee), mandates immediate birth registration and safeguards for the right to acquire nationality for otherwise-stateless children.[14] Domestically, section 28(1)(a) of the Constitution guarantees every child 'a name and a nationality from birth,' and South Africa's ratifications of the ICCPR, UNCRC, and ACRWC reinforce the interpretive bridge between international and constitutional norms. Collectively, these instruments impose a clear obligation: to structure law and administration in ways that prevent childhood statelessness and dismantle discriminatory barriers to nationality.[15]

Yet, practice diverges sharply from principle, and South African jurisprudence continues to confront this gap. Judicial decisions such as *Centre for Child Law v Minister of Home Affairs*[16] and others on birth registration and nationality illustrate courts' willingness to adopt purposive, constitution and international law-compliant interpretations,[17] but persistent bureaucratic chokepoints remain. Documentary burdens, restrictive interpretations, and discretionary administration frustrate constitutional and treaty guarantees, producing exclusion despite the protection guaranteed in the Constitution and the various children's treaties to which South Africa is a party.[18] This tension is compounded by South Africa's non-accession to the 1954 and 1961 Statelessness Conventions,[19] leaving policy vacuums

[10] ibid; Parliamentary Monitoring Group, 'Statelessness in SA; DHA Report back on Committee Resolutions: with Minister & Deputy Minister' (2021) <https://pmg.org.za/committee-meeting/32487/> accessed 17 October 2025.

[11] United Nations Human Rights Commissioner for Refugees <https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf> accessed 27 October 2023.

[12] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 7; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 24; Human Rights Committee, 'General Comment No. 17: Rights of the Child (Art. 24)' (1989) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

[13] African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (adopted 11 July 1990, entered into force 29 November 1999), art 6.

[14] General Comment 2.

[15] See detailed discussion of these obligations in Section 2 of this article.

[16] *Centre for Child Law v Director General: Department of Home Affairs and Others* (CCT 101/20) [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC) (22 September 2021).

[17] See eg, *P.P.M v Minister of Home Affairs* (14238/21) [2024] ZAGPPHC 2; *Khoza* v *Minister of Home Affairs* (2023) ZAGPPHC 140; *Muzore v Minister of Home Affairs*, 4013/2021, (Judgement delivered on 1 September 2023).

[18] See detailed discussion demonstrating this in Sections 3 and 4 of this article.

[19] Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975). Notably, the 1954 and 1961 Conventions go beyond the ICCPR and UNCRC by imposing specific, enforceable obligations on states. The 1954 Convention guarantees a legal status and minimum rights for stateless persons, including identity papers and travel documents, which the ICCPR and UNCRC do not provide. The 1961 Convention focuses on the prevention and reduction of statelessness, requiring states to grant nationality to otherwise stateless children born on their territory and to avoid loss or deprivation of nationality that would result in statelessness. In contrast, ICCPR and UNCRC merely recognise the right to acquire a nationality without prescribing detailed safeguards or procedural guarantees.

around the identification and protection of stateless children.[20] While fragments of these challenges appear in literature on international obligations to eradicate statelessness[21] and national implementation gaps,[22] no South Africa-focused study has yet connected these administrative chokepoints to international obligations and proposed actionable solutions considering these obligations.

What is missing in existing scholarship is a systematic articulation of what this article terms the 'operationalisation gap': the paradox whereby a state ratifies treaties, constitutionalizes rights, and legislates safeguards, yet re-creates exclusion through administrative practice—by imposing onerous evidentiary burdens, coupling birth registration with immigration enforcement, and leaving broad discretion to the nationality department. This article fills that gap by drawing on ACRWC General Comment 2, a region-specific interpretive instrument attuned to Africa's socio-legal realities, to advance original and context-sensitive recommendations. These include legislative amendments, administrative presumptions, and policy firewalls designed to eliminate discretion and dismantle barriers that perpetuate childhood statelessness—thus operationalizing treaty norms in practice. Although the recommendations in this article are tailored to South Africa's legal and policy context, they carry broader relevance for other jurisdictions, particularly in jurisdictions where rising migration pressures often lead states to conflate nationality law with immigration enforcement, thereby creating systemic risks of childhood statelessness.

The article is structured into six interrelated sections. Following this introduction, Section 2 examines South Africa's treaty obligations under three core instruments—the ICCPR, the UNCRC, and the ACRWC—with particular emphasis on the right to acquire nationality at birth as a primary safeguard against childhood statelessness. Section 3 maps out the constitutional protection of the right to nationality, while Section 4 turns to the domestic sphere, critically analysing key legislation and policy frameworks that purport to give effect to this right, while exposing how their operationalization creates loopholes that perpetuate

[20] StatelessHub (n 9).

[21] See eg, C Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 156; A Ahmad, 'The Right to Nationality and the Reduction of Statelessness – The Responses of the International Migration Law Framework' (2017) 5 Groningen Journal of International Law 57; B Blitz and M Lynch (eds), *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Edward Elgar Publishing 2011) 1–320; D Baluarte, 'The Risk of Statelessness: Reasserting a Rule for the Protection of the Right to Nationality' (2017) 19 Yale Human Rights & Development Law Journal 1; B Manby, 'Naturalization in African States: Its Past and Potential Future' (2021) Citizenship Studies 1; W Worster, 'The Obligation to Grant Nationality to Stateless Children Under Customary International Law' (2022) 7 Michigan State International Law Review 98; W Worster, 'European Union Citizenship and the Unlawful Denial of Member State Nationality' (2020) 43 Fordham International Law Journal 768; M Ganczer, 'The Right to Nationality as a Human Right' (2014) 15 Hungarian Yearbook of International Law and European Law 67; GR de Groot, 'Nationality Law' in J Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 505–515.

[22] See eg, F Khan, 'Exploring Childhood Statelessness in South Africa' (2020) 23 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 16; M Sabuj, 'The Right to Citizenship of Rohingya Children of Bangladeshi Descent Under International Human Rights Law' (2024) 45 Statute Law Review 1; M Sabuj, 'Statelessness of Rohingyas and Their Right to Bangladeshi Citizenship' (2025) 32 International Journal on Minority and Group Rights (2024); M Hlatshwayo and S Vally, 'Violence, Resilience and Solidarity: The Right to Education for Child Migrants in South Africa' (2014) 35 School Psychology International 266; L Chisholm, 'Migration and Education in Zimbabwe and South Africa' (2022) 48 Social Dynamics 170; H Beko, 'The Impact of Unregistered Births of Children in South Africa and How Their Rights to Essential Services and Basic Education are Affected (MA thesis, University of the Western Cape 2021); T Callender, 'Thank You for Coming? Policy, Politics, and Polity: How Education Stakeholders Interpret Post-apartheid Education Policy for Immigrants in South Africa—The Case of Cape Town (PhD thesis, University of Colombia, 2013).

exclusion. These include the imposition of onerous evidentiary burdens, the coupling of birth registration with immigration enforcement, and the wide discretion afforded to officials in nationality determinations. Section 5 builds on these findings to propose targeted reforms to South Africa's legislative and policy architecture. These recommendations are anchored in the authoritative guidance of the African Committee of Experts on the Rights and Welfare of the Child's General Comment 2, which interprets the ACRWC through an Africa-specific lens, offering contextually attuned strategies for addressing statelessness. Finally, Section 6 synthesizes the analysis, reflecting on the broader implications of these reforms for advancing constitutional supremacy, fulfilling treaty obligations, and informing comparative approaches in other jurisdictions.

2. South Africa's treaty obligations regarding children's right to acquire nationality

South Africa's 1996 Constitution firmly anchors the nation's commitment to international law, embedding it as a cornerstone of its domestic legal order. Under section 232, customary international law automatically becomes part of South African law unless it conflicts with the Constitution or an Act of Parliament, while section 233 mandates that courts prefer interpretations of domestic legislation that align with international law where reasonable. Parliament and the executive must navigate treaty-making through sections 231 and 232. Furthermore, section 39 elevates the status of international law in rights interpretation, obliging courts to consider international law when adjudicating Bill of Rights issues. This constitutional framework reflects a deliberate and transformative break from South Africa's apartheid era of isolation by embedding international norms into the very fabric of its democracy and ensuring its place within the global legal community.

South Africa ratified the ICCPR on 10 December 1998. Article 24(1) of the ICCPR provides that 'every child shall have, without any discrimination as to race, birth status, national or social origin, the right to protection based on his status as a minor.' This provision is significant because it guarantees the right to nationality in explicit terms for children, unlike instruments such as the Universal Declaration of Human Rights (UDHR), which frame the right more generally.[23] Article 24(3) further stipulates that 'every child has the right to acquire a nationality'.

The Human Rights Committee's General Comment No. 17 offers authoritative guidance on interpreting Article 24(3). It underscores that states must ensure non-discrimination in nationality acquisition, particularly between legitimate children and those born out of wedlock, children of stateless parents, or based on the nationality status of one or both parents.[24] Importantly, the Committee clarifies that the right to a name and nationality at birth requires states to adopt 'special measures of protection'. It states:

> States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the

[23] art 15 UDHR (adopted 10 December 1948) UNGA Res 217 A(III).

[24] Human Rights Committee, General Comment No 17 (Rights of the child, art 24), UN Doc HRI/GEN/1/Rev.9 (Vol I) (adopted 7 April 1989) para 8.

> parents. The measures adopted to ensure that children have a nationality should always be referred to in reports by States parties.[25]

The implication of this guidance is clear: national laws, including South Africa's, must be framed and interpreted to guarantee children's right to acquire nationality at birth, without discrimination on grounds such as legitimacy, parental status, or statelessness. This requires legislative and policy coherence with constitutional guarantees such as section 28(1)(a) of South Africa's constitution on nationality for children, international obligations under the ICCPR, and related instruments. Any domestic measure that undermines this right would not only breach international law but also violate the supremacy of the Constitution.[26]

South Africa ratified the UNCRC on 16 June 1995, thereby committing to the principles entrenched in this widely ratified treaty. Article 7 of the UNCRC provides:

> (1) The child shall be registered immediately after birth and shall have the right from birth to a name and the right to acquire a nationality.
> (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

This provision is progressive because it not only recognizes the right to acquire nationality at birth but also obliges states to ensure its realization through national law. Municipal law must therefore not undermine Article 7 rights. More importantly, states are expected to prioritize implementation where a child would otherwise be stateless.

In its 2024 Concluding Observations on South Africa, the Committee on the Rights of the Child (UNCRC Committee) recommended that South Africa:

> Adopt regulations concerning the practical and administrative steps required for children to acquire citizenship under sections 2(2) and 4(3) of the Citizenship Act and ensure that regulations under section 4(3) do not exclude foreign children with asylum-seeking or refugee parents and children of undocumented or irregular migrants.[27]

The implication of this recommendation is that South Africa must move beyond abstract guarantees and adopt concrete, child-centred regulations that operationalize sections 2(2) and 4(3) of the Citizenship Act in line with international standards. This also means codifying clear procedures that remove evidentiary and documentary barriers, ensuring that children of asylum-seeking, refugee, and undocumented parents are not excluded from nationality acquisition. It also requires harmonizing birth registration rules with constitutional and treaty obligations, prohibiting discriminatory practices, and insulating registration from immigration enforcement. In short, the recommendation underscores that compliance cannot rest on legislative text alone but demands practical, accessible mechanisms that guarantee every child's right to nationality from birth.

The ACRWC is the principal regional treaty on children's rights in Africa. As of January 2026, it has been ratified by 51 of the 55 African Union member states, reflecting near-regional acceptance. South Africa ratified the Charter on 7 January 2000, thereby

[25] ibid.
[26] art 2 of the Constitution of the Republic of South Africa 1996 (Hereinafter—The Constitution).
[27] Committee on the Rights of the Child, Concluding observations on the combined third to sixth periodic reports of South Africa, 11 March 2024, para C(21)(c) <https://docs.un.org/en/CRC/C/ZAF/3-6> accessed 23 December 2025.

committing to its obligations. Article 6 of the ACRWC is particularly significant because it clearly identifies the state responsible for granting nationality to stateless children. It provides:

> Every child has the right to be registered immediately after birth and the right to acquire a nationality at birth. Furthermore, states are to ensure that constitutional legislation recognises the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth he is not granted nationality by any other State in accordance with its laws.

This wording is progressive and precise. It not only affirms the right to nationality at birth but also imposes a positive obligation on states to enact constitutional and legislative measures ensuring that children born within their territory who cannot acquire another nationality are granted citizenship—especially where failure to do so would render them stateless. This clarity marks a significant advance over global instruments such as the UDHR, ICCPR, and UNCRC, which stop short of specifying which state bears the obligation. The ACRWC removes ambiguity by placing the onus squarely on the state of birth.

The ACRWC Committee, mandated to monitor and interpret the ACRWC, has provided authoritative guidance on Article 6.[28] While acknowledging that nationality remains a state prerogative, the Committee insists that national laws must align with international principles, among these, the *best interests of the child*, which the ACRWC elevates as 'the primary consideration' in all actions concerning children.[29] Denying nationality to a child who would otherwise be stateless cannot be reconciled with this principle. The Committee further clarifies that the state of birth bears the responsibility to confer nationality where failure to do so would result in statelessness.[30] Article 6(4) reinforces this by requiring constitutional recognition of the principle that a child born in a state's territory acquires its nationality if no other nationality is available.

The Committee's jurisprudence illustrates these obligations. In its landmark decision against Kenya, the ACRWC Committee found the state in violation of Article 6 for failing to ensure Nubian children could acquire Kenyan nationality and proof thereof at birth.[31] The Committee directed Kenya to adopt legislative, administrative, and other measures to prevent statelessness among Nubian children, underscoring that failure to legislate and implement safeguards constitutes a breach of the ACRWC.[32]

Further, the ACRWC Committee has issued detailed guidance to prevent childhood statelessness. Compliance begins with universal birth registration, including for children born out of wedlock, to undocumented, refugee, or asylum-seeking parents, or to parents with irregular immigration status.[33] The Committee warns against requiring parental identity or residence documents as preconditions for registration where these documents are unavailable or inaccessible, noting that such requirements amount to indirect discrimination against children of stateless or undocumented parents.[34] These recommendations align

[28] Established in terms of art 32 of the ACRWC.
[29] art 4 of the ACRWC; General Comment 2, paras 14–16 and 87.
[30] General Comment 2, para 88.
[31] *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v The Government of Kenya*, Communication No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (decision of 22 March 2011), paras 52–54.
[32] ibid.
[33] General Comment 2, paras 57–66.
[34] ibid.

with UNHCR guidance advocating alternative forms of proof and waivers of documentary requirements to avert statelessness.[35]

Collectively, South Africa's commitments under the ICCPR, UNCRC, and ACRWC impose a clear obligation: the state must ensure that all children born on its territory acquire nationality if failure to do so would render them stateless. National laws and administrative practices must not undermine this right. Instead, they must operationalize it through accessible birth registration and nationality procedures that eliminate discriminatory barriers.

3. South Africa's constitutional guarantee of the right to nationality for children

The Constitution of the Republic of South Africa occupies the apex of the legal hierarchy, which proclaims its supremacy and invalidates any law or conduct inconsistent with its provisions.[36] This imposes a binding obligation on the legislature, executive, judiciary, and all state organs to ensure that their legislative enactments, policy frameworks, and administrative actions conform to constitutional norms and values.[37] Consequently, courts are empowered to review and strike down any measure that contravenes the Constitution, thereby safeguarding the principles of accountability and the transformative vision underpinning South Africa's democratic order.[38] The supremacy clause dictates that no legislation, policy, or governmental act may derogate from the Constitution; any attempt to do so would be constitutionally repugnant and invalid.[39]

Within this framework, the right of every child to acquire nationality from birth enjoys constitutional protection under Article 28(1)(a). When read in conjunction with section 28(2) of the Constitution, which establishes that a child's best interests are of paramount importance in every matter concerning the child, section 28(1)(a) creates a substantive obligation on the state to adopt both legislative and administrative measures ensuring that no child is left without legal recognition of nationality. This provision thus affirms that the acquisition of nationality is not merely a statutory entitlement, but a constitutional guarantee rooted in the broader principles of dignity, equality, and the best interests of the child.

Although section 3(3) of the Constitution delegates the practical implementation of citizenship to the legislature, this delegation does not absolve the state of its constitutional duty to give full and effective meaning to the right guaranteed in section 28(1)(a). South Africa's highest Court, the Constitutional Court, has consistently affirmed that statutory provisions must be interpreted in a manner that promotes the spirit, purport, and objects of the Bill of Rights, as required by section 39(2) of the Constitution.[40] Accordingly, the Citizenship Act 88 of 1995 and the Births and Deaths Registration Act 51 of 1992 (BDRA) must be read through the lens of the constitutional imperative to secure every child's nationality from birth.

[35] United Nations High Commissioner for Refugees (UNHCR), 'Ensuring Birth Registration for the Prevention of Statelessness' (2024) <https://data.unhcr.org/en/documents/details/109697> accessed 23 December 2025.

[36] art 2 of the Constitution.

[37] art 8 of the Constitution.

[38] art 172(1)(a) of the Constitution.

[39] art 2 of the Constitution.

[40] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 12; 2019 (4) SA 475 (CC), para 2; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC), paras 22–23.

The scope of this right has been clarified in judicial decisions. In *DGLR v Minister of Home Affairs*, the High Court reaffirmed that the Department of Home Affairs (DHA) bears a positive obligation to facilitate birth registration and ensure that no child is rendered stateless because of their parents' immigration status.[41] Similarly, in *Chisuse v Director-General, Department of Home Affairs*, the Constitutional Court emphasized that citizenship cannot be interpreted narrowly in ways that undermine constitutional protections or exclude those with legitimate claims to nationality.[42] Both cases underscore a fundamental principle: the interpretation of citizenship and nationality must prioritize substantive inclusion over procedural rigidity, ensuring that constitutional guarantees are not hollowed out by administrative barriers.

4. Legislative and policy deficiencies: examining how South Africa's legal framework perpetuates childhood statelessness

Although South Africa's constitutional architecture and its ratification of key international treaties establish a robust normative framework for the protection of children's right to nationality at birth, the practical realization of this right is far from assured. This section critically interrogates the legislative and policy instruments governing nationality to assess their fidelity to South Africa's constitutional obligations and international commitments. The analysis focuses on the interpretation and implementation of the Citizenship Act 88 of 1995 (as amended), the BDRDA of 1992, their accompanying regulations, and relevant policy directives issued by the Department of Home Affairs. By examining these instruments and their operational dynamics, this section demonstrates how legislative gaps, ambiguities, and restrictive administrative practices create pathways for the perpetuation of childhood statelessness, despite the existence of strong normative guarantees.

4.1. The Citizenship Act 88 of 1995 as amended and its implications for childhood statelessness

The Citizenship Act operationalizes section 3(3) of the Constitution and serves as South Africa's primary legislation governing the acquisition of nationality.[43] This Act, which replaced the original 1992 statute, has undergone significant amendments in 1995, 2005, and 2010.[44] The discussion that follows critically examines how the framing of nationality in South African law affects the realization of the right to acquire nationality for stateless children.

The Citizenship Act provides two principal pathways for acquiring nationality by birth, set out in section 2(2) and 2(3). Section 2(2) states:

> Section 2(2): Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if—
> (a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and
> (b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act 51 of 1992.

[41] *DGLR v the Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13 of 3 July 2014.
[42] *Chisuse v Director-General, Department of Home Affairs* (2020 (6) SA 14 (CC), para 76.
[43] s 3(3) of the Constitution states: National legislation must provide for the acquisition, loss, and restoration of citizenship.
[44] Citizenship Act 88 of 1995.

> Section 2(3): Any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth, if—
> (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and
> (b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act (Act No 51 of 1992).

Based on these provisions, a child born in South Africa to non-citizen parents may acquire South African nationality through two distinct routes, provided statutory requirements are met. The first pathway, under section 2(2), applies primarily to children who would otherwise be stateless. It imposes three cumulative conditions: (i) birth within South African territory; (ii) registration of the birth under the Births and Deaths Registration Act 51 of 1992 (BDRA); and (iii) absence of any other nationality or entitlement thereto. This provision functions as a safeguard against statelessness, aligning with South Africa's obligations under international law, including the ICCPR, UNCRC, and the ACRWC.

The second pathway, under section 2(3), applies to children born to parents lawfully admitted for permanent residence but not citizens. Such a child qualifies for citizenship by birth if they have resided continuously in South Africa from birth until reaching majority (18 years) and if their birth was registered under the BDRA. For analytical clarity, the requirements under section 2(2) and (3) will be examined separately below. Given its critical role in operationalizing both provisions, the registration requirement under the BDRA and its 2014 Regulations will also be discussed in a dedicated section.

4.1.1. The implementation gap in the 'No Right to Another Nationality' requirement

A distinctive feature of South Africa's nationality regime is the condition in section 2(2)(a) of the Citizenship Act, which stipulates that a child may only acquire citizenship if they do not possess another nationality or the right to claim one. At first glance, this appears to be a reasonable safeguard against dual nationality. However, in practice, it imposes an onerous evidentiary burden on stateless children, requiring them to prove the absence of any entitlement to another nationality—a task that is often impossible for those without documentation or access to foreign authorities.

The interpretation of this provision was tested in *Muzore v Minister of Home Affairs*, where Zimbabwean parents sought South African citizenship for their three minor children born in South Africa.[45] The Department of Home Affairs (DHA) rejected the application, reasoning that the children were entitled to Zimbabwean nationality under Zimbabwean law.[46] The Court upheld this decision, affirming that children generally follow the nationality of their parents and that the applicants had failed to meet the statutory requirement. This case illustrates how the theoretical availability of another nationality, even if practically inaccessible, can bar a child from acquiring South African citizenship.

The challenges become even more acute for undocumented or orphaned children. This was blatantly evident in *Khoza v Minister of Home Affairs*, involving an orphaned child born in South Africa without any documentation.[47] The DHA insisted on proof from Eswatini confirming that the child could not acquire Swazi nationality. Only after the Eswatini

[45] *Muzore and Another v Minister of Home Affairs and Another* (4013/2021) [2023] ZALMPPHC 81 (1 September 2023)
[46] s 4 of the Citizenship of Zimbabwe Act 1984 provides for the acquisition of citizenship by descent.
[47] *Khoza v Minister of Home Affairs* (2023) ZAGPPHC 140.

embassy verified that the child's surname was not recognized under Swazi nationality law did the DHA concede his statelessness. Similarly, in *DGLR v Minister of Home Affairs*, the child's Cuban parents had lost their nationality under Cuban law, which classifies those working abroad for more than 11 months as 'permanent emigrants' who cannot transmit nationality.[48] The Court accepted statutory proof of Cuban law as sufficient, without demanding further evidence.[49] While this outcome was favourable, it underscores the burden placed on children to prove the non-availability of another nationality by seeking out evidence from foreign legal systems to establish statelessness.

The intersection of refugee protection and nationality law adds further complexity. As Khan's analysis of Somali refugees demonstrates, systemic instability and lack of consular access render the acquisition of Somali nationality practically impossible.[50] In the 2025 decision of *M.M.E. v Director-General: Home Affairs*, a child born to Rwandan refugee parents was denied South African citizenship on the basis that she retained a right to Rwandan nationality.[51] The DHA argued that the parents should pursue citizenship through the Rwandan authorities. The Court rejected this reasoning, noting that approaching the Rwandan embassy would jeopardize the parents' refugee status under the South African Refugees Act and its regulations, which prohibit re-availing oneself of national protection.[52] The Court held that a 'theoretical right' that cannot be exercised amounts to no right at all and ordered the child's registration as a South African citizen. The High Court categorically remarked that 'it must not be forgotten that procedure is, but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities.'[53] This judgment underscores that, even as recently as 2025, entrenched administrative rigidity continues to perpetuate statelessness. It often requires judicial intervention through constitutional interpretation that foregrounds substantive inclusion to dismantle these systemic barriers. But not all stateless children can access the courts to get remedies tailored to their individual circumstances.

Collectively, these cases expose a structural gap in South Africa's nationality regime. While section 2(2)(a) was intended as a safeguard against statelessness, its evidentiary and procedural demands often function to undermine it. By placing the burden on stateless children to prove the absence of another nationality, the law fails to accommodate the realities of stateless, undocumented, migrant, and refugee-born children—precisely those most vulnerable to statelessness. This approach not only undermines South Africa's constitutional and international obligations but also perpetuates the very harm the provision seeks to prevent.

4.1.2. The legislative gap in the majority age requirement

Section 2(3) of the South African Citizenship Act provides that a person born in South Africa to at least one parent who holds permanent residence status, but is not a South African citizen, qualifies for citizenship by birth. However, acquisition of nationality under this

[48] *DGLR v the Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13 of 3 July 2014.

[49] In terms of art 34 of the Cuban Constitution of 1999, a child born abroad to a Cuban mother or father will be Cuban by birth. Unfortunately, both the child's parents in this case failed to return to Cuba after their work mission was over, in terms of the laws of Cuba. They therefore lost their Cuban Citizenship.

[50] Khan (n 22).

[51] *M.M.E and Others v Director General, Department of Home Affairs and Another* (21970/2021) [2025] ZAGPPHC 202 (12 March 2025).

[52] s 5(1)(a) of the Refugees Act 130 of 1998.

[53] *M.M.E and Others v Director General, Department of Home Affairs and Another* (21970/2021) [2025] ZAGPPHC 202 (12 March 2025), para 39, citing *S.P. Gupta vs Union of India and Another* 1982 (2) SCR 365.

subsection is subject to two additional conditions: first, the child's birth must be registered in accordance with the Births and Deaths Registration Act (BDRA); and second, the child must have lived continuously in South Africa from birth until reaching the age of eighteen, at which point they may apply for citizenship. In effect, subsection 2(3) imposes four cumulative requirements: the child must be born in South Africa, the birth must be registered under the BDRA, at least one parent must be a permanent resident, and the child must have attained the age of majority before applying for citizenship.

The age requirement is particularly problematic. It neither prevents nor reduces childhood statelessness; rather, it risks exacerbating it. A child born in South Africa to a permanent resident who has not yet turned eighteen may remain stateless for 18 years, especially if the child cannot acquire citizenship from the parent's country of origin. This vulnerability is compounded by nationality laws in some states that restrict women from transmitting nationality to their children. For example, an unmarried woman from Eswatini who obtains permanent residence in South Africa cannot pass on her Swazi nationality, as Eswatini law prohibits unmarried women from conferring nationality.[54] Children born to permanent residents may face a risk of statelessness, as illustrated by the example of a Swazi woman residing permanently in South Africa. Although the mother holds permanent residence, the child cannot acquire South African nationality until reaching the age of 18 years. At the same time, under Eswatini's nationality laws, the child cannot acquire Swazi nationality through the mother solely because nationality transmission is restricted on the basis of sex. As a result, the child remains stateless during childhood, caught between two legal systems that together deny access to nationality. Yet, under s 2(3), the child cannot get South African nationality, which is impossible until the child reaches the age of 18 years, leaving them in prolonged legal uncertainty.

And so, while South Africa's legislative framework appears, at first glance, to offer multiple avenues for acquiring nationality, closer scrutiny reveals that these mechanisms fail to adequately protect all stateless children. Access to these pathways is contingent upon attainment of majority age, birth registration—a requirement that is often onerous, inaccessible, or, in some cases, impossible for many children. Consequently, the formal availability of nationality routes does not translate into meaningful protection for those whose births cannot be registered or who have not attained majority age. This disconnect undermines the effectiveness of South Africa's efforts to prevent statelessness and perpetuates the risk of exclusion for the most vulnerable.

4.2. The BRDA and its implications for childhood statelessness

Birth registration, though a fundamental right,[55] remains a persistent challenge in South Africa. Proudlock's 2014 study identified five categories of children who face systemic barriers to registration: those born in rural areas, children of undocumented parents, orphaned or abandoned children, and children born to foreign parents.[56] More than a decade later, these same groups continue to experience difficulties, leaving them at heightened risk of

[54] See, eg, s 43 of the Eswatini Constitution 2005; the Child Protection and Welfare Act 6 of 2012 of Eswatini; art 1(2) Somali Citizenship law 1962; The Lebanon Constitution and Decree-Law of 18 September 1965.

[55] art 7 UNCRC; art 6 ACRWC.

[56] P Proudlock (ed), *South Africa's Progress in Realising Children's Rights: A Law Review* (Children's Institute, University of Cape Town & Save the Children South Africa 2014).

statelessness.[57] This enduring problem warrants critical examination, particularly because birth registration is a prerequisite for acquiring nationality under the Citizenship Act. The discussion below interrogates the registration requirement and evaluates its practical implications for children's access to nationality.

4.2.1. Struck down BRDA provisions and their lingering effects

Birth registration is essential for securing a child's identity and enabling access to basic rights, yet the legal framework has historically created obstacles. A striking example is the former s 10 of the BDRA, recently declared unconstitutional by the Constitutional Court in 2021.[58] Before its invalidation, s 10 imposed restrictive conditions on registering children born out of wedlock. It required notice of birth to be given under the mother's surname or jointly with the father's acknowledgement, contingent on the mother's consent. This formulation produced severe practical consequences: fathers could not register a child if the mother was absent or refused consent; children in the sole care of their fathers were left unregistered; and undocumented mothers were effectively barred from registering births due to stringent documentation requirements.

Additional barriers arose from BDRA regulations mandating that non-South African parents provide certified copies of valid passports or visas. This requirement disproportionately affected mixed-status families, for example, where the father was a South African citizen, but the mother was a foreign national without valid immigration documents. In such cases, children were denied birth registration, leaving them without legal recognition and vulnerable to statelessness. The Constitutional Court addressed these issues in *Centre for Child Law v Director-General: Department of Home Affairs*.[59] The case concerned a South African father who married a Congolese woman under Congolese customary law while stationed in the DRC. After relocating to South Africa, the couple attempted to register their marriage and later the birth of their second child. The DHA refused both, citing a lack of proof of marriage and the mother's expired visa. As a result, the child was deemed born out of wedlock to an undocumented mother and denied registration. The Court held that s 10 violated the constitutional rights of children and fathers in two respects: first, it infringed children's rights to a name and nationality at birth under s 28(1)(a); secondly, it discriminated against biological fathers based on marital status, sex, and gender, contrary to s 9(3) of the Constitution. The judgment illustrates how civil registration laws, even unintentionally, can perpetuate childhood statelessness.

Although section 10 has been struck down, its consequences linger. Some children whose births could not be registered before the 2021 ruling remain unregistered and, in many cases, stateless.[60] These children now face the additional burden of navigating complex administrative processes to rectify gaps created by an unconstitutional provision.[61] This underscores a broader truth: reforming discriminatory laws is necessary but insufficient

[57] Committee on the Rights of the Child, Concluding observations on the combined third to sixth periodic reports of South Africa, 11 March 2024, para C(21)(c) <https://docs.un.org/en/CRC/C/ZAF/3-6> accessed 23 December 2025.

[58] *Centre for Child Law v Director General: Department of Home Affairs and Others* (CCT 101/20) [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC) (22 September 2021).

[59] ibid.

[60] Cliffe Dekker Hofmeyr, 'South Africa: Unlocking Citizenship: Overcoming Irregular Birth Certificates' 21 February 2025 <https://citizenshiprightsafrica.org/south-africa-unlocking-citizenship-overcoming-irregular-birth-certificates/>; Fathers for Justice, 'Outrage South African Fathers are Still Unconstitutionally Prejudiced in the Current Legal System' 19 November 2023 <https://www.f4j.co.za/2023/11/19/equal-rights-fathers-5050-custody/?v=eacb463a8002> accessed 23 November 2023.

[61] ibid.

unless accompanied by proactive measures to remedy historical exclusions and dismantle systemic barriers to birth registration.

4.2.2. Regulations to the BDRA and their implications for childhood statelessness

The 2014 Regulations to the BDRA impose documentation requirements that, while administratively logical, create significant barriers to birth registration for vulnerable children. Section 3(1) of the Regulations provides that the registration of a child born to a South African citizen must be accompanied by a certified copy of the identity document of either parent.[62] In practice, this requirement excludes children born to undocumented parents, who cannot produce the necessary documents. The problem is compounded by the fact that some adults, although born and raised in South Africa, were never registered at birth and therefore lack identity documents, rendering them technically stateless.[63] Their children inherit this vulnerability, with no legal pathway to acquire nationality. These strict document-based protocols embed immigration gatekeeping into birth registration, creating a chilling effect where parents avoid registration for fear of triggering immigration enforcement.[64] Consequently, many children remain unregistered, and South Africa's constitutional guarantee of nationality at birth becomes hollow in practice.

Although the High Court in *Naki v Director-General: Home Affairs* declared the requirement of valid identity documentation unconstitutional, holding that such documentation needs only to be provided 'where it is available', implementation challenges persist. Reports indicate that parents with blocked identification documents, expired permits, or refugee status continue to face administrative resistance.[65] This illustrates how formal judicial victories do not automatically translate into systemic change, leaving undocumented and stateless parents—and their children—trapped in cycles of exclusion.

Further barriers arise under section 8(1) of the Regulations, which governs registration for children born to non-South African parents. It requires notice of birth within 30 days and submission of valid documents such as passports, permits, or visas.[66] If notice is given by a next of kin, they too must provide certified identification. Where neither parent nor next of kin possesses valid documentation, the child's birth cannot be registered.[67] Similarly, section 9 of the Regulations addresses orphaned or abandoned children, requiring social workers to register births within 60 days and only after obtaining a court order under the Children's Act.[68] This process is fraught with delays due to judicial backlogs and difficulties in securing the death certificates of caregivers,[69] leaving many abandoned children unregistered.

[62] Department of Home Affairs, 'Regulations on the Registration of Births and Deaths' 26 February 2014.

[63] Lawyers for Human Rights, 'Childhood Statelessness in South Africa' <https://www.lhr.org.za/archive/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf> accessed 23 December 2025.

[64] Darshan Vigneswaran, 'Making Mobility a Problem: How South African Officials Criminalize Migration' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (OUP 2013) 151–168; L Moyo and O Osunkunle, 'The Criminalization of Migration in South Africa: An Exploration of Operations Dudula and Fiela from a Social Media Perspective' in S Selvarajah and others (eds), *Xenophobia in the Media: Critical Global Perspectives* (Routledge 2024) 210–224.

[65] *Naki v Director-General: Department of Home Affairs* 2018 3 All SA 802 (ECHC).

[66] Department of Home Affairs (n 62) s 3.

[67] ibid.

[68] ibid; s 156 of Children's Act 38 of 2005.

[69] Legal Resources Center, Court challenge over massive delays in child birth registration, 18 June 2025 <https://lrc.org.za/court-challenge-over-massive-delays-in-child-birth-registration/> accessed 23 December 2025.

Collectively, these provisions illustrate how the Regulations, though framed as administrative safeguards, operate as substantive barriers to nationality. By conditioning birth registration on documentation that vulnerable families often cannot provide, the system perpetuates childhood statelessness. By insisting on documents like valid visas and passports before birth registration, the framework reflects an implicit conflation of civil registration with immigration control, undermining constitutional guarantees and South Africa's obligations under international law.

4.3. The DHA interpretation and application of laws: implications for childhood statelessness

The DHA is a national department under South African law,[70] and as a national department, it is subject to the Constitution.[71] This department plays a pivotal role in implementing nationality laws in South Africa. Its administrative practices and interpretive choices significantly influence whether children can access their constitutional right to nationality. While the DHA exercises discretion within the framework of legislation,[72] this discretion often determines whether a stateless child qualifies for citizenship.[73] This reality underscores a critical tension: access to nationality is not merely a matter of law but of administrative interpretation by policymakers and officials. In practice, the DHA has repeatedly demonstrated reluctance to comply with statutory provisions designed to protect stateless children, even where entitlement under the Citizenship Act is clear.[74]

This reluctance was evident in *DGLR v Minister of Home Affairs*, where the DHA argued that a stateless child could not rely on section 2(2) of the Citizenship Act based on the fact that her mother was a permanent resident. The DHA contended that the child should instead obtain permanent residence under the Immigration Act. The Court rejected this interpretation, clarifying that section 2(2) explicitly provides that a child born in South Africa who is not a citizen of any other country is entitled to South African citizenship.[75] The Court further emphasized that the Immigration Act regulates foreigners, not stateless children who lack any nationality.[76] This case illustrates how deliberate administrative misinterpretation by the DHA can undermine constitutional and legislative guarantees.

A similar pattern emerged in *Chisuse v Director-General: Department of Home Affairs*.[77] The applicants, four children born in South Africa to foreign parents, had lived in the country their entire lives but were denied citizenship under section 2(2) of the Citizenship Act. The

[70] s 7(2) of the Public Service Act 103 of 1994 states that the President may establish or abolish any department of state within the public service. This section legally enables the creation of national departments such as the Department of Home Affairs.

[71] s 8(1) of the Constitution states that: 'The Bill of Rights [in the Constitution] Applies to All Law, and Binds the Legislature, the Executive, the Judiciary and All Organs of State.'

[72] s 3(3) of the Constitution states that: 'National Legislation Must Provide for the Acquisition, Loss and Restoration of Citizenship.'

[73] s 2(2) of the Citizenship Act 88 of 1995.

[74] See *DGLR v the Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13 of 3 July 2014, where a child born to Cuban parents was not granted nationality even though the child was registered in terms of the BDRA and the Cuban government had provided communication stating that they do not recognize the child as a Cuban citizen. See also, *Minister of Home Affairs v Ali* 2019 2 SA 396 (SCA), where the Department of Home Affairs refused to grant citizenship by naturalization to children who met all the requirements of s 4(3) of the Citizenship Act. See also *M.M.E and Others v Director General, Department of Home Affairs and Another* (21970/2021) [2025] ZAGPPHC 202 (12 March 2025).

[75] *DGLR v the Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13 of 3 July 2014.

[76] ibid.

[77] *Chisuse v Director-General, Department of Home Affairs* (2020 (6) SA 14 (CC).

DHA argued that they were not stateless because they could claim nationality from their parents' country of origin—The Democratic Republic of Congo. The Constitutional Court rejected this reasoning, holding that a mere theoretical possibility of foreign nationality does not disqualify an applicant from claiming South African citizenship if they are stateless. The Court ruled that the DHA had failed to provide proof that the applicants could obtain citizenship elsewhere and affirmed that they were entitled to citizenship under the Act. This judgment underscored the principle that constitutional interpretation must prioritize substantive inclusion over speculative assumptions.

Administrative practices have also created systemic barriers beyond individual cases. A striking example is the 'Identity Document blocking system' introduced by the DHA to combat identity fraud.[78] Under this system, identity numbers suspected of irregular issuance are blocked pending investigation. While intended to prevent fraud, the practice has often been applied pre-emptively, without completing investigations, resulting in severe consequences for bona fide citizens and permanent residents. The impact on children is particularly acute: when a mother's identification document is blocked, she cannot register her child's birth, thereby precluding the child from acquiring citizenship through descent or obtaining an identity document at the age of 16 years. The High Court in *P.P.M v Minister of Home Affairs* highlighted these challenges, observing:

> The practice of blocking a parent's ID impacts such parent's children. A child's status as a citizen, refugee, permanent resident, or illegal foreigner is tied to his or her parents' status. Since the South African approach to attaining citizenship or permanent residence links the child's status to that of at least one parent, it is unavoidable that a child cared for by a single parent whose ID is blocked will be prejudicially affected. In addition, a child whose birth is not registered in terms of the Births and Deaths Registration Act because the parent sojourns temporarily in the Republic may face almost insurmountable obstacles.[79]

The Department's restrictive stance is further reflected in public statements. Responding to media reports suggesting that a child born in South Africa to foreign parents could acquire citizenship, the Minister of Home Affairs stated:

> It is a difficult thing to issue a birth certificate where grounds for citizenship are not established, whether in terms of birth, descent, or naturalisation. Citizenship is not based on nationality or territory. Children born to permanent residents follow their parents' status. We do not separate children from their parents. What can be done is to record a notice of the child's birth. Such notification can thereafter be taken to the parents' countries of origin for registration and issuance of a passport, after which the child will be issued with a derivative permanent residence permit upon application.[80]

This statement reveals the Department's prevailing interpretation that a child inherits the nationality status of their parents. The implication is unambiguous: a child born to stateless parents is deemed to inherit their statelessness. Such an approach is inconsistent with

[78] White Paper on the rearrangement of the Department of Home Affairs, 2019 <http://www.dha.gov.za/files/dhawhitepaper.pdf> accessed 13 December 2025.

[79] *P.P.M v Minister of Home Affairs* (14238/21) [2024] ZAGPPHC 2; [2024] 1 All SA 847 (GP); 2024 (5) BCLR 703 (GP), para 66.

[80] Department of Home Affairs, 'Media Statement on How Citizenship is Acquired and Children Registered in South Africa' 11 April 2017 <https://www.gov.za/speeches/citizenship-11-apr-2017-0000> accessed 23 December 2025.

section 2(2) of the Citizenship Act, which provides that a child born in South Africa who is not a citizen of any other country is entitled to South African citizenship. The DHA's restrictive interpretation, therefore, perpetuates childhood statelessness, in direct contravention of both the Constitution and domestic legislative provisions designed to prevent such outcomes.

Ultimately, while South Africa retains sovereign authority over its nationality laws, the discretionary practices and interpretative stance adopted by the Department of Home Affairs have profound implications for the realization of children's rights. By privileging restrictive interpretations and embedding procedural hurdles, the DHA effectively excludes certain categories of stateless children from acquiring nationality, despite their formal eligibility under the Citizenship Act. The result is the persistence of statelessness within South Africa, whereby children who, by law, should qualify for citizenship are denied recognition because of administrative rigidity and policy choices. This disconnect between constitutional guarantees and bureaucratic practice—the *operationalisation gap*—not only undermines South Africa's domestic legal framework but also places the state in breach of its international obligations to prevent and reduce statelessness.

5. Towards ACRWC-informed legislative and policy reforms

From the foregoing analysis, it is clear that South Africa demonstrates formal compliance through treaty ratification and constitutionalization yet reproduces exclusion in practice. This paradox manifests through four interlocking barriers: restrictive statutory provisions, onerous evidentiary requirements, narrow interpretative approaches, and broad administrative discretion vested in the Department of Home Affairs—mechanisms that perpetuate childhood statelessness despite constitutional and international commitments. Drawing on the ACRWC Committee's General Comment on Article 6, this section advances context-specific recommendations that translate constitutional supremacy and treaty obligations into actionable reforms. While such proposals may appear ambitious in an era where nationality is increasingly conflated with immigration control, the standards articulated by the ACRWC Committee confirm their alignment with South Africa's binding obligations. And what makes these guidelines particularly instructive is their progressive stance: unlike many global instruments, the ACRWC explicitly recognizes that the state of birth bears the primary obligation to confer nationality where a child would otherwise be stateless.[81]

5.1. ACRWC-informed legislative reforms

Given the profound implications that certain provisions of the Citizenship Act have for perpetuating childhood statelessness in South Africa, legislative reform is imperative. It is recommended that these provisions be amended to align with constitutional guarantees under section 28(1)(a) and South Africa's international obligations, particularly as interpreted by the ACRWC Committee. For example, section 2(3) of the Citizenship Act on citizenship by birth, provides that 'any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth, if he or she has lived in the Republic from the date of his or her birth to the date of becoming a major.' This provision creates a significant gap for children of permanent residents who cannot acquire their parents' nationality—such as in cases governed by restrictive nationality laws like those of Eswatini. These children remain potentially stateless for the first 18 years of their lives. An amendment to the law could

[81] art 6 ACRWC.

address this by removing the requirement that nationality be conferred only upon reaching majority and instead granting citizenship at birth to children of permanent residents. Such reform would align with the guidance of the ACRWC Committee, which rightly observes:

> While the right to a nationality becomes of greater significance as a person approaches and reaches adulthood, it is critical for the right to a nationality to be recognised for children. This is both because the clear recognition of nationality from the moment of birth is the best guarantee that nationality of the adult will also be recognised; and also because children may have their other rights restricted if they are not regarded as nationals, in particular in relation to their access to education, health care and other social services.[82]

Requiring a child of a permanent resident to wait until the age of majority to acquire nationality, thereby rendering them stateless during childhood, squarely contradicts this guidance. It also undermines the enjoyment of other rights linked to nationality. This position finds further support in the Human Rights Committee's General Comment No. 17, which underscores that 'states are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born [not at the age of majority]'.[83] Similarly, the ACRWC Committee recommends that 'states should adopt provisions giving children born in their territory the right to acquire nationality after a period of residence that does not require the child to wait until majority before nationality can be confirmed'.[84]

The same logic applies to section 4(3) of the Citizenship Act on citizenship by naturalization, which provides that a child born in South Africa to parents who are neither South African citizens nor permanent residents qualifies to apply for citizenship only upon reaching majority, provided they have lived in South Africa continuously since birth. This provision is in direct tension with section 28(1)(a) of the Constitution, which guarantees every child the right to a nationality from birth. By imposing a waiting period until adulthood, section 4(3) conflicts with both constitutional guarantees and the ACRWC Committee's guidance, which cautions against legislative frameworks that defer nationality recognition until majority.[85]

5.2. ACRWC-informed policy reforms

Much of the loopholes that perpetuate childhood statelessness in South Africa do not originate in the statutory text itself, but in the way the executive arm of government (through regulations, administrative directives) and the DHA have operationalized these laws. This reality underscores a critical point: legislative reform alone is insufficient. To achieve meaningful compliance with constitutional guarantees and international obligations, ACRWC-informed reforms must also extend to the policy and regulatory framework governing birth registration and nationality determination.

From a policy and regulations perspective, there is an urgent need for explicit and clear policy provisions guaranteeing nationality at birth for children who would otherwise be stateless, without imposing onerous evidentiary requirements. Current regulations governing birth registration in South Africa typically require parents to present a national identity document, a valid visa, or a permit. These requirements are unattainable for stateless

[82] General Comment 2, para 85.
[83] Human Rights Committee, General Comment No 17 (Rights of the child, Article 24), UN Doc HRI/GEN/1/Rev.9 (Vol I) (adopted 7 April 1989).
[84] General Comment 2, para 92.
[85] art 6 ACRWC and General Comment 2, para 92.

parents, undocumented immigrants, and individuals whose visas have expired. To address this, policy reform should introduce a legal presumption that any child born in South Africa who would otherwise be stateless is deemed a South African citizen at birth, subject only to rebuttal with clear evidence. This approach would prevent statelessness by default and shift the burden of proof from the child. As Article 6 of the ACRWC requires, states must 'adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.' The ACRWC Committee reinforces this principle, observing that 'it may be unreasonable to expect a child who may have a theoretical right to another nationality to take the steps needed to acquire that nationality.'[86]

Such reform would also necessitate amendments to registration policies and regulations to permit alternative forms of proof, such as affidavits or community attestations, where formal documentation is unavailable—a common scenario for undocumented immigrants and children born to stateless parents. Leaving this to administrative discretion has proven inadequate. These changes are not only in the best interests of children but also consistent with South Africa's international obligations. As the ACRWC Committee notes, 'Legislation should specify, inter alia: the regulation of the role of government agencies involved in civil registration; the regulation of any semi-government authorities involved …'[87] The Committee specifically warns against requiring parental identity or residence documents as preconditions for registration, noting that such requirements constitute indirect discrimination against children born to stateless or undocumented parents.[88] Effectively, alternative forms of proof and waivers of documentary requirements must be ensured to prevent statelessness.

The ACRWC Committee further emphasizes that compliance with the obligation to prevent and reduce statelessness begins with ensuring that all children born on a state's territory are registered, including children born out of wedlock, to foreign parents (whether in irregular immigration status, refugees, or asylum-seekers), children whose parents are unknown, and other groups at risk of non-registration.[89] Given that lack of documentation poses serious barriers to registration and, ultimately, nationality acquisition, this underscores the need for flexible evidentiary standards to ensure that these children are not discriminated against based on their parents' status. Such measures would minimize the legal limbo in which many stateless children in South Africa currently find themselves, often stemming from the absence of birth registration.

Moreover, studies confirm that undocumented parents, refugees, asylum-seekers, and stateless parents frequently avoid registering their children's births due to fear of prosecution under immigration laws. This reality calls for legal safeguards insulating birth registration from immigration enforcement, thereby removing the fear of arrest or deportation that deters parents from registering their children. The ACRWC Committee highlights this dilemma, noting that:

> children in undocumented status are very vulnerable for at least the following two reasons. On the one hand, their parents or caregivers are likely to remain hidden due to fear of being arrested if the administrative authority discovers their irregular migration status.

[86] General Comment 2, para 92

[87] General Comment 2, para 12.

[88] ibid, para 16. See also, United Nations Human Rights Council, Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/27/22, para 64.

[89] General Comment 2, paras 63 and 66.

> On the other hand they run the risk of being registered under forged identity details by their parents or caregivers. For the above reasons, the Committee holds that universal birth registration under Article 6(2) of the African Children's Charter also means that children in undocumented migration status must be registered at birth without discrimination.[90]

Commitment to non-discrimination requires explicit regulations prohibiting the use of birth registration data for immigration enforcement and guaranteeing that parents or guardians will not face arrest, detention, or deportation when registering a child's birth.

Building on this, it is evident that the DHA exercises wide discretion in matters of child registration and nationality acquisition—discretion that has, in several instances, contravened both the Constitution and South Africa's international treaty obligations. This discretion is often exercised in contexts where the law is silent or lacks sufficient detail, such as birth registration, enabling interpretations that perpetuate childhood statelessness. For example, the Minister's statement that children inherit the nationality status of their parents reflects a restrictive interpretation that disregards section 2(2) of the Citizenship Act, which entitles a child born in the Republic who is not a citizen of any other country to South African citizenship. Such an approach effectively condemns children of stateless parents to inherit statelessness, in direct violation of constitutional, legislative, and international children's rights guarantees.

From a policy perspective, therefore, there is a pressing need to adopt clear regulations that eliminate discretionary decision-making by codifying uniform procedures for the operations of the Department of Home Affairs and establishing independent oversight mechanisms to monitor DHA compliance and provide remedies where administrative decisions undermine constitutional and international obligations. This would help address the unfettered discretion that DHA currently wields, effectively operationalizing the ACRWC Committee's emphasis that 'states do not enjoy unfettered discretion in establishing rules for the conferral of their nationality but must do so in a manner consistent with their international legal obligations.'

To sum up, the recommendations advanced here are not exhaustive. Rather, they provide an example of principled guidance for reshaping laws and policies that currently contravene the ACRWC and other binding international children's rights standards. By embedding child-centered principles into administrative practice, such as presumptive nationality for otherwise stateless children, flexible evidentiary requirements, and safeguards against immigration-linked enforcement, South Africa can close the operational gaps that undermine its normative commitments. These reforms are essential to dismantle systemic barriers and ensure that the right to nationality is not merely theoretical but effectively realized for every child.

As noted in the abstract, this article offers a practical framework for addressing childhood statelessness in South Africa, with relevance beyond that context. These insights provide useful lessons for other countries grappling with similar challenges, including the Republic of Côte d'Ivoire (Ivory Coast), which has one of the largest recorded stateless populations globally. By the end of 2025, UNHCR estimated the stateless population in Côte d'Ivoire at 930,978.[91] Côte d'Ivoire acceded to both UN Statelessness Conventions in 2013 and became the first African state to introduce a statelessness determination

[90] ibid paras 5 and 24.

[91] UNHCR, 'Situation Eradication of Statelessness in the West and Central Africa Region Mapping and Analysis' <https://rimap.unhcr.org/countries/cote-divoire> accessed 18 April 2026.

procedure in 2020.[92] It has also ratified key children's rights instruments, including the Convention on the Rights of the Child on 4 February and the African Charter on the Rights and Welfare of the Child on 1 March 2004. Despite these important institutional steps, statelessness remains widespread. One contributing factor lies in nationality and civil registration requirements, which, as in South Africa, often require valid identity documents to register a child's birth.[93] These requirements create practical and evidentiary barriers to nationality acquisition. The ACRWC-informed policy reforms discussed in this section, therefore, offer a meaningful pathway for closing the gap between legal commitment and effective implementation in Côte d'Ivoire.

6. Conclusion

This article has shown that childhood statelessness in South Africa persists not because of a lack of legal norms, but because of what it terms the *operationalisation gap*—the disconnect between constitutional and treaty guarantees and their implementation. Despite section 28(1)(a) of the Constitution and South Africa's ratification of the ICCPR, UNCRC, and ACRWC, administrative practices continue to impose onerous evidentiary burdens, link birth registration to immigration enforcement, and grant wide discretion to officials. These mechanisms transform formal rights into hollow promises, leaving children who should qualify for nationality in prolonged legal limbo.

Against this backdrop, the article's original contribution has been in naming, evidencing, and remedying that governance problem. By theorizing the *operationalization gap* (in Sections 2, 3, and 4) and then designing ACRWC-informed solutions (in Section 5), the article moves beyond descriptive critique to an implementation blueprint that makes South Africa's commitments usable in practice. The blueprint's core elements include legislative amendments to remove age-based delays, introduce a presumption of nationality for otherwise stateless children, and permit alternative forms of proof where documentation is unavailable. At the policy level, reforms must insulate birth registration from immigration control, codify uniform procedures, and establish independent oversight to curb discretionary decision-making. These measures operationalize constitutional supremacy and international obligations, ensuring that nationality is recognized at birth rather than deferred or denied.

While grounded in South Africa's socio-legal context, the analysis offers a transferable blueprint for other jurisdictions globally with operationalization gaps. By briefly examining the Republic of Côte d'Ivoire in Section 5 as a jurisdiction facing comparable challenges, the study demonstrates that the relevance of the proposed framework extends beyond the South African context. And by bridging the gap between normative frameworks and administrative realities, this article contributes both a novel conceptual lens and a practical roadmap for eradicating childhood statelessness. Guaranteeing nationality at birth is not aspirational; it is a legal and moral imperative central to the protection of children's rights.

Conflict of interest. None declared.

[92] UNHCR, 'Côte d'Ivoire Adopts Africa's First Legal Process to Identify and Protect Stateless People' <https://reliefweb.int/report/c-te-divoire/c-te-d-ivoire-adopts-africa-s-first-legal-process-identify-and-protect-stateless> accessed 18 April 2026.

[93] Act No 1961-415 of 14 December 1961 promulgating the Ivory Coast Nationality Code, as amended by Act No. 1972-852 of 21 December 1972, 1961-415; 1972-852, 21 December 1972 <https://www.refworld.org/legal/legislation/natlegbod/1972/92362> accessed 18 April 2026.