

# Statelessness and COVID-19 in South Africa

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## Abstract

The COVID-19 pandemic has emphasised the plight of the stateless in South Africa. Statelessness is a pandemic on its own and has been regarded as ‘a forgotten human rights crisis.’ The consequence of statelessness is the inability to access internationally and democratically recognised human rights standards and protections due to a stateless person not having a nationality. The declaration of the State of Disaster in South Africa in March 2020 and the ensuing stages of lockdowns, testing and access to vaccinations have been put into place to curb the infection rate of COVID-19. Such interventions are available to nationals, non-nationals, refugees and asylum seekers, but those who are stateless encounter challenges in accessing socio-economic rights granted by the government. The inability of the stateless to access basic services such as access to health facilities, food, shelter, sanitation, vaccinations and protection have been exacerbated by the COVID-19 pandemic. Despite international and regional laws guaranteeing the protection of those who are stateless and the South African constitutional dispensation, socio-economic hardships affect the stateless who do not have a nationality. Against this background, this article outlines what statelessness is, it examines good practices in countries such as the United Kingdom, Spain, Portugal, Kenya and Uganda in relation to statelessness and access to COVID-19 vaccinations. It suggests that in addition to good practices, ubuntu must be the basic value that underpins the transformation of nationality laws. Even though some advances have been made to provide a separate registration platform for the stateless to access vaccinations, much work needs to be done still before a permanent solution is found.

**Keywords:** ubuntu; statelessness; good practices; COVID-19; access; vaccinations; socio economic rights; socio economic services

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## Introduction

The COVID-19 pandemic has brought to light the plight of the stateless in South Africa. Statelessness is regarded as a ‘forgotten human rights crisis’<sup>1</sup> because a stateless person does not have a nationality and therefore no access to democratically recognised human rights standards and protections.<sup>2</sup> The declaration of the State of Disaster,<sup>3</sup> in South Africa on 15 March 2020 and the ensuing stages of lockdowns,<sup>4</sup> testing and access to vaccinations,<sup>5</sup> were a bid to curb the infection rate of COVID-19. Although such interventions are available to nationals, non-nationals, refugees and asylum seekers,<sup>6</sup> stateless individuals encounter challenges in accessing socio-economic benefits.<sup>7</sup> The inability of the stateless to access such basic rights such as access to health facilities, food, shelter, sanitation and vaccinations have been exacerbated by the COVID-19 pandemic.<sup>8</sup> Despite international and regional laws guaranteeing the protection of those who are stateless<sup>9</sup> and the South African constitutional dispensation,<sup>10</sup> socio-economic hardships affect stateless individuals who have no nationality.<sup>11</sup>

Out of the 60.14 million people in South Africa, only ten million doses of COVID vaccine were administered by 29 September 2021.<sup>12</sup> According to the United Nations High Commissioner for Refugees (UNHCR), people of concern in South Africa amount to 36 664, which include stateless people.<sup>13</sup> The COVID-19 pandemic has brought to

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- 1 Lindsey N Kingston, ‘A Forgotten Human Rights Crisis and Issue (Non) Emergence’ (2013) 14 Human Rights Review 2.
  - 2 UNHCR Ending Statelessness <<https://www.unhcr.org/ending-statelessness.html>> accessed 31 March 2022.
  - 3 Disaster Management Act of 2002.
  - 4 South Africa alert level 5 lockdown started on 26–30 April 2020. A full list is available <<https://www.gov.za/covid-19/about/about-alert-system>> accessed 22 February 2022.
  - 5 SA Coronavirus online platform at <<https://sacoronavirus.co.za/>> accessed 31 February 2022.
  - 6 *ibid.*
  - 7 Bilkis A Siddika, Impact of Statelessness: Are we ready to face? (2019) 7(12) Open Journal of Social Sciences <<https://www.scirp.org/journal/paperinformation.aspx?paperid=9684>> accessed 22 March 2022.
  - 8 UN ‘Covid-19 and Human Rights: We are in This Together’ Report (April 2020) <[https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un\\_human\\_right\\_s\\_and\\_covid\\_april\\_2020.pdf](https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_human_right_s_and_covid_april_2020.pdf)> accessed 31 March 2022.
  - 9 UN Convention Relating to the Status of Statelessness (1954) and the UN Convention on the Reduction of Statelessness (1961) (The Statelessness Conventions).
  - 10 The Constitution of the Republic of South Africa, 1996.
  - 11 Melanie Khanna and Betsy Lippman, ‘New Evidence about the Socioeconomic Impact of Statelessness emerges from a Study of the Shona Community in Kenya’ (January 2021) <<https://www.unhcr.org/blogs/socioeconomic-impacts-of-statelessness-shona-community-in-kenya/>> accessed 30 March 2022.
  - 12 Stats SA <<http://www.statssa.gov.za/publications/P0302/P03022021.pdf>> accessed 19 October 2021.
  - 13 UNHCR ‘Southern Africa Covid Response 1-30 June 2021’ <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwib9Mjbuar2AhWSYsAKHY19CGYQFnoECBIQAQ&url=https%3A%2F%2Freporting.unhcr.org%2Fsite>>

light the plight of people without a nationality.<sup>14</sup> COVID-19 has had an unequal impact on people of concern such as the stateless.<sup>15</sup> Of interest is the question whether stateless people have access to vaccinations in South Africa.<sup>16</sup>

This article analyses access to socio-economic services during the COVID-19 pandemic and, in particular, access to vaccination for stateless persons in South Africa. In doing so, it provides an overview of statelessness in the ambit of international and regional legal frameworks and examines how countries such as the United Kingdom, Spain, Portugal, Kenya and Uganda have dealt with access to vaccination. This is followed by a discussion on statelessness and access to COVID-19 vaccines in South Africa. It concludes by observing this scenario through the lens of ubuntu, an African concept, which recognises a human being as part of a community, by virtue of being human. The philosophy of ubuntu could be utilised as a socio-legal tool in order to argue for the case of the stateless in South Africa. To be effective, vaccination programmes must be inclusive as the COVID-19 pandemic affects everybody, regardless of whether they have a nationality or not. Although this article focuses on South Africa, the challenges that arose during the COVID-19 pandemic and the status of being stateless may be relevant to other states faced with similar challenges.

## Statelessness and Access to COVID-19 Vaccinations: An International and Regional Overview

To date, disruptions in birth registration services due to COVID-19 restrictions have resulted in new risks of statelessness.<sup>17</sup> This creates a real risk, in that stateless people may be excluded from national immunisation plans, regardless of whether their age, health status or role in society would otherwise place them in a priority group.<sup>18</sup>

For the approximately fifteen million people worldwide who are stateless and already endure discrimination and denial of basic rights and services, the harm caused by statelessness has reached unprecedented levels.<sup>19</sup> Statelessness is a worldwide problem,

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s%2Fdefault%2Ffiles%2FSouthern%2520Africa%2520COVID19%2520update%2520April%25202021.pdf&usg=AOvVaw0nfk1o0WjXlxTKqF2-hhrK> accessed 3 March 2022.

14 *ibid.*

15 <<https://reliefweb.int/report/world/impact-covid-19-stateless-populations-policy-recommendations-and-good-practices-vaccine> accessed 25 February 2022; UNCHR Impact of covid-19 on stateless populations June 2021 <https://www.refworld.org/docid/60b8d6d84.html>> accessed 30 March 2022.

16 UNCHR 'Impact of Covid-19 on Stateless Populations' (June 2021) <<https://www.refworld.org/docid/60b8d6d84.html>> accessed 30 March 2022. Stateless people were barred from accessing testing and treatment facilities and further excluded from social services, due to a lack of legal status.

17 *ibid.*

18 *ibid.*

19 Laura van Waas and Ottoline Spearman, 'The Life-or Death Cost of Being Stateless in a Global Pandemic' (2020) 32(3) *International Journal of Refugee Law* 498.

as reported by the United Nations High Commissioner for Refugees (UNHCR).<sup>20</sup> Due to their legal status of not having a nationality, stateless persons live under the radar and fear perpetual detention without deportation.<sup>21</sup>

International law regulates statelessness through the Convention Relating to the Status of Stateless Persons of 1954 and the Convention on the Reduction of Statelessness of 1961 (The Statelessness Conventions). The Convention Relating to Statelessness is the cornerstone of the international legal framework for the protection of stateless people.<sup>22</sup> It illustrates the international concern over the human and political problems caused by statelessness and enshrines the protection framework.<sup>23</sup> It defines a stateless person as ‘someone who is not considered a national under the laws of any state.’<sup>24</sup> This definition can be analysed by breaking it down into two constituent elements which are (a) not considered a national under the operation of its law and (b) by any state.<sup>25</sup> An enquiry is limited to the states with which a person may have a link, because of birth in the territory, descent, marriage, adoption or habitual residence.<sup>26</sup> The legal effect is that a stateless person is not recognised as a national by any state and therefore is unable to receive the legal protection and rights afforded to recognised nationals. A nationality is a legal bond between a person and a state as it provides a person with a sense of identity and more importantly allows them to exercise a wide variety of rights,<sup>27</sup> therefore the lack of a nationality is a serious disadvantage.<sup>28</sup> Some people are born stateless, while others become stateless.<sup>29</sup> Statelessness is caused by a series of sovereign, political, legal, technical or administrative directives that may result in a lack of nationality.<sup>30</sup>

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20 Statelessness in Numbers 2020 on Global Statelessness’ <[https://files.institutesi.org/ISI\\_statistics\\_analysis\\_2020.pdf](https://files.institutesi.org/ISI_statistics_analysis_2020.pdf)> accessed 22 March 2022.

21 Caia Vlieks, ‘Contexts of statelessness: A study of “Statelessness in Situ” and “Statelessness in the Migratory Context” in Europe’ (LLM thesis, Tilburg Law School 2017) 4; Bill Frelick and Maureen Lynch, ‘Statelessness: A Forgotten Human Rights Crisis’ (2005) *Forced Migration Review* 65.

22 Laura Van Waas, ‘Fighting Statelessness and Discriminatory Laws in Europe’ (2012) *European Journal of Migration and Law* 243.

23 Katia Bianchini, ‘A Comparative Analysis of Statelessness Determination Procedures in 10 EU States’ (2017) *International Journal of Refugees* 4.

24 Convention Relating to the Status of Stateless Persons 1954 Art 1(1).

25 Laura van Waas, ‘Fighting Statelessness and Discriminatory Laws in Europe’ (2012) *European Journal of Migration and Law* 244.

26 UNHCR, *Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014) 11.

27 Carol A Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) *International Journal of Refugee Law* 185.

28 Vhonani S Neluvhalani, ‘An Analysis and Re-assessment of the Immigration Legislative and Administrative frameworks in Combating Statelessness: A Decolonised View’ (LLD thesis, NWU University Potchefstroom 2021) 74.

29 UNHCR ‘Understanding Statelessness’ <<http://www.unhcr.org/stateless-people>> accessed 25 February 2022.

30 Kingston (n 1) 74.

A lack of international consensus over who exactly is to be considered ‘stateless’ remains a major stumbling block.<sup>31</sup> It is accepted that statelessness can take different forms, with Weis referring to one form as ‘original’ or ‘absolute’ statelessness, which is the status of persons who do not acquire a nationality at birth.<sup>32</sup> This is de jure statelessness as per the definition of Article 1(1) of the 1954 Convention. De jure statelessness manifests itself in persons who have no legal claim to nationality in any of the states to which that person is connected by either birth or descent.<sup>33</sup> The second form of statelessness, is described as ‘relative’ statelessness, where the person acquired a nationality at birth, but has lost it without acquiring another, also known as de facto statelessness. This is the situation where a person ‘lacks the ability to prove his/her nationality’ or where they are unable to establish with certainty a link with a specific country.<sup>34</sup> This is manifested in a legal claim to nationality under the law but without proof.<sup>35</sup> In the case where no country would consider a person a national, the status changes from de-facto to de jure statelessness.<sup>36</sup> De facto statelessness is not defined in the 1954 Convention, however, it is considered that being de facto stateless refers to a person outside his/her country of nationality and who is unable or, due to valid reasons, is unwilling to avail themselves of the protection of that country.<sup>37</sup>

Finally, some people are stateless in situ, which refers to stateless persons who are situated ‘in their home country’ that is, within a country they consider to be their home and with which they have strong or stable ties through birth or long-term residence<sup>38</sup>— a country they consider their own<sup>39</sup> with an absence of links to other countries.<sup>40</sup> Statelessness in situ is a consequence of denial of nationality even when the person is born in that country and has resided there his/her entire life<sup>41</sup> and has never crossed borders to another.<sup>42</sup> The 1954 Convention remains the primary legislation that regulates non-refugee stateless persons to ensure that they enjoy human rights without

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31 Vliex (n 21) 6.

32 Paul Weis, ‘The United Nations Convention on the Reduction of Statelessness 1961’ (1962) *International Comparative Law Quarterly* 1074.

33 John Dugard and others, *Dugard’s International Law: A South Africa Perspective* (Juta 2018) 536.

34 Jason Tucker, ‘Questioning de facto Statelessness: by looking de facto Statelessness’ (2014) *Tilburg Law Review* 276.

35 Dugard and others (n 33) 536; *Nibigira v Minister of Home Affairs* (41256/2011) [2011] ZAGPJHC 178 (28 November 2011) para 16; *B NO v Minister of Home Affairs NO* (2665/2017) [2018] ZAECPEHC 24 (29 May 2018) para 8.

36 Tucker (n 34) 278; Hugh Massey, *UNHCR and de facto statelessness Legal Protection* (2010) 5.

37 UNHCR (n 26) 44.

38 Gyulai 2012 ‘Statelessness in the EU Framework for International Protection’ (2012) *European Journal of Migration and Law* 279.

39 Vliex (n 21) 37.

40 UNCHR (n 37) Part III para 164.

41 Vliex (n 21) 38.

42 *ibid.* Children make up the greater part of persons who are at risk of statelessness, even though they are, in principle, protected under international law and the principle of best interests of the child since ‘the right to a nationality from birth’ is a right that is entrenched in the Constitution and Art 7 of the Convention for the Rights of the Child (1989).

discrimination. It provides for stateless persons to have a recognised legal status, access to travel documents, identity documents and other basic forms of documentation. In addition, it provides a common framework with minimum standards of treatment such as freedom of religion and education of their children,<sup>43</sup> the right to employment,<sup>44</sup> housing,<sup>45</sup> etcetera.

The absence of a legal status prevents a stateless person from accessing socio-economic services (amongst others) because of a fear that their legal status might put them at risk of being detained without possible deportation.<sup>46</sup> This is a predicament which calls for vaccination programmes to be inclusive of all people resident on the territory regardless of legal status.<sup>47</sup>

The 1961 Convention also focuses on avoiding statelessness and requires countries to provide safeguards in their nationality laws to prevent statelessness, both at birth or by operation of law, by ensuring that the contracting state grants nationality to a person born on its territory, who would otherwise be stateless.<sup>48</sup> By ratifying the 1961 Convention, countries agree to the reduction of statelessness over time. The regulation of immigration-related issues, such as human security, access to nationality and the consequences of statelessness is gaining importance,<sup>49</sup> as it leads to hardship and affects dignity and identity.<sup>50</sup> Statelessness may affect the integration of people into society, contribute to discrimination and produce community tensions.<sup>51</sup> Stateless people do not fit within the conventional international legal order where nationality, which constitutes the common link between the individual and international law, determines the country responsible for their protection.<sup>52</sup> Owing to their statelessness, stateless persons are incapable of exercising their most fundamental human rights and because of this, statelessness has been described as a legal vacuum.<sup>53</sup>

Statelessness is a widespread problem, which is increasing worldwide and has various overwhelming legal, social, economic and psychological consequences for those

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43 Stateless Convention 1954 Arts 4 and 22.

44 *ibid* Arts 17 and 18.

45 *ibid* Art 21.

46 Institute on Statelessness and Inclusion (ISI), *The World's Stateless Children* (Wolf Legal Publishers Netherlands 2017) 37.

47 UNCHR, 'Impact of Covid-19 on Stateless Populations' (June 2021) <<https://www.refworld.org/docid/60b8d6d84.html>> accessed 30 March 2022.

48 UNHCR, Introductory Note (1961 Convention).

49 UNHCR *The State of the World's Refugees, A Humanitarian Agenda* (1997) 2.

50 Katia Bianchini, 'The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States' (PhD thesis, University of York 2015) 9.

51 Vlieks (n 21) 4.

52 Bianchini (n 50) 9.

53 *Amuur v France* 19776/92 para 51; The applicants asserted that their detention had no legal basis, whether under the French legislation in force at the time or under international law. They had found themselves in a legal vacuum in which they had neither access to a lawyer nor information about exactly where they stood at the time.

affected by it.<sup>54</sup> Recognition is central to the right to nationality, and when recognition is withdrawn, human beings are left stateless and thus rightless.<sup>55</sup> Arendt aptly states that the calamity of those without rights is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion, but that they no longer belong to any community whatsoever.<sup>56</sup> This is the situation that many stateless persons find themselves in. It is a man-made problem and the onus is on the state to resolve it by granting stateless persons a nationality.<sup>57</sup> The Universal Declaration of Human Rights of 1948, makes provision for the ability to realise and have access to the right to nationality<sup>58</sup> and more needs to be done to assist the stateless.

The Global Action Plan as soft law, offers practical guidelines on how states may ensure that the national law of a state is developed to incorporate provisions that will assist in identifying those who are stateless and to resolve major statelessness situations.<sup>59</sup> It is envisaged that states may assist in preventing new cases of childhood statelessness from occurring and for states to ensure that their nationality laws grant children, who would otherwise become stateless, a nationality at birth.<sup>60</sup> This action ties in neatly with the principle of ubuntu as a socio-legal tool.

All states are required to have nationality laws that allow both men and women to become a nationals and for receive equal treatment in relation to the conferral of nationality onto their children with regard to the acquisition, change and retention of nationality.<sup>61</sup> It is further required that states should not prevent access to nationality through discriminatory processes.<sup>62</sup> States must identify stateless migrants through Statelessness Determination Procedures which would lead to a legal status that allows and guarantees the right to basic human rights and assistance with the naturalisation process.<sup>63</sup> The seamless integration of Statelessness Determination Procedure into the South African existing immigration processes will allow for the early determination of statelessness, with measures in place to provide the necessary protection under the Statelessness Conventions.<sup>64</sup> States must ensure that there are no reported cases of statelessness due to a lack of registration at birth.<sup>65</sup> This has been a growing risk with

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54 William Conklin, *Statelessness: The Enigma of an International Community Statelessness* Foreword (Oxford 2014).

55 Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Books 1994) 300.

56 *ibid* 295.

57 Fatima Khan, 'Exploring Childhood Statelessness in South Africa' (2020) PER/PELJ 26.

58 Universal Declaration of Human Rights Art 15 (1948).

59 Global Action Plan: Resolve Existing Major Situations of Statelessness Action 1.

60 *ibid* Ensure No child is born Stateless Action 2.

61 *ibid* Remove gender discrimination from nationality laws Action 3.

62 *ibid* Prevent denial, loss or deprivation of nationality on discriminatory grounds Action 4.

63 *ibid* Action 6: Grant protection status to stateless migrants and facilitate their naturalisation.

64 Neluvhalani (n 28).

65 Global Action Plan (n 59) Action 7: Ensure birth registration for the prevention of statelessness.

the lockdowns imposed, as some of the services regarding birth registrations were not deemed essential.

The International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>66</sup> provides that member states must recognise the right of all their peoples to the enjoyment of the highest attainable standard of physical and mental health,<sup>67</sup> and the steps to be taken by member states to achieve the full realisation of this right shall include those necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.<sup>68</sup> Furthermore, the Universal Declaration of Human Rights establishes the right for all to a standard of living adequate for the health and well-being of individuals and their families. This would include food, clothing, housing, medical care, social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond a person's control.<sup>69</sup> This humanitarian approach echoes the very essence of ubuntu.

In particular, the spread of COVID-19 has hastened the need for governments worldwide to have measures in place to aid and protect all people in their territories including the stateless. It is one of the reasons why the UNHCR published an Impact Study in May 2020, which provides up-to-date policy recommendations and good practices for adoption by any government with a stateless population facing the danger of COVID-19.<sup>70</sup> The UNHCR Impact Study, provides a basis for improving the legal conditions of stateless people and those at risk of becoming stateless. Some guidelines are pivotal in giving direction to states that have a statelessness population. They prescribe that states must be cognisant of the conditions and environments where the stateless live as they are part of the most vulnerable people to contract the COVID-19 virus and may be fearful to access any public health facilities due to their lack of a legal status.<sup>71</sup> States are urged to take a human rights-oriented response that puts people at the centre.<sup>72</sup>

The South African Development Community (of which South Africa is a member) at its fortieth Parliamentary Forum, tabled statelessness as an issue of concern within the

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66 The International Covenant on Economic, Social and Cultural Rights 1967.

67 *ibid* Art 12 (1) of.

68 *ibid* Art 12 (2)(c).

69 The Universal Declaration of Human Rights 1945 Art 25(i).

70 The Impact of COVID-19 on Stateless Populations: Policy Recommendations and Good Practices, May 2020 <<https://www.refworld.org/docid/5eb2a72f4.html>> accessed 29 September 2021.

71 UNHCR 'The Impact of COVID-19 on Stateless Populations: Policy Recommendations and Good Practices' (June 2021) <<https://www.refworld.org/docid/60b8d6d84.html>> accessed 30 March 2022 1.

72 The human rights-centered approach is analogous to the socio-legal principle of ubuntu that is people-centered to ensure that a communal approach is taken in addressing issues.



region and it passed a resolution on the Prevention of Statelessness and the Protection of Stateless Persons.<sup>73</sup>

## Vaccination Strategies in Selected Jurisdictions

As of 26 May 2021 some 166 states have started vaccination campaigns.<sup>74</sup> At the time of this report, the UNHCR confirmed that it was not clear as to whether states would make provision for stateless persons in their territories in order for them to access vaccinations, as the issue of not having a nationality continued to pose a challenge.<sup>75</sup> In the bid to curb COVID-19, public health experts understood that once vaccinations became available, equitable and universal access to vaccination would be key.<sup>76</sup> This led to the launch of COVAX facility,<sup>77</sup> which is a global collaboration aimed at accelerating the development and production of COVID-19 vaccines.<sup>78</sup> According to the UNHCR:

The initial aim is for vaccines to be made available as quickly as possible to at least 20% of the populations of all 190 participating countries or territories and so that all States can target those at highest risk of contracting the virus, including health care workers, and those most vulnerable to suffering severe consequences if they do. This includes 92 low- and middle-income countries eligible for support through the COVAX Advanced Market Commitment (AMC), a financing instrument designed to support equitable access to vaccines regardless of income level. As of 31 May, COVAX had shipped over 77 million COVID-19 vaccine doses to 127 participants.<sup>79</sup>

The COVAX facility further made provision for a humanitarian buffer to cater for those high risk and vulnerable people including the stateless.<sup>80</sup> In addition, the World Health Organisation (WHO) issued a framework aimed at guiding states on how to allocate vaccines. The UNHCR published statistics on the national vaccination plans and programmes of 157 countries. A majority (due to language barriers) remain unclear on whether stateless persons will be able to access vaccines. In forty-seven countries, it is reflected that stateless persons would be included, based on assurances made to the

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73 SADC countries urged to domesticate laws on statelessness <<https://www.newsday.co.za/2016/11/12/sadc-countries-urged-domesticate-laws-statelessness/>>. ISS (n 46) 42.

74 UNCHR (n 71).

75 *ibid* 2.

76 *ibid* 3.

77 COVAX Facility is a global network of states to which South Africa is a member <<https://www.gov.za/coronavirus/faqs/vaccine>> accessed 22 March 2022.

78 UNHCR (n 71) 3.

79 *ibid* 4.

80 A separate 'Humanitarian Buffer' of up to five per cent of the total number of doses available through COVAX was created to facilitate access to vaccines for high-risk and vulnerable populations, including stateless people, in humanitarian settings where there have been unavoidable gaps in national vaccine plans despite advocacy efforts <<https://www.gov.za/coronavirus/faqs/vaccine>> accessed 22 March 2022.

UNHCR. However, there is limited information on the actual practice to-date.<sup>81</sup> Some countries are specific in that stateless persons are excluded from their national vaccination programmes because of practical reasons, a lack of certain identification documents and a lack of legal status.<sup>82</sup> It is noted further that owing to a general lack of data, it is most likely that stateless persons get overlooked in national campaigns. Many stateless persons also fear coming out due to a lack of legal status as it poses the risk of detention.<sup>83</sup>

The UNHCR has identified good practices in countries that have created mechanisms in their vaccination programmes to provide access to vaccination for all people in their territories without making a distinction between nationals and other categories such as refugees, asylum seekers and stateless persons. Countries such as the United Kingdom, Spain, Portugal, Kenya and Uganda have the following practices (this article only focuses on these out of the 157 states in the UNHCR Access to Vaccinations Report).

The United Kingdom is a good example of providing access to vaccination for all people in its territory. It has introduced a firewall between vaccination and immigration services.<sup>84</sup> This allows undocumented migrants and those who are stateless to receive vaccinations without their information being passed on to the immigration police.<sup>85</sup> Spain makes provision for all persons residing in its territory, including migrants with irregular legal status. Migrants in detention are prioritised as they are in close proximity to each other.<sup>86</sup> Portugal has included stateless persons in its national vaccination plans on an equal footing with nationals based on the priority categories established on health risk. Uganda has rolled out its national vaccination plan prioritising those at high risk. An identity document is required for vaccination, but an introduction letter from the local authority is accepted as proof of identity for the purposes of vaccination. Kenya also accepts introduction letters from a local authority for purposes of vaccination.<sup>87</sup>

## Statelessness and Access to COVID-19 Vaccines in South Africa

The number of stateless persons in South Africa is estimated to be around 10 000.<sup>88</sup> South Africa pledged<sup>89</sup> to ratify both Statelessness Conventions, but this has not yet

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81 UNHCR (n 71) 3.

82 *ibid* 4.

83 *ibid* 5.

84 *ibid* 5.

85 *ibid* 5.

86 *ibid* 8.

87 *ibid* 9.

88 Scalabrini Centre of Cape Town: 'Stateless in South Africa' <<https://www.scalabrini.org.za/resources/stateless-in-south-africa/>> accessed 21 March 2022.

89 UNHCR 'Report: Follow up of the Pledges made during the Intergovernmental Event at the Ministerial Level of the Ministerial Level of Member States of the United Nations' (December 2011, dated 1 August 2013) <<https://www.refworld.org/pdfid/52428fa04.pdf>; LHR 2017

been done, as South Africa contends that its citizenship provisions contain sufficient safeguards to prevent the risk of statelessness. Studies reveal that the stateless consist of different groups of people nationality problems, albeit for different reasons.<sup>90</sup> An example includes migrants, asylum seekers and refugees from other countries who do not enjoy the nationality of their country of origin and who face the risk of statelessness as a result of a protracted problem of lack of documentation of their link to any country.<sup>91</sup> Children who are abandoned and/or orphaned also often encounter problems of nationality and can be at risk of statelessness.<sup>92</sup>

There is a significant gap in South Africa's legislation regarding statelessness.<sup>93</sup> Therefore, stateless people run the risk of being excluded from national immunisation plans, despite the fact that the Constitution of the Republic of South Africa (the Constitution) contains a provision that South Africa belongs to all who live in it.<sup>94</sup> During lockdown, the Department of Home Affairs suspended birth registrations, which may have created a backlog and a risk for unregistered children born during this time.<sup>95</sup> The UNHCR recommends that birth registration services should be considered an essential service.<sup>96</sup>

The inability of stateless people to access socio-economic services and receive human rights protection goes against the constitutional right to a nationality, as guaranteed in the Constitution,<sup>97</sup> and the Universal Declaration of Human Rights,<sup>98</sup> amongst others.<sup>99</sup>

The case of *Chisuse*,<sup>100</sup> confirmed that nationality consists of more than legal status and is at the core of a person's identity and their sense of belonging in the community. This case illustrated that the court plays a major role in the absence of legislation that makes specific provision for the rights of children. It displays an interpretive approach that is

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<http://www.ngopulse.org/press-release/press-statement-states-ask-south-africa-give-rights-stateless>> accessed 22 March 2022.

90 The World's Stateless-Children 36.

91 Jessica P George and Rosalind Elphick, *Statelessness and Nationality in South Africa* (UNHCR 2013) 103.

92 Lawyers for Human Rights and Institute on Statelessness and Inclusion, 'Childhood Statelessness in South Africa' (2016) <[http://www.lhr.org.za/sites/lhr.org.za/files/childhood\\_statelessness\\_in\\_South\\_Africa.pdf](http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_South_Africa.pdf)>.

93 Dugard and others (n 33) 535; ISS (n 46) 36.

94 The Constitution preamble.

95 UNHCR (n 71) 9.

96 *ibid* 10.

97 The Constitution ss 27 and 28.

98 The Declaration of Human Rights 1948 Art 15.

99 *ibid*; The International Covenant on Civil and Political Rights (1966) Art 24; The United Nations Convention on the Rights of the Child (1989) Arts 7 and 8; The African Charter on the Rights and Welfare of Children Art 6; The Constitution ss 20 and 28.

100 *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20.

mindful of the risks of childhood statelessness and the place of birth registrations in the global provision for identity for all.<sup>101</sup>

The lack of administrative processes to cater for stateless persons is a violation of an individual's human right which is identified as the root cause for additional human rights violations as well as an obstacle to human development.<sup>102</sup> Notwithstanding the fact that South Africa has not ratified the Statelessness Conventions, it is bound to protect the right to a nationality in terms of its obligations under a range of international instruments.<sup>103</sup> This would include the right to a nationality in terms of Article 7 of the Convention on the Rights of the Child, which recognises the right to a name and a nationality at birth<sup>104</sup> and the African Charter on the Rights and the Welfare of the Child,<sup>105</sup> which also confirms the rights of a child to a name and a nationality. In addition, the Constitution enshrines the right not to be deprived of a nationality and a right to a name and a nationality at birth.<sup>106</sup>

Even though there is a lack of dedicated domestic laws on statelessness, some 'patchwork' legislation exists, which can allow for access to a nationality.<sup>107</sup> A significant number of cases on statelessness and those who are affected by the risk of statelessness have been reported, and as such their adjudication have laid a positive foundation for the state to implement mechanisms to provide solutions for statelessness.<sup>108</sup> Some safeguards are included in the South African Citizens Act,<sup>109</sup> however, there are no regulations to bring the safeguards into effect despite the decision in the case of *DGLR v Minister of Home Affairs (DGLR case)*.<sup>110</sup> Therefore, legal precedence has provided an avenue that seeks to provide redress in cases of

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101 Mihloti B Sherinda and Jonathan Klaaren, 'The South African Constitutional Court Decides Against Statelessness and In Favour of Children: *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20'

<[https://www.researchgate.net/publication/354881035\\_The\\_South\\_African\\_Constitutional\\_Court\\_Decides\\_Against\\_Statelessness\\_and\\_In\\_Favour\\_of\\_Children\\_Chisuse\\_v\\_Director-General\\_Department\\_of\\_Home\\_Affairs\\_2020\\_ZACC\\_20](https://www.researchgate.net/publication/354881035_The_South_African_Constitutional_Court_Decides_Against_Statelessness_and_In_Favour_of_Children_Chisuse_v_Director-General_Department_of_Home_Affairs_2020_ZACC_20)> accessed on 30 March 2022.

102 Kingston (n 1) 75.

103 The Constitution ss 20 and 28; Dugard and others (n 33) 537; Convention on the Nationality of Married Women of 1957; Convention on the Elimination of all Forms of Racial Discrimination of 1965; Convention on the Elimination of all Forms of Discrimination Against Women of 1979; Convention on the Rights of a Child of 1989; International Covenant on Civil and Political Rights of 1966; African Charter on the Rights and Welfare of the Child of 1999.

104 The Convention on the Rights of a Child of 1989 Art 7.

105 The African Charter on the Rights and the Welfare of the Child 1990 Art 6.

106 The Constitution ss 20 and 28(1)(a).

107 Jessica P George and Rosalind Elphick *Promoting Citizenship and Preventing Statelessness in South Africa* (Lawyers for Human Rights, 2014) 21.

108 Julia Sloth-Nielsen and Marilize Ackermann, 'Unaccompanied and Separated Foreign Children in the Care System in the Western Cape – A Socio-legal Study (2016) 19 PER 18–19; Jessica P George and Rosalind Elphick, 'Statelessness and Nationality in South Africa' (2013) <<http://www.refworld.org/docid/519df3594.html>>.

109 The South African Citizenship Act 1995 s 2(2).

110 *DGLR and KMRG v Minister of Home Affairs* 38429/13.

statelessness, where there is a gap in legislation. However, it is important to note that until such time as the Department of Home Affairs promulgates the regulations to ensure access to a nationality at birth for a child who is born stateless, the status quo prevails.<sup>111</sup> The inability to access a nationality through *jus soli* in terms of section 2(2), continues to create an administrative gap in the Citizenship Act.<sup>112</sup>

An example of inadequacies in the legal framework is illustrated in the case of *Mulowayi v Minister of Home Affairs (Mulowayi case)*,<sup>113</sup> where a child born to parents who are permanent residents, was prevented from obtaining South African nationality because the provisions of the South African Citizenship Amendment Act (SACA)<sup>114</sup> do not allow automatic citizenship for children born to South African permanent residents.<sup>115</sup> In their bid to obtain a solution, the parents sought to naturalise as South Africans. This process required them to renounce their Congolese nationality as Congolese law does not allow for dual nationality.<sup>116</sup> Their application for naturalisation was denied in terms of Regulation 3(2)(a),<sup>117</sup> that stipulates a minimum period of ten years' permanent residency as a qualification for citizenship in contradiction with the period of five years, as set out in section 5(1) of SACA. This decision rendered the parents stateless, in addition to the minor child who was born stateless. The High Court ruled Regulation 3(2)(a) was *ultra vires*, irrational and inconsistent with section 238 of the Constitution and therefore invalid.<sup>118</sup> The declaration for invalidity was given, pending a confirmation order by the Constitutional Court. Access to the right to a nationality was examined critically by the Constitutional Court. It was noted that the right to nationality extends to all within the South African territory and therefore people who are de jure stateless and children born from such parents who would otherwise become stateless, must have access to mechanisms that would allow them a nationality.<sup>119</sup> The Constitutional Court was clear in that the High Court had erred in the suspension of its order. The Constitutional Court examined the routes available for access to a nationality and none of them were available for the minor child.<sup>120</sup> Under the third route, the minor child would have to wait until he turns eighteen to obtain a nationality in 2025.<sup>121</sup> The

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111 *DGLR* case.

112 Citizenship Act of 1995.

113 *Mulowayi v Minister of Home Affairs* [2019] ZACC 1.

114 The South African Citizenship Amendment Act 2010

115 The South African Citizenship Amendment Act 2010 s 2(3).

116 *ibid* s 5(1)(h).

117 Regulations on the South African Citizenship Act 1995.

118 Section 238(a) states that an Executive organ of the state in any sphere of government may delegate any power or function to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed.

119 Dugard and others (n 33)537.

120 SACA s 2 (2); Firstly, to be born to either within or outside South Africa to a South African parent. Secondly, a person who is not a citizen or national of any other country or has no right to such citizenship and who is registered according to the Births Deaths Registration Act and thirdly, a person who was born in South Africa to parents with permanent residency in South Africa and who has lived his/her whole life in South Africa.

121 *ibid* s 2(3).

Constitutional Court judge's obiter comments highlighted that the available route for the minor child to attain citizenship at the age of majority contradicted his constitutional right to a nationality at birth.<sup>122</sup> To date, the Department of Home Affairs has not complied with the order made in the case of *Minister of Home Affairs v DGLR*<sup>123</sup> to promulgate regulations that allow a child born stateless to apply for a nationality by means of section 2(2) of the Citizenship Act. Until such time that regulations are available, the Mulowayi minor child remains stateless until 2025 when he becomes a major, unless this is challenged through further litigation. Inability to have a nationality will affect his ability to access many other rights such as the right to education, amongst others.

The contributory factors to statelessness in South Africa counts colonialism as one of its origins, as well as the idiosyncrasies of the African continent based on recurrent identity conflict, that have resulted in the mass expulsion of foreigners.<sup>124</sup> Most of the longstanding populations affected by statelessness are descendants of people 'who moved or who were forcibly moved' from one part of Africa to another during the colonial period. These people belonged to ethnic groups whose traditional territory was divided among one or more new states.<sup>125</sup> They then experienced difficulties in obtaining birth registration for children born stateless or born to stateless parents, making statelessness an inter-generational issue.<sup>126</sup> A generational statelessness was caused by migrant workers from neighbouring countries who never returned to their countries of origin.<sup>127</sup> In this context, discriminatory citizenship laws created during colonisation and Apartheid, combined with economic migration, led many migrant labourers and their descendants to be affected and finding themselves without a nationality.<sup>128</sup> These are some of the causes of statelessness in South Africa and are not exhausted in this article. The South African domestic legal framework only allows the conferral of nationality through *jus sanguine*.<sup>129</sup> It is unfortunate that colonial boundaries are the boundaries that exist even to date and solutions would need to be found, based on the existing boundaries. Manby confirms that colonial boundaries have

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122 Section 28(1) of the Constitution.

123 *Minister of Home Affairs v DGLR* [2016] 1051/2015.

124 AU 'Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum 2'; Michele E Olivier, 'The Role of the African Union in Integrating Africa' (2015) *South African Journal of International Affairs* 513.

125 AU (n 124).

126 Dugard and others (n 33) 537; *M v Minister of Home Affairs* (6871/2013) [2014] ZAGPPHC 649 (22 August 2014) para 18; *DGLR and KMRG v Minister of Home Affairs* 38429/13 217.

127 Jessica P George and Rosalind Elphick, *Statelessness & Nationality in South Africa* (Lawyers for Human Rights 2013) 13; Bronwen Manby, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* (Bloomsbury Publishing 2018) 59.

128 George and Elphick (n 107) 8.

129 Section 2(1) of the Citizenship Act.

real meaning and have created fragile national communities, furthermore, that solutions must be developed based on the existing boundaries.<sup>130</sup>

South Africa has its own peculiar history as it has created different classes of citizenship along racial lines and ethnic-based distinctions.<sup>131</sup> Ultimately, a majority of black South Africans had their nominal nationality taken away, and their right to just nationality attributed to one of the supposedly independent and ethnically designated ‘homelands.’<sup>132</sup> Motshabi states that the ‘western theories we use are inadequate to local problems and the European lens does not perceive our complexity.’<sup>133</sup> Thus, some argue for theories that are based on the ‘key features of South African law and society.’<sup>134</sup> They decry the practice of ‘starting with existing schools of jurisprudence’ developed ‘elsewhere for different conditions and requirements’ and ‘imposing them on local conditions.’<sup>135</sup> By peering through an unconventional lens such as ubuntu, it is argued that it may assist in identifying solutions for South Africa that may counter the colonial impact on citizenship and issues of nationality to combat statelessness. Statelessness in South Africa has not only been created by the legacy of inter-generational migrants. It is also a problem that has surfaced as a result of domestic laws that do not accommodate those who are at risk of being stateless.<sup>136</sup>

The right to equality is to be enjoyed by everyone as it applies to ‘all persons within the borders of South Africa.’<sup>137</sup> The courts have interpreted the reference to ‘everyone’ to refer to all persons, not just South African citizens but also various categories of immigrants.<sup>138</sup> This includes foreigners who have yet to be lawfully admitted to South Africa, as they too, have been recognised as beneficiaries of the rights guaranteed in the Bill of Rights.<sup>139</sup> It is in this context, that an argument for the stateless is advanced.

Section 39 of the Constitution provides that when interpreting the Bill of Rights, every court tribunal or forum must consider international law.<sup>140</sup> Section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The Constitution provides

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130 Manby (n 127) 2.

131 Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (Open Society Foundations, 2016) 65.

132 Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Hart Publishing, 2018) 48.

133 Khanya B Motshabi, ‘Decolonising the University: A Law Perspective’ (2018) Strategic Review for Southern Africa 109.

134 Thaddeus Metz, ‘Ubuntu as a Moral Theory and Human Rights in South Africa’ (2011) African Human Rights Law Journal 532.

135 Patrick Lenta, ‘Just Gaming? The case of Postmodernism in South African Legal Theory’ 2001 South African Journal on Human Rights 173.

136 *Minister of Home Affairs & Others v DGLR & Another* 1051/2015.

137 Section 9(2) of the Constitution.

138 *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* CCT35/99 para 37.

139 *Lawyers for Human Rights & Other v Minister of Home Affairs & Other* CCT18/03 para 27.

140 The Constitution s 39(a).

that every child has a right to a name and a nationality from birth.<sup>141</sup> This right to a name and a nationality exists for both citizens and non-citizens.<sup>142</sup> It is expressly aimed at protecting those children who at birth, are at risk of statelessness due to not having a nationality attributed to them at birth through their parents. The right to a nationality at birth allows and provides a link to a person's right to dignity, which applies to everyone regardless of citizenship.<sup>143</sup> It also extends to the right to freedom and security of a person,<sup>144</sup> as well as the right to freedom of movement.<sup>145</sup> All these rights can be used as critical tools to protect the rights of the stateless in South Africa.<sup>146</sup> These are the rights that stateless persons are denied due to their lack of nationality and legal status.<sup>147</sup> The Constitution protects against arbitrary deprivation of a nationality.<sup>148</sup> This right should also be available for those who are stateless, pending the outcome of their legal status.

In practice, the implementation of the protection of the right against arbitrary deprivation of a nationality seems to be non-existent or slow at the very least.<sup>149</sup> The Convention on the Rights of the Child (CRC)<sup>150</sup> and the African Charter on the Rights and Welfare of the Child,<sup>151</sup> provide alternative avenues since South Africa is a state party and duty-bound to uphold their provisions. South Africa has made inroads in this regard with the promulgation of the Children's Act which promotes and protects the rights of children.<sup>152</sup> Notwithstanding the aforesaid, the lack of procedural guidelines, inter-departmental strategies, implementation mechanisms, application of constitutional imperatives and provision of appropriate legal representation for undocumented foreign children and the stateless in South Africa remain a problem in South Africa.<sup>153</sup>

Those who are stateless and unable to prove their nationality, face arbitrary detentions with no possible deportation and this infringes upon their right to liberty and security.<sup>154</sup>

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141 The Constitution s 28(a).

142 Elphick and George (n 107) 20.

143 The Constitution s 10.

144 *ibid* s 12.

145 *ibid* section 21 of the Constitution.

146 George and Elphick (n 107) 22.

147 *ibid* 23.

148 The Constitution s 20.

149 *DGLR & KMGR v Minister of Home Affairs & Others*; Regulations on the registration of Births and Deaths: GN R128 (2014).

150 Convention on the Rights of the Child of 1989.

151 African Charter on the Rights and Welfare of the Child (1999).

152 Children's Act 75 of 2005.

153 Anthea van der Burg, 'A Legal Protection of Undocumented Children in South Africa: Reality or Myth?' (LDD thesis, University of the Western Cape 2005) 83.

154 Alice Edwards 'Back to Basics: The Right to Liberty and Security of Person and Alternatives to Detention of Refugees, Asylum Seekers, Stateless Persons and Other Migrants' (2011) UNHCR Legal and Protection Policy Research Series 17; the right to liberty and security of an individual is a recognised fundamental right as well as a basic element of legal systems which respect the rule of law



Due to their being stateless, no country recognises them as nationals and therefore, they face protracted stays which inevitably perpetuate human rights abuses.<sup>155</sup> In the case of *Nibigira*,<sup>156</sup> the applicant's petition for release from immigration detention was denied because it was not possible to deport him. The question to be answered was whether the applicant could be released to 'roam South Africa' only to be arrested again?

The COVID-19 pandemic provides an opportunity for South Africa to actively ensure that nationality laws include safeguards to protect those who are stateless and to prevent new cases of statelessness. This is in spite of the declaration that 'vaccinations are available for all in South Africa whether one is a citizen or not.'<sup>157</sup> The ideal of making vaccinations available to all, is unattainable as the administrative processes are not in line. The vaccination process to be followed, includes registration on an online platform,<sup>158</sup> supplying information that identifies a person together with proof of identity in the form of a passport or a South African identity document. Refugees' and asylum seekers' details are required prior to being vaccinated. This procedure limits accessibility for those who are stateless as they are unable to provide any form of legal identification.<sup>159</sup> It must be noted that a lack of identification documentation is not tantamount to statelessness, however, it is usually one of the issues that brings the lack of nationality or statelessness to the fore in circumstances where individuals seek to enforce their rights.<sup>160</sup>

It is, therefore, incumbent on South Africa to exercise its political will and show its commitment to protect all those who live in it, by reforming the laws that will recognise those that are de facto, in situ and de jure stateless.<sup>161</sup> Some positive strides have been made to include stateless people in the vaccination campaign, even though these have been made in January 2022, the third year into the COVID-19 pandemic. This development in South Africa allows people who have no legal identity nor identity documents to access pop-up stands created for ease of access for those excluded by the online platform and its requirements. It allows them to be registered under a different registration category, separate from those who have legal identification.<sup>162</sup> This is a

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155 Van der Burg (n 153) 90.

156 *Nibigira v Minister of Home Affairs* (41256/2011) [2011] ZAGPJHC.

157 President Cyril Ramaphosa Nation Address on 30 September 2021 Lockdown Level 1 Announcement.

158 Vaccine Information Portal <<https://sacoronavirus.co.za/vaccine-updates/>> accessed 7 October 2021.

159 At the time of writing this article South Africa's Department of Health had announced that it could start vaccinating undocumented persons from October 2021 however, this had not been implemented as at 7 October 2021. <https://www.news24.com/news24/southafrica/news/people-without-identity-documents-could-be-vaccinated-from-october-health-department-20210827> accessed 7 October 2021.

160 Elphick and George (n 142) 10.

161 Foreword to Conklin (n 54).

162 Mkhululi Chimoio, 'Covid-19: Vaccinating Stateless Persons in South Africa' (*Africa Renewal E-magazine*, 21 January 2022) <<https://www.un.org/africarenewal/magazine/january-2022/covid-19-vaccinating-stateless-people-south-africa>> accessed 4 April 2022.

similar route that Kenya and Uganda (amongst others) have used to cater for the stateless populations and undocumented people in their territory. The National Director of Lawyers for Human Rights,<sup>163</sup> Wayne Ncube, applauded the government's move to vaccinate stateless people. He stated that Lawyers for Human Rights have been working hard to make sure stateless and undocumented people are vaccinated as they have a right to healthcare at all health facilities.<sup>164</sup>

This could, in the meantime, assist with the challenge of access to vaccinations. More needs to be done to provide permanent solutions for people who are stateless in South Africa.

## Ubuntu as a Socio-legal Tool for the Stateless

The Constitution is premised on a legal framework of restorative justice, which is critical to the South African developing democracy.<sup>165</sup> The aim of the Constitution's transformative nature is to ensure that the state transforms South African society over time.<sup>166</sup> The philosophical principle of ubuntu is rooted in the adage *umuntu ngumuntu nga banye bantu*, which literally translates to mean that 'a person is a person because of others.' Mbingi says that ubuntu denotes the significance of the role of the community and an individual's dependence on it (interdependence of the individual and the community).<sup>167</sup> Ubuntu embodies human rights-based values that are universal in nature.<sup>168</sup> It is a way of life that accords human dignity and equality to any person, irrespective of status in a communitarian sense.<sup>169</sup> This value is not exclusively South African, as it includes the 'human race' as a whole.<sup>170</sup> It is acknowledged that ubuntu is

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163 A South African non-profit organisation that supports marginalised and vulnerable people <<https://www.un.org/africarenewal/magazine/january-2022/covid-19-vaccinating-stateless-people-south-africa>> accessed 4 April 2022.

164 Chimoio (n 162) <<https://www.un.org/africarenewal/magazine/january-2022/covid-19-vaccinating-stateless-people-south-africa>> accessed 4 April 2022.

165 Chuma Himonga, Max Taylor and Anne Pope, 'Reflections of Judicial Views of Ubuntu' 2013 PER 370 370–614; Ubuntu has a social ethic and unifying vision of interconnectedness. Gade CBN, (2012) South African Journal of Philosophy 488.

166 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*. In re *Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC).

167 Lovemore Mbingi, *Ubuntu: The Spirit of African Transformation Management* (Knowres Pub 2005) 70.

168 Jabu Sindane and Ian Liebenberg, 'Reconstruction and the Reciprocal Other: The Philosophy and Practice of Ubuntu and Democracy in African Society' (2000) *Politeia* 31.

169 Sivhaga Netshitomboni, 'Ubuntu: Fundamental Constitutional Value and Interpretive Aid' (LLM thesis, University of South Africa 1998) 4.

170 James K Khomba, 'Redesigning the Balanced Scorecard Model: An African Perspective' (PhD thesis, University of Pretoria) 160; Matshikhiri C Neluvhalani, 'Examining the Migratory Theory of Black Africans into South Africa: A Decolonised Perspective' (PhD thesis, University of Venda 2017) 16.

an ideal which remains unimplemented in the global village, and also in South Africa, which has a history of xenophobia that is against the ethos of ubuntu.<sup>171</sup>

Ubuntu as a philosophy was instrumental in transforming post-apartheid society and this was reflected by its inclusion in the postamble of the 1993 Constitution,<sup>172</sup> which specifically enjoined courts to promote values that underlie a democratic society based on freedom and equality. The post amble provides as follows:

The adoption of the Constitution lays the secure foundation for the people of South Africa to transcend the division and strife of the past, which generated gross human rights, the transgression of humanitarian principles in the violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for revenge, a need for ubuntu and not for victimisation.

Even though the principle of ubuntu is not included in the 1996 Constitution, it is argued that its ethos remains based on the constant reference to human dignity.<sup>173</sup> It is envisaged that the revisiting African community practices from the past,<sup>174</sup> would be another avenue which may assist in the transformation of the nationality legislative framework in going forward. This will aid in creating solutions that would assist those who are stateless so that they can receive human rights protection and access all rights by virtue of being human. This is also founded on the rule of law, the constitutional legal framework, human rights instruments and the socio-legal concept of ubuntu.<sup>175</sup> In strengthening the argument for creating solutions based on ubuntu, the adage *umuntu akalahwa*<sup>176</sup> which translates to mean that ‘a person cannot be thrown away,’ underscores the need to respect human life and dignity whatever the circumstances.<sup>177</sup>

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171 Jonathan Crush, ‘The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa’ (2000) *International Migration* 105; Matt Mogeke, ‘African Union: Xenophobia as Poor Intercultural Communication’ (2005) *Ecquid Novi* 5; Alois B Sibanda, ‘Unmasking the Spectre of Xenophobia: Experiences of Foreign Nations Living in the “Zone of Non-being”’: A Case Study of Yeoville (MA thesis, University of South Africa 2014) 13. This article does not discuss the aspects of xenophobia.

172 The Interim Constitution 1993 postamble; *S v Makwanyane* 1995 (6) BCLR 665 (CC).

173 The Constitution ss 1, 7, 10, 39 and item 22 of Schedule 6; *S v Makwanyane* para 311 and 328; Azhar Cachalia and others, *Fundamental Rights in the New Constitution* (Juta 1994) 34; of the African Charter on Human and People’s Rights (1986 Art 27.7). It creates a duty on an individual to strengthen cultural values in a spirit of tolerance; *Netshitomboni* (n 169) 7.

174 Michael Gelfand, ‘The Genuine Shona: Survival Values of an African Culture’ (Mabo 1973) 57–90.

175 The Universal Declaration of Human Rights (1948) Art 15; The International Covenant on Civil and Political Rights (1966) Art 24; The United Nations Convention on the Rights of the Child (1989) Arts 7 & 8; The African Charter on the Rights and Welfare of the Child (1999) Art 6; The Constitution of the Republic of South Africa 1996 ss 20 and 28.

176 Oscar Dlomo, ‘Strategic Advantages that can be Derived from Ubuntu’ (Seminar on Incorporation of Ubuntu into a Genuinely South African Approach to Management, Midrand, 30 October 1991).

177 *Netshitomboni* (n 169) 6.

The Bill of Rights enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.<sup>178</sup> These are the right to equality,<sup>179</sup> the right to human dignity,<sup>180</sup> the right to life,<sup>181</sup> and the right to freedom and security of the person.<sup>182</sup> Of significance, is the fundamental right to a nationality,<sup>183</sup> healthcare, food, water and social security for all,<sup>184</sup> which, in the context of a pandemic does not distinguish between nationals, non-nationals, refugees, asylum seekers and the stateless, as COVID-19 affects everyone.

The socio-legal principle of ubuntu plays a pivotal role in advocating for legal reform that will entrench the essence of equality, human dignity, communalism, conciliation and inclusiveness in order to enhance the constitutional interpretation landscape.<sup>185</sup> Himonga states that customary law and ubuntu are not synonymous but that ubuntu is an integral value that informs the regulation of interpersonal relations and dispute resolutions which are inherent in customary law.<sup>186</sup> At the very core of legislative reform, ubuntu is instrumental in arguing the case for the stateless.<sup>187</sup> It is a philosophy that promotes the common good of society, which is trans-cultural and, if embraced, would enable South Africans to succeed in their quest for reconciliation and nation-building.<sup>188</sup>

Ubuntu is one alternative that has not been traversed enough in as far as it pertains to nationality and statelessness.<sup>189</sup> This is because states are often reluctant to acknowledge the presence of stateless persons on their territories, and they are rarely counted in official government statistics as a resident category.<sup>190</sup> Ubuntu underpins the rationale that not one African born in Africa should be stateless in (South) Africa.

## Conclusion

The article highlights the problem of statelessness and access to vaccination during the COVID-19 pandemic. It examines the good practices being implemented by some

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178 The Constitution s 7.

179 *ibid* s 9.

180 *ibid* s 10.

181 *ibid* s 11.

182 *ibid* s 12.

183 *ibid* s 28.

184 *ibid* s 27.

185 Himonga and others (n 165) 370.

186 *ibid* 373.

187 Vhonani S Neluvhalani, 'An Analysis and Reassessment of the Immigration Legislative and Administrative Framework in Combating Statelessness: A Decolonized View' (LLD thesis, NWU Potchefstroom 2021); Universal Declaration of Human Rights Art 15; Chapter 2 of the Constitution.

188 Joe Teffo, 'Botho/Ubuntu as a Way Forward for Contemporary South Africa' (1998) *Word & Action* 38(365) 5.

189 Neluvhalani (n 187).

190 Neluvhalani (n 28) 208.

countries in as far as they relate to the treatment of those who are stateless in their territories and their access to vaccination. The article found that some countries were active in creating solutions to cater for stateless people by providing registration platforms that allow them to register for vaccination, even though they had no legal identity. For example, the United Kingdom created a firewall between the Immigration and Health departments in order that the identity of the stateless person remains protected and his/her information is not shared with the immigration authorities. Even though this does not address the challenge of statelessness or legal identity, it provides a temporary relief mechanism that ensures that all people within the territory have access to vaccines without fear. It should be noted that the United Kingdom has ratified the Statelessness Conventions and has a Statelessness Determination Procedure. South Africa still has a long way to go as it does not make provision for stateless people to register for vaccines. The cases of *DGLR*, *Chisuse and Mulowayi* are examples of statelessness in South Africa. Despite court judgments, the regulations to bring effect to section 2(2) of the Citizen's Act remain outstanding. These are but some of the cases and are not representative of the depth of the challenge of statelessness due to a dearth of accurate statistics. The article recommends that in addition to international and regional human rights standards, soft law remains a tool that provides best practices and guidelines which may be adopted in addressing challenges related to statelessness. Ubuntu must be considered as one of the underlying values that underpin transformation of nationality laws. It can be used as a basis to advocate for the stateless as it is aligned to the transformative nature of the Constitution and emphasises the importance of the individual and his/her inter-connectedness to the community. The adage *umuntu ngu muntu nga banye bantu* is testament to the fact that the COVID-19 pandemic requires an inclusive approach that provides access to all people in South Africa regardless of their legal status, as COVID-19 affects everyone.

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