

CONCEPT NOTE: THE RIGHT TO CITIZENSHIP IN SOUTH AFRICA'S CONSTITUTIONAL DEMOCRACY

Moments of major societal change require a re-thinking of traditional concepts and categories. South Africa's transition to democracy from the oppressive system of Apartheid spurred on a constitutional revolution that requires a wholesale re-think both of foundational legal norms as well as particular legal rules in light of the 'spirit, purport, and objects of the Bill of Rights'. The role of citizenship in the South African constitution is ripe for such attention and re-thinking yet the xenophobic realities of current South Africa have sought to bolster the distinction between South African citizens and those from elsewhere.

Section 3 of the foundational provisions of the Constitution recognizes a common South African citizenship and that citizens are equally entitled to the rights and benefits of citizenship and subject to its duties. Section 20 of the Bill of Rights provides that "[n]o citizen may be deprived of citizenship". The historical backdrop of these provisions was the wholesale de-nationalisation of black South Africans and the deprivation of their rights incidental to citizenship such as having the right to vote. While this provision is simple and concise, other constitutional provisions explicitly guarantee citizens certain rights. These include a range of political rights (section 19), the right to enter, remain in and reside anywhere in the republic (section 21), and the right to choose their trade, occupation or profession freely (section 22). Section 3 also contains a general empowering provision requiring national legislation to provide for the acquisition, loss and restoration of citizenship. The Citizenship Act 88 of 1995 was passed to give effect to this mandate.

There is a developing jurisprudence emerging around citizenship and whether it should retain importance in South Africa. The Constitutional Court in *Chisuse* expressed a degree of ambivalence towards citizenship that has characterised the approach of courts. On the one hand, the denial of citizenship on grounds of race leads to the proposition that '[c]itizenship and equality of citizenship is, therefore, a matter of considerable importance in South Africa' (para 28). On the other hand, 'caution must be exercised not to overemphasize the importance of citizenship' (para 24) and that 'this Court has repeatedly affirmed that arbitrary and irrational distinctions between citizens and non-citizens are inconsistent with the Constitution' (para 24).

The courts have tended to blur the boundary between citizenship and permanent residence – for instance, in *Khosa v Minister of Social Development*, the Constitutional Court upheld the rights of permanent residents to claim pension and child-support grants on a par with citizens. This shift in emphasis is significant, shifting the pre-condition for certain rights to long-term residence.

Whilst expanding the sphere of those entitled to certain rights to permanent residents, the Constitutional Court has refused to strike down other legislation that based entitlements on an individual's immigration status. It upheld a provision that generally permits employment in the security industry only for citizens and permanent residents (*Union of Refugee Women*) and unanimously upheld legislation that restricts admission as attorneys or advocates to citizens and permanent residents (*Rafoneke*). The justifiability of these judgments requires further engagement.

The courts have also faced a range of challenges concerning the acquisition and loss of citizenship. *Chisuse* involved the court interpreting legislation to ensure that children born of one South African parent abroad would still be entitled to citizenship. In a 2021 High Court decision, Kollapen J ruled that it was constitutional for South African citizens automatically to lose their citizenship if they acquire another citizenship without first applying to the Minister to retain it. That decision has recently been overturned by the Supreme Court of Appeal and awaits confirmation by the Constitutional Court. That decision raises squarely questions concerning the purpose of the right to citizenship – is it simply a protection against statelessness or a strong protection for a status that has concomitant rights attached to it? If the latter, what are the unique elements that only citizenship provides one with?

The South African constitution is expressly global and comparative in nature requiring an engagement with international law and comparative developments. Having an understanding of changes in the meaning, importance and nature of citizenship both in Africa and more broadly can also help advance our understanding of the approach to citizenship that should be adopted in the South African Constitution.

In light of this context, this conference seeks to focus on the role that citizenship should play in South African constitutional democracy. A range of sub-questions fall within the scope of the conference:

- Which theories of citizenship are appropriate for adequately conceptualizing citizenship within South Africa? Is a revised understanding of citizenship required by the South African context and philosophy?
- Beyond the prevention of statelessness, what should be the content of the right to citizenship, in South Africa and internationally?
- What constitutional principles should govern the approach to the acquisition and loss of citizenship?
- Is the blurring of the boundary between citizenship and permanent residence coherent?
- Is the line erected between citizens, permanent residents, and all other residents of South Africa coherent and defensible?
- Are there some rights that should be restricted to citizens only?
- What role does the xenophobic context of South Africa and the world play in how we should approach citizenship?
- What can South Africa learn from the evolving approach to citizenship in international law?
- What can South Africans learn from the evolving approach to citizenship in other constitutional democracies?

We welcome submissions of abstracts (up to 500 words) on one or more of the above topics. Abstracts must be submitted to trkanhanga@uj.ac.za by 14 July 2023.