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A note on the 1982 Botswana Citizenship Act

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Introduction

From a comparative law perspective, citizenship laws are designed to define and prescribe the conditions which connect or disconnect an individual with a given state or legal system.¹ In most legal systems, the term citizenship connotes a legal status which is derived from the existence of certain factual conditions such as birth within a given country. The existence of the factual conditions is treated as a qualification or legal condition for acquisition of nationality. The totality of such conditions, therefore, prescribes the nationality or citizenship law of a given state. Owing to the inevitable differences that obtain in various countries, the conditions governing the loss or acquisition of nationality vary in significant ways. Even within a single country, due to internal political, economic and social changes the concept of nationality does not remain static. Changes in circumstances lead to a redefinition of the law which gives birth to a new concept of nationality or citizenship.²

In Botswana, prior to the coming into force of the new Citizenship Act, the legal conditions for the acquisition and loss of nationality were contained partly in the Constitution³ and partly in the Citizenship of Botswana (Supplementary Provisions) Act.⁴ The 1982 Citizenship Act effects substantial changes in the character of nationality particularly regarding the acquisition of nationality by naturalisation. The genesis of the new Act was a Parliamentary Motion by the Hon. Magang. The motion, inter alia, instructed the Minister of Home Affairs to refer the Citizenship Act to the Law Reform Committee.⁵ The 1982 Act is based upon the recommendations of the committee.

International law concedes the right of each state to determine, under its own legal system, the persons who are going to be its citizens. The international community is obligated to recognise the law of each state so long as it is in line with international conventions, custom and the principles of law generally recognised with regard to nationality or citizenship.⁶

Regarding a state's right to ascribe nationality at birth, international law recognises two grounds upon which a state may confer its nationality at birth, that is to say, the fact of birth within its territory (otherwise known as the principle of jus soli) or of descent from a citizen (known as jus sanguinis).⁷ The principle of jus sanguinis, which is said to have originated with membership in the family or tribe, is the older of the two principles and finds expression in the citizenship laws of countries in Europe, Africa and Asia. The principle of jus soli finds expression in the citizenship laws of Great Britain (though somewhat modified by the British Nationality Act 1981) the United States of America and most Latin American States. The modes adopted by the Botswana 1982 Act for ascribing or granting nationality at birth incorporate both jus soli and jus sanguinis. In this respect the Botswana Act is therefore consistent with traditional international prescriptions.

There are no hard and fast international prescriptions regarding the competence of the state in connection with naturalisation procedures. This domain appears to be conceded by international law as lying within the exclusive zone of each state. The exceptional conventional prescriptions are the Convention on the Reduction of Statelessness, the United Nations Declaration on the Elimination of Discrimination Against Women and the Convention on the Nationality of Married Women 1957. An examination of the Botswana Act reveals no violation of these international standards.

The Citizenship Bill was published on 31st December 1981. The Bill was enacted into law on 18 October 1982 and was brought into force on 31 December 1982.

This note attempts a brief outline of the major provisions of the Act. Firstly the note sets out the criteria for the acquisition of Botswana nationality. Secondly the note considers the contingencies for the loss, renunciation and deprivation of citizenship. Thirdly the status of applications lodged before the coming into force of the new Act is taken up. Finally administrative and judicial aspects of the Act are discussed.

Botswana Citizenship at the Commencement of the Act

When the Act came into force every person who was a citizen of Botswana at its commencement remained a citizen despite the repeal of the law under which he might have acquired his citizenship.⁸

Acquisition of Botswana Citizenship after Commencement of the 1982 Act

a. Citizenship by Birth

i. Birth in Botswana - Jus Soli

The principle of jus soli is maintained, albeit in a modified form. S. 4(1) provides that a person born in Botswana shall have a mandatory right to be a citizen of Botswana. The fact that both jus soli (by birth) and jus sanguinis (by descent) are recognised by the Act would lead to cases of dual nationality. To avoid this result S.4(1) has a proviso to the effect that a person shall not be a citizen of Botswana by birth if at the time of his birth he acquires the citizenship of another country by descent through his father.

ii. Birth outside Botswana - Jus Sanguinis

Section 5 provides for the automatic acquisition of Botswana citizenship by descent (jus sanguinis) by a person born outside of Botswana if at the time of his birth his father was a citizen of Botswana or in the case of a person born out of wedlock, his mother must have been a citizen by birth. It is arguable that S.5 has the potential for discriminatory effect in that a person may be born of a mother who may be a citizen by naturalisation and may have no connection with any other country. Likewise a mother could have acquired citizenship by marriage under the repealed law and may give birth outside of Botswana after she is divorced or after her husband's death. In all the above cases there is a potential for statelessness.⁹

Section 5, in conformity with the nationality laws of most states, contains no limitations upon the acquisition of Botswana nationality by descendants of Botswana nationals born outside of the country. Therefore Botswana nationality may be transmitted indefinitely, for example, to successive generations of persons born and continuing to live in South Africa or Zimbabwe.

b. Citizenship by Adoption

Any child of not more than three years old adopted under the provisions of any written law relating to the adoption of children will automatically become a citizen of Botswana if the adopter or in the case of a joint adoption, the male adopter, was at the date of adoption a citizen of Botswana.¹⁰

In the case of a child of over three years old adopted by a citizen of Botswana under the provisions of any written law relating to the adoption of children, the Act grants the Minister of Home Affairs discretionary power to register such a child upon application by the adopter.¹¹

c. Botswana Citizenship by Naturalisation and Registration

The Act sets out the qualifications for naturalisation.¹² Firstly, the applicant for naturalisation must have been resident in Botswana for a continuous period of 12 months immediately preceding the date of his application for naturalisation.

Secondly, the applicant for naturalisation must lodge with the Minister of Home Affairs a written declaration of his intention to make such an application not earlier than 6 or later than 5 years immediately before the date of application.

Thirdly, the applicant must have been resident in Botswana for periods amounting in the aggregate to not less than 10 years during the period of 12 years immediately preceding his application for naturalisation.

Fourthly, the applicant must be of good character.

Fifthly, the applicant must have sufficient knowledge of the Setswana Language and any such other language as may be prescribed.

Finally, the applicant must intend to reside in Botswana in the event of a certificate of naturalisation being granted to him.

The Act provides privileged naturalisation procedures for married women.¹³ The effect of these procedures is to grant citizenship on easier conditions than those outlined above. The legal requirement for naturalisation of married women is residence in Botswana for a continuous period amounting in the aggregate to not less than two and a half years.

The provisions regarding naturalisation of married women are entirely consistent with Article 5 of the United Nations Declaration on the Elimination of Discrimination Against Women (1967) and Article 3(1) of the Convention on the Nationality of Married Women (1957). Article 5 of the former provides that:

Women shall have the same rights as men to acquire, change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband.

Article 3(1) of the latter Convention provides that:

Each Contracting State agrees that the alien wife of one of its members may, at her request, acquire the nationality of her husband through specially privileged naturalisation procedures...

Loss, Renunciation and Deprivation of Citizenship

The Act seeks to bar the holding of other nationalities. To this end it provides that any person who is a citizen of Botswana and also a citizen of another country shall cease to be a citizen of Botswana unless he has, immediately before the attainment of the age of 21 years, renounced his citizenship of that other country, taken the oath of allegiance and made such declaration of his intentions regarding residence as may be prescribed.¹⁴

The Act has provisions¹⁵ for deprivation of citizenship. Under the Act the Minister of Home Affairs may by order deprive a person of citizenship if he is satisfied that that person

- a. has voluntarily (other than by marriage) acquired the citizenship of another country;
- b. has obtained naturalisation under fraudulent circumstances;
- c. being a citizen by naturalisation
 - i. has failed, on being so required by the Minister, to renounce, within a specified time, his citizenship of any other country or to take the oath of allegiance.
 - ii. has shown himself by act or speech to be disloyal or disaffected towards Botswana.
 - iii. during hostilities in Botswana was or is engaged with or cooperated with the enemy.
 - iv. has within five years of being naturalised been sentenced in any country to imprisonment for a term of not less than 12 months.
 - v. has been resident in other countries for a continuous period of 7 years and during that period has not given notice in writing to the Minister of Home Affairs of his intention to retain his citizenship of Botswana.

Phasing out Rights of Registration Under Pre-existing Law

Prior to the coming into force of the Act, qualifications for naturalisation were governed by the Constitution and the Citizenship of Botswana (Supplementary Provisions) Act. These qualifications were generally easier than the new

conditions. The new Act continues the pre-existing qualifications in respect of those applications for the acquisition of citizenship of Botswana which were lodged on or before 31 December 1981. Such applications will be dealt with in accordance with the law in force immediately before the commencement of the Act.

Administration of the Act

Administrative responsibility for the Act is vested in the Minister of Home Affairs. The Minister is assisted in his administrative functions by the Citizenship Committee. In addition to the Minister, who serves as its Chairman, the committee consists of the following individuals:¹⁶

1. The Chairman of the House of Chiefs
2. One member of the National Assembly appointed by the President
3. Two members of the general public appointed by the President.

Judicial Review Excluded

The Act provides that the Minister shall not be required to assign any reason for any decision taken under the provisions of the Act and that no such decision shall be subject to appeal or review by any court.¹⁷

Footnotes

1. Silving, Nationality in Comparative Law, 5 American Journal of Comparative Law 410-412 (1956).
2. Ibid.
3. See Sections 20 to 29, Constitution of Botswana.
4. Chapter 25:01, Laws of Republic of Botswana.
5. The motion was moved and adopted on 14 March 1980.
6. See Convention on Certain Questions Relating to the Conflict of Nationality Laws (Signed at the Hague, April 1930).
7. See Harvard Research in International Law, the Law of Nationality, 23 American Journal of International Law 27-31 (1929).
8. Section 24.
9. I am grateful to Mr P.T.C. Skelemani, Deputy Attorney-General, Republic of Botswana, for having drawn my attention to the potentially harsh and discriminatory effects of S.5.
10. Section 6.
11. Section 7.
12. Section 11.
13. Section 12.
14. Section 13.
15. Section 15.
16. Section 3.
17. Section 18.