CITIZENSHIP IN SOUTH AFRICA

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SOMMARIO: 1.- Introduction; 2.- Historical background; 3.- Development of South African citizenship; 4.- Current *South African Citizenship Act*; 5.- Loss and deprivation of citizenship; 6.- Conclusion.

1.- **Introduction**

Throughout Western history states developed two methods to determine citizenship or nationality, *ius soli* and *ius sanguinis*. The former takes as criterion the status of at least one parent, while the latter assigns citizenship based on the place of birth.
This divide originates in different legal families, *in casu* the common law and the civilian tradition

2.- **Historical background**

The principle of *ius soli* as the criterium to acquire citizenship was introduced in 212 AD by the emperor Caracalla who conferred citizenship to all free persons residing within the Roman empire[1].
However, during the later empire imperial regulations restricting mobility brought the origin of parents to the stage again[2]. Although the idea of the Roman empire and the concomitant Roman citizenship continued for centuries during the Middle Ages, the political realities of the later Middle Ages saw the creation of the early modern European states. Thus, Azo addressed the question of the citizenship of a city state and Baldus held that persons born in a city were citizens of the same[3].
Thus, *ius soli* re-emerged in Europe during the later Middle Ages and developed in tandem with the nation state.
A parallel development took place in the United Kingdom, where the theoretical foundation for the *ius soli* in the common law was laid in 1608 in the case of *Calvin v Smith*.[4]
This principle which in essence provides that persons born on the territory of a state acquire the citizenship of this state has the additional benefit that the creation of stateless people is eliminated.

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[1] D. 1.5.17 (Ulp. 22 *ad ed.*): *In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt*.

[2] C. 11.48.1, 3, 6 and 11. Before 212AD the rules in Roman law were that a child born from marriage acquired the citizenship of the father, while if a child born from an unmarried woman would follow the citizenship of the mother. D. 1.5.19 (Cels. 29 *dig.*): *Cum legitimae nuptiae factae sint, patrem liberi sequuntur: volgo quaesitus matrem sequitur*; D 1.5.24 (Ulp. 27 *ad Sab.*): *Lex naturae haec est, ut qui nascitur sine legitimo matrimonio matrem sequatur, nisi lex specialis aliud inducit.*

[3] C.A. Perello, *Race and nation. On 'ius sanguinis' and the origins of a racist national perspective*, in *Fundamina* 24.2 (2018) 1-20.

[4] P.J. Price, *Natural law and birthright. Citizenship in Calvin's case (1608)*, in *Yale Journal of Law & Humanities* 9.1 (1997) 73-145.

However, the emergence of new sciences and the growing importance of nationalism saw the advent of a competing criterion, *ius sanguinis*. The motive for this change was the emergence of the scientific study of mankind following Linnaeus' *Systema naturae per tria regna naturae* (1735), in which he categorised humanity in four groups, European, American, Asiatic and African.
In consequence, the French *Code Civil* of 1804 introduced *ius sanguinis*. This principle allocated citizenship in accordance with the citizenship/nationality of the father and became, during the 19th century, the dominant paradigm in European codifications.
Colonisation spread these competing principles worldwide, with the result that most European colonies adopted the French method, *ius sanguinis*, while the English-speaking world depended on *ius soli.*
However, neither principle escaped the hard realities of wars, politics and economics during the 20th century, with the result that no principle has remained in force unadulterated. Growing migration as well as the rise of the welfare state, which gave the citizens more rights, but also an increase in obligations towards the state and the growing importance of human rights are reflected in the various jurisdictions.

3.- **Development of South African citizenship**

At the end of the second Boer war in 1902 the inhabitants of the territory of South Africa became British subjects as the whole of South Africa became a British Crown Colony. Although the political status changed in 1910 with the establishment of the Union of South Africa by the *South Africa Act* (1909), the inhabitants remained British subjects.
The *Union Nationality and Flags Act* of 1927 introduced Union citizenship. Adhering to the *ius soli*, the Act defined Union nationals as any person born in the Union, who is not an alien or a prohibited immigrant[5]. Special provision was made for British subjects who became Union citizens after two years domicile and naturalised British subjects after three years domicile, as long as they retain that domicile. Finally, persons born outside South Africa, whose father was a Union national at the time of such person's birth acquired Union citizenship and the same applied to the wife of a Union national.
The Act also defined natural-born British subjects, namely any person born in one of the King's dominions, or outside the dominions whose father was at the time of that person's birth a British subject.
The *Statute of Westminster* of 1931[6] gave effect to certain resolutions passed by imperial conferences held in 1926 and 1930. In consequence, the *Colonial Laws Validity Act*, 1865 was repealed and full power of legislation was given to the parliaments of the dominions; henceforth United Kingdom legislation would not extend to a dominion except by consent[7].
In 1934 the parliament of the Union re-enacted these changes in the *Status of the Union Act* 1934[8], which declared the country to be a sovereign independent state.
In 1948 the HNP[9] won the elections and started to implement their policy of strict racial separation, which led to the Republic of South Africa Constitution of 1961, ending the Union,

[5] The *Immigrants'Regulation Act*, No 22 of 1913 denominated certain classes of persons prohibited immigrants, for example Asiatics.
[6] 22 Geo. V, c 4. W.P.M. Kennedy, H.J. Schlosberg, *The Law and Custom of the South African Constitution*, London 1935, 95ff.
[7] Ss. 2 ff.
[8] No. 69 of 1934.
[99] Herstigte Nasionale Party, Reunited National Party,

leaving the Commonwealth and establishing the republic, which severed all ties with the British Empire. The state president replaced the Crown and the Governor General and all references to "king", "queen", and "crown" were replaced with "state".
In 1949 the *South African Citizenship Act*[10] was enacted creating a new South African citizenship, thus ending the dual British citizenship that Union citizens enjoyed, automatically depriving all Union citizens of their British subject status[11]. Moreover, South African citizenship was automatically lost if citizenship of another country was obtained
The *Citizenship Act* of 1949 provided for the acquisition of South African citizenship by birth, descent, registration, resumption and naturalisation, but in general it can be said that all persons born in the Republic of South Africa were citizens by birth irrespective of race, albeit with serious differences in the responsibilities and privileges of citizenship.
In 1970 implementation of the independent homelands based on ethnicity[12] saw the enactment of the *Bantu Homeland Citizenship Act*[13], which introduced citizenship of territorial authority areas for all Africans in the republic. This created three forms of citizenship within the territory of South Africa, i.e. South African citizenship, citizenship of a self-governing Bantu territory and citizenship of territorial authority areas. The latter became in time self-governing, and four became "independent"[14]. Citizenship of the latter ended South African citizenship. In 1986 the *Restoration of South African Citizenship Act*[15] restored South African citizenship to all persons who had lost it in terms of the 1970 act on the independence of their "homeland". In 1993 another *Restoration and Extension of South African Citizenship Act*[16] was passed to ensure that all South Africans had citizenship, which was a requirement to vote in 1994.
The Constitution[17] entitles all citizens to an equal citizenship with universal adult franchise. In consequence, the new *South African Citizenship Act* of 1995[18] repealed all former citizenship acts and replaced these with a common citizenship[19].

4.- **Current *South African Citizenship Act***

The Act distinguishes between citizenship by birth and by descent. However, although the original Act linked this distinction to the traditional division between *ius soli* and *ius sanguinis*, the 2010 Amendment[20] no longer follows this course.

[10] No. 44 of 1949.
[11] At that time the principal form of British nationality/citizenship; Cf. *British Nationality and Status of Aliens Act* 1914; *British Nationality Act* 1948. *Contra* Hobden at 2, who believes that South Africans ceased being British subjects in 1961. This belief is not supported by British immigration experts.
[12] Preliminary legislation was for example the *Population Registration Act*, No 30 of 1950, the *Bantu Authorities Act*, No 68 of 1951, the *Bantu Self-Government Act*, No 46 of 1959, the *Transkei Constitution Act*, No. 48 of 1963.
[13] Act No 26 of 1970.
[14] Transkei (1976), Bophuthatswana (1977), Venda (1979) and Ciskei (1981). This independence was not recognised internationally.
[15] No 73 of 1986.
[16] No 196 of 1993
[17] No 200 of 1993 repealed by *Constitution of the Republic of South Africa*, No 108 of 1996.
[18] No 88 of 1995.
[19] C. Hobden, *Report on citizenship law South Africa*, Global Citizenship Observatory (GLOBALCIT) Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School, 2018, 1-18. https://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Dissemination/Publications.
[20] *South African Citizenship Amendment Act*, No 17 of 2010.

Section 2 of the Act defines a citizen by birth as any person who was prior to this amendment a SA citizen by birth[21], or who is born outside the republic from a parent being a SA citizen; any person born in the republic outside this definition shall be a SA citizen by birth, if he/she has no right to other citizenship and the birth is registered in accordance with the *Birth and Deaths Registration Act*[22]. Finally section 2 (3) provides that a person born in the republic of parents with permanent residence permits shall be a SA citizen by birth, if she/he has lived in the republic until majority[23] and the birth was registered in the republic.
Citizenship by descent is now defined in section 3 as any person adopted in terms of the *Children's Act* by a SA citizen and whose birth is duly registered. It is obvious that this definition does not relate to the *ius sanguinis* criterion, while the relationship between *ius soli* and the South African version of citizenship by birth has also become rather tenuous.
This is confirmed by section 4 *Citizenship by naturalisation*, which provides in section 4 (3) that a child born in South Africa of parents not South African citizens and without permanent residence qualifies to apply for citizenship by naturalisation if such person lived in the republic from birth to majority and her/his birth had been duly registered[24].
Citizenship by naturalisation[25] underwent some changes[26] since the original Act of 1995 and the increased residence requirement, from one year to five years immediately preceding the date of application, which indicates a more restrictive approach. Of special importance are the *Regulations on the South African Citizenship Act*, 1995, made by the Minister of Home Affairs[27]. Paragraph 3 (2) (a) provides that the period of ordinary residence referred to in the Act is ten years immediately preceding the application. It appears that the Department of Home Affairs interprets the five years of ordinary residence requirement of section 5 (1) (c) as relating to permanent residence. As section 25 of the *Immigration Act* requires five years of residence in order to acquire permanent residence, this explains the ten years of the Regulation. However, this indicates one of the serious problems of the *Citizenship Act*, which it shares universally with virtually any Act or legal rule, namely that the interpretation by government departments and civil servants determine law in practice.
The above observation is confirmed by the decision in *Minister of Home Affairs & Another v Ali & Others*[28]. Ms. Ali and five others applied for citizenship in terms of section 4 (3) of the Act. The Department of Home Affairs refused to receive and grant the application arguing that this section has no retrospective effect and applied only to children born after the amendment became operative on the first of January 2013, Ms Ali and the others being born during 1996, 1997 and 1998. On the basis of such interpretation the Department has omitted to promulgate regulations giving effect to section 4 (3), in short application forms. The Western Cape Division of the High Court ordered that the Department of Home Affairs accept the applications on affidavit and decide within ten days from receipt; that section 4 (3) applies to persons meeting the requirements, irrespective of whether they were born before or after 1 January 2013; that the minster shall within one year enact the necessary regulations and pending such enactment accept applications in terms of section 4(3) on affidavit[29].

[21] In the original 1995 Act s 2 allocated citizenship by birth to any person born in the republic subject to certain exceptions.
[22] Ss 2 (1) (a) and (b); 2 (2).
[23] 18 years in terms of *Children's Act* 2005.
[24] This section was introduced by the *South African Citizenship Amendment Act*, No 17 of 2010.
[25] Ss 4, 5, 6
[26] The *Children's Act*, No 38 of 2005 in s. 17 changed the age of majority from 21 to 18 years.
[27] Government Gazette 28 December 2012, Government Notice No 1122 operative on 1 January 2013.
[28] [2018] ZASCA 169
[29] *Ali & Others v Minister of Home Affairs & Another*, 2018 (1) SA 633 (WCC); [2017] ZAWCH 94.

The minister appealed and argued on appeal that such order encroaches on the separation of powers. The Supreme Court of Appeal dismissed the appeal and concluded that the interpretation by the Minister does not promote the spirit, purport and objects of the Bill of Rights[30].

5.- **Loss and deprivation of citizenship**

In spite of section 20 of the Constitution[31] the *South African Citizenship Act* provides for loss of citizenship and in spite of the equality requirement differentiation between different modes of acquisition of the same exist.

The *South African Citizenship Act* allows for dual citizenship[32]. A South African citizen acquiring another nationality or having another citizenship serving in the armed forces of such country while that country is at war with the republic, shall cease to be a South African citizen[33]. However, before acquisition of another citizenship the South African citizen may apply for an exemption to the Minister of Home Affairs, who has the discretion to order such retention[34]. A foreigner applying for South African citizenship must satisfy the Minister that, amongst other requirements, her/his country of citizenship allows dual citizenship, and if not provide proof of renunciation of such citizenship[35]. Furthermore, a naturalised South African citizen loses citizenship if she/he engages, under the flag of another country, in a war the republic does not support[36].

Sections 8 and 10 deal with deprivation of citizenship of naturalised citizens. Section 20 of the Constitution prohibits deprivation, but is derogable, and in section 9 the constitution guarantees everyone equality before the law. Derogation must conform to the parameters set out in section 36 (1) of the Constitution.

6.- **Conclusion**

The Constitution is the supreme law of the land[37] and all law inconsistent with it is invalid. Section 3 of the Constitution provides for a common and equal South African citizenship. The *Bill of Rights* formulates these rights in general terms for all people in the country. In consequence, most sections commence with "Everyone" and only section 19 dealing with political rights and section 20 *Citizenship* and section 22 *Freedom of trade, occupation and profession,* are limited to South African citizens.

This generality raises concerns in respect of the position of non-citizens without temporary or permanent residence and specifically the legal position of the children of such foreigners. Section 28 of the *Constitution* provides that every child has the right to a nationality from birth and the question arises whether section 2 (2) of the *Citizenship Act* passes the test of constitutionality as the requirement of a birth certificate in the republic in accordance with the *Birth and Death Registration Act*, is for the child of stateless parents an impossibility. Also,

[30] At para 26.
[31] No citizen may be deprived of citizenship.
[32] Dual citizenship was permitted in the 1995 Act.
[33] S 6 (1) (a) and (b).
[34] S 6 (2).
[35] Introduced in 2013, s 5 (1) (h): Provided that in the case where dual citizenship is not allowed by his or her country, such person renounces the citizenship of that country and furnishes the Minister with the prescribed proof of such renunciation.
[36] S 6 (3) added in 2010 by *South African Citizenship Amendment Act*.
[37] *Constitution of the Republic of South Africa*, Act 108 of 1996, s. 2.

section 20, which provides that "No citizen may be deprived of citizenship," raises questions. This section is an obvious response to the situation before the advent of a democratic dispensation and legislative practices such as the *Constitution of the Transkei* and the *Bantu Homeland Citizenship Act*, but nevertheless makes the sections of the *Citizenship Act* dealing with deprivation of citizenship questionable, for example the differentiation between citizens by naturalisation and other citizens found in section 6.

The highest barrier against inclusive citizenship remains the requirement of a birth registered in terms of the *Birth and Death Registration Act*, since a valid residence permit or visa are necessary to register the birth of a child of foreign parents. In other words, children of illegal immigrants born in South Africa are excluded even for the stateless exception of section 2 (2) of the Act.

The remark made above concerning the implementation of the Department of Home Affairs being the highest barrier can be validated by the odyssey of Ms Ali and others in her position. As set out the case dealt with persons born in South Africa after 1995, who applied after 1 January 2013 for nationality by naturalisation in terms of (the new) section 4 (3) of the *Citizenship Act*. As the Minster had omitted to enact Regulations for the implementation of this section, Ms Ali and other asked the High Court for an order. The Minister opposed such order and appealed the granting thereof. The Supreme Court of Appeal decided in favour of Ms Ali and ordered the Minster to allow application on affidavit and to enact the necessary regulations with one year.

The same situation continues regarding the stateless child of section 2 (2) of the Act. In 2015 in the case of *DGLR & Another v Minister of Home Affairs & Others*[38] the Minster was ordered to enact regulations to make it possible for stateless children to acquire citizenship.

On 24 July 2020 the *Draft Amendment Regulations on the Citizenship Act*, 1995 were published in Government Gazette No 43551, vol 661. The Scalabrini Centre of Cape Town[39] in written comments on the Draft expressed concern that the draft did not comply with the empowering provision in the principal Act[40], by introduction of additional and unobtainable requirements. Also, the interpretative court decisions[41] were not followed. Finally, the regulations did not comply with the Constitution as well as international obligations protecting children who would otherwise be stateless.[42]

The societal and political debate around the Citizenship Act takes place in the context of economic depression, civil protest and severe ideological divides in politics. The resulting unemployment has led to xenophobia and a more prohibitive implementation of immigration and citizenship rules and regulations. This deviates from the constitutional ideals as reflected in the original 1995 Act, with one common, equal citizenship and the majority of the rights enumerated in the modern Bill of Rights entitling everyone within South Africa to these rights,

In practice the barrier has become the residence permit, temporary or permanent, and this obstacle is reflected in the increased number of illegal, undocumented foreigners. The position of this group is tenuous and as mentioned above acquisition of a birth certificate for

32 Unreported case of the Supreme Court of Appeal [2015] SCA No 38429/2013.

[39] A registered non-profit organisation, as a Child and Youth Care centre and as a Public Benefit Organisation.

[40] S 23. The Centre argues that the Minister introduces many additional requirements in the regulations.

[41] *DGLR and ALI* cases; *Jose and Another v The Minister of Home Affairs and Others* (38981/17) [2019] ZAGPPHC 88; 2019 (4) SA 597 (GP).

[42] https://www.scalabrini.org.za/resources/scalabrini-centre-of-cape-towns-comments-on-draft-regulations-to-refugees-act-2018/.

their offspring is unobtainable. In consequence, several provisions of the *Citizenship Act* are illusory.

Abstract. - The paper describes the vicissitudes of citizenship within the territory of South Africa.
Originally British subjects in terms of *ius soli*, the inhabitants of South Africa were subjected to various statutes throughout the twentieth century, which affected their citizenship and the concomitant rights and duties.
The 1996 Constitution guarantees one common and equal citizenship. Moreover, the Bill of Rights entitles Everyone in the country. The article addresses some of the obstacles which persist.

L'articolo tratta delle evoluzioni del regime della cittadinanza in Sud Africa. Originariamente l'ordinamento britannico si basava sul principio dello *ius soli*, ma, nel corso del XX secolo, gli abitanti del Sud Africa sono stati assoggettati a diversi sistemi normativi, che hanno coinvolto la loro cittadinanza e i conseguenti diritti e doveri.
La Costituzione del 1996 garantisce a tutti i cittadini una uguale e comune cittadinanza. Inoltre, la Carta dei diritti riguarda chiunque abiti nel Paese. L'articolo prende poi in considerazione alcuni persistenti ostacoli sulla strada della piena parità dei diritti.