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# REPORT ON CITIZENSHIP LAW: NAMIBIA

AUTHORED BY  
DIANNE HUBBARD

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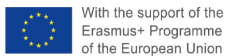
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# Report on Citizenship Law

## Namibia

*Dianne Hubbard*

### 1. Introduction

Namibian citizenship only came into being when Namibia became an independent nation on 21 March 1990, after a decades-long liberation struggle. During Namibia's colonial occupation, its inhabitants were identified against their will first as German nationals (from 1885), then as British (from 1918), and finally as South Africans (from 1949) – but they lacked the full rights of citizenship of any country during that period. Apartheid policies denied black Namibians many of the fundamental rights of citizenship. Against this backdrop, the Namibian Constitution adopted at independence embodies an unusually detailed scheme for citizenship by birth, descent, marriage, registration and naturalisation which must be commended for being gender-neutral in every respect. Subsequent legislation has added provision for honorary citizenship and the special conferment of citizenship on the descendants of persons who fled Namibia during a period of colonial genocide in the early 1900s.

The post-independence period has been earmarked by a mixture of suspicion and compassion. The government tried to prohibit dual citizenship altogether until the High Court ruled that this restriction cannot constitutionally be applied to citizens by birth or descent. The courts also stepped in to prevent government from applying a restrictive definition of ordinary residence for purposes of deciding who is entitled to citizenship by birth in Namibia to non-Namibian parents. Concerns have been expressed about sham marriages for citizenship purposes, which the government is making various efforts to prevent, and the requisite residency periods for citizenship by both marriage and naturalisation were substantially lengthened by a constitutional amendment in 2010. As Namibia's current President Hage Geingob stated when he chaired the Constitutional Committee that prepared the draft Constitution in 1989, “this country is so beautiful, everybody wants to stay here”.

At the same time as trying to make sure that the door into Namibian citizenship is not open too wide, the government has been generous and sympathetic in making proactive efforts to provide a path to citizenship for long-term Namibian residents who lack documentation, even when they are known to have countries of origin other than Namibia.

The next few years should see significant legislative changes to the rules on civil registration, marriage and immigration procedures that will support the existing citizenship regime by eliminating gaps and preventing abuses – but major changes to the underlying requirements for citizenship are not anticipated.

## 2. Historical background

### 2.1 German colonial period

The first citizenship controversies in Namibia arose during the period of German colonisation. In the nineteenth century, the area which was to eventually become Namibia was characterised by decentralised power and authority, organised in small political units based on kinship and language, with more disparate groups sometimes joining together to utilise the protection of a strong individual as their leader.<sup>1</sup> Colonial annexation began in the late nineteenth century, with the port area of Walvis Bay being claimed by the British and incorporated into their Cape Colony in 1884. German traders began to annex land in “South West Africa” in the 1880s, and Imperial Germany claimed the remainder of the territory of “South West Africa” as a Protectorate at the Berlin Conference of 1884-85 where European powers coolly agreed upon the division of land for their colonial ambitions in Africa.<sup>2</sup> In 1886, Germany set out a legal framework for extending German laws to its various protectorates, and this was applied to “German South West Africa” in 1888.<sup>3</sup>

In terms of this legal framework, the registration of births, deaths and marriages applied only to German nationals living in the protectorate and not to the indigenous population - with the specific intention of ensuring that colonial subjects would not be able to assert claims of German citizenship and nationality.<sup>4</sup> However, a German concern which came to the fore was the impact of marriages between male settlers and local women, due to the German legal rule that a person married to a German citizen and a legitimate child born to a German father automatically acquired German citizenship. This inspired legal moves to prohibit and even to retroactively invalidate “mixed marriages”, thereby deprived African women and the mixed-race offspring born to them and their German partners of inheritance rights and security.<sup>5</sup>

During the period of German occupation, Namibia became the site of the world’s first genocide, which was to have later implications for citizenship issues. German military forces brutally countered resistance to German rule by Herero and Nama communities. The German military commander issued an extermination order against the Herero in 1904, and some fled into the desert after a battle near Namibia’s border with the British colony of Bechuanaland. They were pursued by German forces intent on eliminating them, as well as facing dehydration when the Germans cut off access to some essential waterholes. Those who did not die on the gruelling journey reached what was later to become Botswana. Herero and Nama captives were incarcerated in prisoner-of-war camps which were more like concentration camps.

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<sup>1</sup> Wallace, 2011: 47-49.

<sup>2</sup> See, e.g., McDougall, 1986: 444; Wallace, 2011: 116.

<sup>3</sup> *Law regarding Legal Relations in the German Protectorates of 16 April 1886 (Gesetz, betreffend die Rechtsverhältnisse der deutschen Schutzgebiete*, also known as *Schutzgebietsgesetz*), applied to German South West Africa by the *Ordinance regarding Legal Relations in the South West African Protectorate of 1 January 1888 (Verordnung, betreffend die Rechtsverhältnisse in dem südwestafrikanischen Schutzgebiet)*. Hartmann, 2007: 54-55.

<sup>4</sup> Hartmann, 2007: 57-59.

<sup>5</sup> Hartmann, 2007: 62-66; Wallace, 2011: 194-ff.

Although sources disagree about the total mortality figures, the final death toll is conservatively estimated at being at least half of the Herero population and one-third of the Nama population, with some specific communities of Nama speakers being almost totally destroyed.<sup>6</sup>

## 2.2 Post WWII mandate administered by South Africa

During World War I, military troops from neighbouring South Africa invaded and occupied “German South West Africa”. After Germany’s defeat in World War I, the Union of South Africa sought to annex the Territory. However, as part of the Treaty of Versailles, a “mandate system” was set up under the auspices of the newly-formed League of Nations to provide for the administration of “those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world”.<sup>7</sup>

As a result, the mandate for “South West Africa” was assigned to “His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa” – which was at that time a self-governing territory within the dominions of the British Crown.<sup>8</sup> The result was that South Africa was allowed to exercise full powers of administration over the territory and authorised to apply its laws to the territory “subject to such local modifications as circumstances may require” – while also being expected to “promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate”.<sup>9</sup>

The immediate citizenship consequences again applied only to the white colonial inhabitants. The “native inhabitants” of “South West Africa” were initially stateless in terms of the Mandate. The Council of the League of Nations adopted a resolution on 23 April 1923 which stated that “the native inhabitants of a mandated territory are not invested with the nationality of the mandatory Power by reason of the

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<sup>6</sup> Wallace, 2011: 155-ff, mortality figures at 177-178; Olusoga & Erichsen, 2010: generally, 229-30 (mortality rates).

<sup>7</sup> *Peace Treaty of Versailles*, Article 22. (Articles 1-26 of the Peace Treaty formed the Covenant of the League of Nations.) Article 22 divided the mandates it established into three categories which came to be known as Class A, B, and C mandates. The Class A category included territories which have “reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone”; Class B mandates covered peoples considered to be at an intermediate stage of development requiring direct administration by the Mandatory to advance certain specified objectives; and Class C mandates, which included territories “such as South West Africa”, which “owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory”.

<sup>8</sup> Fransman, 1942: B.211.

<sup>9</sup> The quotations are from the Mandate for German South West Africa (*League of Nations Official Journal*, Jan-Feb 1921, page 89), which confirmed the decision of the Supreme Council of the Allied Powers. See also Dugard, 1973: 69-70 and Du Pisani, 1986: 48-52. The Mandate was actioned locally by the *Treaty of Peace and South West Africa Mandate Act 49 of 1919*, ratified after a period of martial law by *SA Proclamation 1 of 1921*.

protection extended to them”.<sup>10</sup> South Africa confirmed this position to the League of Nations in 1928, stating: “No special national status has been conferred upon the native inhabitants of the Territory. They are regarded as persons without nationality under the protection of the Mandatory Power in terms of legal opinion.”<sup>11</sup> The League of Nations elaborated in the same year:

No legislative measure conferring automatic naturalisation upon the native inhabitants, nor giving them some form of descriptive title, has been passed. They are regarded as stateless subjects under the protection of the mandatory Power, and in a passport such a person would be described as a native inhabitant of South-West Africa under the protection of the Union of South Africa in its capacity as mandatory of South-West Africa.<sup>12</sup>

The position of the white inhabitants was very different. In 1924, South Africa granted automatic British subject status to German citizens who were resident in the territory, with a view to retaining a segment of the population which it viewed as being important in terms of economic development.<sup>13</sup> Other European inhabitants of the territory could apply for naturalisation in the ordinary manner.<sup>14</sup> (The initial law in force at the time on this topic was the South African *Naturalisation of Aliens Act 4 of 1910*, which was replaced by the *British Nationality in the Union and Naturalisation and Status of Aliens Act 18 of 1926*. Both of these statutes were laws of the Union of South Africa, issued under the powers given to the territory within the British empire, which in turn gave the Union the right to apply these laws to South West Africa.) The League of Nations expressed the opinion that there was no bar to a “native inhabitant”

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<sup>10</sup> League of Nations, 1929: 1. The full text of the resolution as reproduced in that document was as follows:

1. The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory Power and cannot be identified therewith by any process having general application.
2. The native inhabitants of a mandated territory are not invested with the nationality of the mandatory Power by reason of the protection extended to them.
3. It is not inconsistent with (1) and (2) above that individual inhabitants of the territory should voluntarily obtain naturalisation from the mandatory Power, in accordance with arrangements which it is open to such Power to make with this object under its own law.
4. It is desirable that native inhabitants who receive the protection of the mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate.

<sup>11</sup> ‘Report of the Government of the Union of South Africa to the Council of the League of Nations concerning the Administration of South West Africa for the year 1928’, page 17, available at <[www.historicalpapers.wits.ac.za/inventories/inv\\_pdf/AD1715/AD1715-28-1-6-001-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AD1715/AD1715-28-1-6-001-jpeg.pdf)> (last accessed 18 October 2020).

<sup>12</sup> League of Nations, 1929: 2.

<sup>13</sup> O’Linn, 2010: 21; Goldblatt: 219-221; Du Pisani, 1986: 69. The relevant law was the *South West Africa Naturalization of Aliens Act 30 of 1924*, which provided that every adult European who was a subject of any of the “late enemy powers” and was domiciled in the mandated territory between 1 January and 15 September 1924 would automatically become a naturalised British subject, unless a declaration rejecting this naturalisation was signed within six months of the latter date. According to Du Pisani, dual citizenship was not allowed, with the theory being that the German residents would be Union citizens while they lived in South West Africa, but could revive their German citizenship should they return to Germany. About 3 228 German citizens initially accepted this offer of automatic naturalisation, while some 300 refused it, with 2 354 more Germans being naturalised in this way by 1931. Du Pisani, 1986: 69. One other South African law, the *Naturalization of Aliens (South West Africa) Act 27 of 1928*, took the issue no further, as it applied only to certain children of persons deemed to have become British subjects under the South West Africa Naturalization of Aliens Act 30 of 1924.

<sup>14</sup> League of Nations, 1929.

applying for naturalisation under *Act 18 of 1926*, and that “in this respect they stand in precisely the same position as Europeans who are aliens”.<sup>15</sup> This seems to have been more of a theoretical possibility than a practical one, since South Africa did not even allow its own black inhabitants the full enjoyment of citizenship rights.<sup>16</sup>

To complicate matters further, although these laws referred to “Union nationality”, there was at this stage technically no such thing as a “South African citizen”. In 1927, the South African *Union Nationality and Flags Act 40 of 1927* provided that all British subjects in the territory, and all children born in the territory to British subjects on or after 1 June 1928, were nationals of the Union of South Africa<sup>17</sup> - but Union nationals, like nationals of other Crown colonies and British dominions, were British subjects.<sup>18</sup> Although this law did not overtly restrict this nationality to Europeans, there was no route to Union nationality for “Natives” because (regardless of what British law may have provided) South Africa did not view them as British subjects in the Union.<sup>19</sup>

South Africa almost immediately set out to fully annex South West Africa as a “fifth province”, but this move was stymied by international opposition. At the conclusion of World War II, the South African government made a formal request to the United Nations (which had by this time replaced the League of Nations) to incorporate the Territory – claiming falsely that this is what the population wished. The UN General Assembly denied this request, and the stage was set for an international tug-of-war which would continue until Namibian independence. South Africa continued to violate international responsibilities by using South West Africa as a source of land, natural resources and cheap black labour.

The situation intensified when the Nationalist Party came to power in South Africa in 1948, formally initiating the policy of apartheid. South Africa’s racist policies were to leave a legacy of problems for identification and citizenship issues in post-independence Namibia, because the laws on birth registration made registration optional and voluntary for “natives” in contrast to the mandatory duty to register

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<sup>15</sup> Ibid.

<sup>16</sup> See, for example, *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) (22 July 2020) at paragraphs 1, 26.

<sup>17</sup> See League of Nations, 1929: 2.

<sup>18</sup> Klaaren, 2017: 192-193; Jensen, 1951: 100.

<sup>19</sup> The British *Nationality and Status of Aliens Act 1914* -- the first statute intended to apply throughout the empire -- expressly allowed the self-governing territories to treat “different classes of British subjects” differently – thus empowered south African to discriminate against British subjects who were “natives”. The South African *Union Nationality and Flags Act 40 of 1927* conferred Union Nationality on “a person born in any part of South Africa who is not an alien or prohibited immigrant under any law relating to immigration” – with South Africa including South West Africa for this purpose. However, despite the wording, this did not cover “Natives”. According to the submission by the Government of Ethiopia to the International Court of Justice in 1961 alleging that South Africa had violated its obligations as a mandatory power:

Prior to the submission of the Government's report for 1928 to the League of Nations, the representative of the Union Government, on being asked by a member of the Permanent Mandates Commission whether the term “person” as used in the provision quoted above included a “Native,” had informed the Commission that the “whole basis of the law was that, before a person could become a Union national, he must be a British subject. Once that point was realised, the Act became perfectly plain. A native of South-West Africa was not a British subject, and, that being so, he could not become a Union national.

‘Memorial submitted by the Government of Ethiopia’: 191. Until 31 May 1961, when South Africa became a Republic and withdrew from the Commonwealth after encountering opposition to its policy of apartheid, South African citizens were also subjects of the British Empire.



births which applied to the European populations.<sup>20</sup> The result has been that many Namibians still today lack documentation to prove their identity or their citizenship.

With respect to citizenship, in 1949, the pendulum swung from statelessness to the other extreme, with South African citizenship being imposed involuntarily upon the inhabitants of South West Africa by the new citizenship regime set out in the *South African Citizenship Act 44 of 1949* - the first law to establish South African citizenship in its own right, in line with the scheme of linked citizenships among the newly independent members of the British Commonwealth as envisaged by the *British Nationality Act of 1948*. In terms of this law, inhabitants of South West Africa who were born there and were domiciled there when the Act came into force automatically became citizens of the Union, which was defined by the law to include the mandated territory.<sup>21</sup> It was later argued to the International Court of Justice that this law violated the obligations under the Mandate not to identify inhabitants of a mandated territory with nationals of the mandatory power by any process having general application.<sup>22</sup>

Even as the inhabitants were forced to live under the umbrella of South African citizenship, at the same time, only whites enjoyed full South African citizenship rights. Black, Indian and Coloured South Africans were formally considered to be citizens, but they lacked fundamental rights such as the right to equality, the right to vote and the right to freedom of movement. In later years, even formal citizenship status was endangered as South Africa began a move towards making Blacks “citizens” of ethnically-based “homelands” in both South Africa and “South West Africa”.<sup>23</sup>

South Africa’s drive to annex “South West Africa” as a colonial possession led to a request by the UN General Assembly for an Advisory Opinion from the International Court of Justice. In 1950, the Court issued an opinion stating that South

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<sup>20</sup> The *Births, Marriages and Deaths Registration Act 17 of 1923* - applied to South West Africa by the *Births, Marriages and Deaths Registration Proclamation 38 of 1923* - made birth registration voluntary for “natives” outside urban areas, unless specific regulations had been enacted by the Governor-General in this regard (sections 33-35). Its successor, the *Births, Marriages and Deaths Registration Act 81 of 1963* - applied to South West Africa initially by the South West African *Births, Marriages and Deaths Registration Ordinance 27 of 1965* which was later replaced by the South African *Births, Marriages and Deaths Registration Amendment Act 58 of 1970* – similarly did not made birth registration of “Bantus” in rural areas mandatory unless it was specifically applied to a particular area by regulation (sections 35-37). The provisions containing these racial distinctions were modified in 1970 (by the South African *Births, Marriages and Deaths Registration Amendment Act 58 of 1970*), but removed completely only in 1987 (by the South West African *Marriages, Births and Deaths Amendment Act 5 of 1987*).

<sup>21</sup> The key provision of the *South African Citizenship Act 44 of 1949* was section 2(2): “Every person born in South-West Africa on or after the date of commencement of the British Nationality in the Union and Naturalization and Status of Aliens Act, 1926 (Act No. 18 of 1926), but prior to the date of commencement of this Act and who was, immediately prior to the date of commencement of this Act, domiciled in the Union or South-West Africa, shall be a South African citizen.” The 1949 Act came into force on 2 September 1949.

<sup>22</sup> ‘Memorial submitted by the Government of Ethiopia’ to the International Court of Justice to the International Court of Justice in 1961, page 192. (See footnote 9 above for the statement of this duty.)

<sup>23</sup> Hobden, 2018: 2-3. In South Africa, some Blacks were stripped of their South African citizenship on this basis, but the plan did not come to full fruition in Namibia.

West Africa continued to be a territory with international status, and that this status could not be altered by South Africa without the consent of the United Nations.<sup>24</sup>

It has been noted that the legislative moves to institutionalise apartheid after 1948 were “slower and less elaborate” in Namibia than in South Africa.<sup>25</sup> For instance, the move to create independent black homelands, intended ultimately to be the sole source of citizenship for black inhabitants, was initiated in Namibia after a Commission of Enquiry known as the “Odendaal Commission” drew a new blueprint for ethnic boundaries, but (unlike in South Africa), none of the planned homelands were actually declared independent, being treated more as regional authorities with limited powers of governance.

By this time, nationalist movements in Namibia had begun to take shape and to make their voices heard internally and internationally.<sup>26</sup>

In 1960, Ethiopia and Libya instituted proceedings in the International Court of Justice arguing that South Africa had violated its obligations under the Mandate by, amongst other things, failing to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory, including through the “deliberate, systematic and consistent” discrimination embodied in the implementation of apartheid laws and policies.<sup>27</sup> The arguments in support of this proposition included a summary of the citizenship issues already described.<sup>28</sup> However, to Namibia’s great disappointment, the Court issued an opinion in 1966 that refused to consider the merits of the case on the grounds that the petitioners lacked standing.<sup>29</sup>

This failure of redress through legal channels sparked the beginning of the armed struggle spearheaded by the People’s Liberation Army of Namibia (PLAN) under the leadership of the South West Africa People's Organisation (SWAPO), which has emerged as the primary liberation movement.<sup>30</sup> At the same time, the UN General Assembly passed a resolution revoking South Africa’s mandate and thus making its presence in the territory an illegal occupation.<sup>31</sup> The UN set up the United Nations Council to administer the territory until its independence,<sup>32</sup> but South Africa managed to prevent this body from exercising any significant powers inside the territory.<sup>33</sup>

The name of the territory was formally changed to “Namibia” by a 1968 General Assembly Resolution. Recognising the inadequacy of South African

<sup>24</sup> *International Status of South West Africa, 1950 I.C.J. 128*. The full text of the court’s opinion is available online at <[www.icj-cij.org/en/case/10](http://www.icj-cij.org/en/case/10)>. See also O’Linn, 2010: 31-ff; McDougall, 1986: 445-446.

<sup>25</sup> Wallace, 2011: 251, quoting Zed Ngavirue, *Political Parties and Interest Groups in South West Africa (Namibia): A Study of a Plural Society (1972)*, Basel: P. Schlettwein [no page given].

<sup>26</sup> See, for example, Wallace, 2011: 243-ff.

<sup>27</sup> ‘Memorial submitted by the Government of Ethiopia’, 1961: 33.

<sup>28</sup> See ‘Memorial submitted by the Government of Ethiopia’: 131-ff.

<sup>29</sup> The Court’s decision is reproduced in Dugard, 1973: 293-ff.

<sup>30</sup> Wallace, 2011: 268.

<sup>31</sup> UN General Assembly Resolution 2145 (XXI), dated 27 October 1966, reproduced in Dugard, 1973: 379-381.

<sup>32</sup> UN General Assembly Resolution 2248 (S-V), dated 19 May 1967, reproduced in Dugard, 1973: 410-412

<sup>33</sup> See Dugard, 1973: 114. For instance, when the Council tried to enter the Territory to take over its administration in April 1968, it was refused landing rights by South Africa. Dugard, 1973: 436; Du Pisani, 1986: 189-90.

citizenship rights for Namibians, this resolution also charged the Council to “continue with a sense of urgency its consultations on the question of issuing to Namibians travel documents enabling them to travel abroad”.<sup>34</sup> South Africa was undeterred, continuing to extend apartheid policies to the territory along with the continuing moves to integrate it more closely with South Africa.<sup>35</sup>

The painful years of the liberation struggle and the oppressive treatment of Namibians by South Africa did not have specific consequences for the issue of citizenship, but they provide an essential backdrop to understanding Namibian policies in the post-independence era.

Opposition to South African rule continued to increase both inside Namibia and by Namibians in exile. One of Namibia’s most famous freedom fighters, Andimba Toivo ya Toivo, stated during his trial for terrorism in 1968, “We find ourselves here in a foreign country, convicted under laws made by people whom we have always considered as foreigners” - continuing with the ringing cry, “We are Namibians and not South Africans”.<sup>36</sup>

In 1971, the UN Security Council requested an Advisory Opinion from the International Court of Justice on the legal consequences of the continuing presence of South Africa in Namibia notwithstanding the revocation of the Mandate. The Court ruled that South Africa was acting illegally and ordered its immediate withdrawal,<sup>37</sup> but this opinion proved to be unenforceable. It did, however, galvanise resistance to the South African presence inside the country, inspiring a general strike and an escalation in the armed conflict.<sup>38</sup> In the wake of these developments, buttressed by international pressure, there was a gradual movement in South African legal enactments towards the eventual independence of Namibia.<sup>39</sup> In 1976, the United Nations General Assembly recognised SWAPO, “the national liberation movement of Namibia”, as “the sole and authentic representative of the Namibian people”.<sup>40</sup>

In 1977, UN Security Council Resolution 435 set out a framework for free and fair elections to be held under international supervision. South African unilaterally attempted “elections” aimed at inaugurating a constitution-making process, but this initiative was boycotted by SWAPO and other political parties and was not viewed internationally as having any legitimacy.<sup>41</sup>

The five Western members of the UN Security Council (Canada, France, Germany, the UK and the United States) formed a “Contact Group” that engaged in

<sup>34</sup> UN General Assembly Resolution 2372 (XXII), dated 12 June 1968, reproduced in Dugard, 1973: 436-437. O’Linn, 2010: 722.

<sup>35</sup> Dugard, 1973: 431-435; Du Pisani, 1986: 184-189.

<sup>36</sup> The full statement made by Toivo ya Toivo at the trial is reproduced in Dugard, 1973: 417-ff.

<sup>37</sup> *Advisory Opinion Concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16. The full text of the court’s opinion is available online at <[www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf](http://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf)>. See also Dugard, 1973: 447-ff.

<sup>38</sup> Wallace. 2011: 274-275., 285-ff.

<sup>39</sup> For instance, the *South West Africa Constitution Amendment Act 95 of 1977* gave the State President of South Africa power to make laws for South West Africa “with a view to the eventual attainment of independence”, while *South African Proclamation R.249 of 1977* abolished the territory’s representation in the South African Parliament. Furthermore, between 1977 and 1980, the administration of a number of laws was transferred from South Africa to South West Africa.

<sup>40</sup> UN General Assembly Resolution A/RES/31/146 (1 December 1976).

<sup>41</sup> The UN Security Council declared these internal elections null and void. UN Security Council Resolution S/RES/439 (1978) of 13 November 1978. NDI, 1990: 16.

mediation at an international level to move the process forward, but international linkages between Namibian independence and other Cold War issues also delayed the independence process.<sup>42</sup>

The Contract Group and the parties to the Namibian conflict agreed on a set of “Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia”. This document set out some fundamental components which were to be included in the framework for Namibia’s initial elections and in the future Constitution. Citizenship was not addressed in this document, but it did provide that “[e]very adult Namibian will be eligible, without discrimination or fear of intimidation from any source, to vote, campaign and stand for election to the Constituent Assembly”.<sup>43</sup>

Faced with increasing criticism at an international level, pressure from the armed struggle and the growing internal resistance, and the changes in geopolitics occasioned by the end of the Cold War, South Africa finally acceded to the United Nations plan for a transition to independence. Implementation of Resolution 435 began on 1 April 1989.

### 2.3 Transition to independence

Resolution 435 placed the administration of the electoral process in the hands of the South West African Administrator-General, subject to the “supervision and control” of the United Nations represented by the UN Special Representative and the United National Transitional Assistance Group (UNTAG).

Since there was no concept of Namibian citizenship as yet, one of the most controversial issues leading up to the initial election was who would be eligible to vote. The basic principle agreed upon was that voter registration would be open to persons age 18 or older who were born in Namibia, who had at least one parent born in Namibia or who had lived in Namibia for at least four years. Residency could not be the sole criterion, because it was necessary to accommodate Namibians returning from exile. But some safeguards were added to respond to fears that the rules on voter registration would enable South African civil servants who had been based in Namibia to vote, along with other persons resident outside the country who had no intention of making Namibia their home. For example, South African civil servants were allowed to register only if they declared an intention to remain in Namibia. Returning exiles who were repatriated through the process supervised by the UN High Commissioner for Refugees did not have to provide other documentation, but others who were returning to Namibia had to present documentary proof of their eligibility. Individuals in Namibia who lacked identification documents could prove their eligibility to register as voters by means of a written declaration from another registered voter, or from their traditional chief or headman.<sup>44</sup> Fears of interference by persons with no rightful connection to Namibia and the problems of lack of documentation are issues that continue to plague the post-independence application of the rules on citizenship.

<sup>42</sup> France, Canada and Germany all left the Contract Group in protest over the linkage philosophy. NID, 1990: 17.

<sup>43</sup> The text of the principles is reproduced in Wiechers, 1991.

<sup>44</sup> NID, 1990: 29-31.

Namibia's relatively smooth political transition was praised internally and internationally.<sup>45</sup> The elections took place in November 1989, with some 97 percent of just over 700 000 registered voters casting their ballots in an election that was pronounced "free and fair" by the UN Special Representative in Namibia. Seven political parties gained seats in the Constituent Assembly. Swapo won a majority of the votes, but failed to win a two-thirds majority. Since it had been agreed that the Constitution would have to be adopted by two-thirds of the Constituent Assembly, cooperation between the various political parties was necessary. The Namibian Constitution was in fact agreed upon with surprising speed and adopted unanimously by the Constituent Assembly, and Namibia became independent on 21 March 1990.

A parting shot from South Africa was the *South African Citizenship at Attainment of Independence Namibia Regulation Act 74 of 1990* which stripped South African citizenship from any person ordinarily resident in Namibia on the date of independence, other than those persons born in South Africa or those with a natural parent or grandparent born in the Republic.

## 2.4 The evolution of the citizenship provisions in the Namibian Constitution

After Namibia's election for a Constituent Assembly, the shaping of the Namibian Constitution was the task of a twelve-person Constitutional Committee which included representatives of all the political parties in the Constituent Assembly, chaired by Hon Hage Geingob, who became the first Prime Minister of independent Namibia and was elected as Namibia's third president in 2014. The working draft used as the starting point had been prepared by SWAPO and accepted by the other political parties for this purpose. The Committee met in closed sessions to discuss the draft with a panel of three constitutional law experts who re-worked the document on the Committee's instructions, producing a final draft for consideration by the full Constituent Assembly.<sup>46</sup>

The record of the Committee Debates provides some insight into the thinking behind the Constitutional provisions on citizenship. At the outset, the Committee based its deliberations on "three universal criteria" it identified as being the basis for citizenship: birth, blood-ties and naturalisation. The matters for debate were the conditions which should define and limit those principles and the process by which an individual would acquire citizenship on the basis of those principles.<sup>47</sup>

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<sup>45</sup> The build-up to the elections was not entirely free of violence. Notable disruptions included South African attacks on returning PLAN fighters at the outset of the implementation of UN Resolution 435 which led to some 250 deaths; the assassination of several persons by South Africa agents, including prominent white SWAPO member Adv Anton Lubowski; and an attack on a regional UNTAG office which killed one local employee. Wallace, 2011: 305-306; 'Namibia – UNTAG Background: Functions of UNTAG', <<https://peacekeeping.un.org/sites/default/files/past/untagFT.htm#Structure>>.

<sup>46</sup> See Wiechers, 2010. The three constitutional experts, all of whom were South African lawyers, were Advocate Arthur Chaskalson, Professor Marinus Wiechers and Professor Gerhard Erasmus. The Committee's formal title was "Standing Committee on Standing Rules and Orders and Internal Arrangements (Constitutional Matters)".

<sup>47</sup> Constituent Assembly Committee Debates: 15 January 1989, 100-101, Mr Tjitendero. (Note that some of the dates in the document are in error. The January dates were certainly intended to refer to 1990 and not 1989 since the Constituent Assembly was elected only in November 1989.)

The working draft proposed that anyone born in Namibia before or after the enactment of the Constitution would be a Namibian citizen (with a few exceptions). Objections were raised to the potential inclusion of a child born to a casual tourist in Namibia or to someone only temporarily present for work, business or study purposes.<sup>48</sup> One proposal for addressing this was to require that the parents must have resided in Namibia for a specified period of time before the child's birth, regardless of their citizenship status.<sup>49</sup> Then, since the concern was to exclude only casual visitors, a decision was taken not to require residence for any specific time period, but to rather rely on the concept of ordinary residence<sup>50</sup> - a decision which would provoke much later controversy.

One committee member proposed complete elimination of the concept of citizenship by birth, in favour of citizenship only by descent or naturalisation.<sup>51</sup> Another proposed something along the lines of the position in the 1979 Nigerian Constitution, combining birth in the country with descent from a citizen (or a person who would have been a citizen if the Constitution had been in force at the time of their birth).<sup>52</sup>

Another member raised a question as to whether a child born to a member of a military or police force of "the occupying country" should be disqualified to be a Namibian citizen, even if one of the child's parents is a Namibian citizen – or whether this would be visiting the sins of the parents on the child, as well as a violation of the spirit of national reconciliation. The general view was that such children should qualify for citizenship even if one of their parents would not.<sup>53</sup>

There was also a concern that the provision as initially proposed would exclude persons born in the territory before independence, as well as persons who had lived in the territory for years before independence, who had in fact qualified to vote in the Constituent Assembly elections - but could not meet the proposed qualifications for citizenship by birth or descent. As one committee member pointed out, "we have people in this country who had no option, they had to register as South African citizens. They might have preferred to register as citizens of Namibia, but they couldn't, there was no Namibian citizenship, so they had to register as citizens of South Africa."<sup>54</sup> It was proposed that there should be a transitional mechanism for citizenship by registration to cover such persons.<sup>55</sup> Others proposed that citizenship

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<sup>48</sup> Constituent Assembly Committee Debates: 15 January 1989, 94, Mr Mudge; 101, Mr Angola; 101, Dr Tjirange; 101-102, Ruppel.

<sup>49</sup> Constituent Assembly Committee Debates: 15 January 1989, 105-106, Mr Ruppel.

<sup>50</sup> Constituent Assembly Committee Debates: 15 January 1989, 108-111. The term ordinary residence was chosen over domicile because a person can have domicile in a country without being physically present there, whereas residence requires physical presence.

<sup>51</sup> Constituent Assembly Committee Debates: 15 January 1989, 106-107, Mr Angola.

<sup>52</sup> Constituent Assembly Committee Debates: 15 January 1989, 107, Mr Katjuongua.

<sup>53</sup> Constituent Assembly Committee Debates: 15 January 1989, 98-99.

<sup>54</sup> Constituent Assembly Committee Debates: 15 January 1989, 94, Mr Mudge; 102-105, general discussion.

<sup>55</sup> Constituent Assembly Committee Debates: 15 January 1989, 111-112, Mr Mudge. Mr Mudge stated: "We are of the opinion that provision should be made for citizenship by registration by people who have been ordinarily resident in the territory for a continuous period of not less than five years immediately prior to independence, who has been a South African citizen during the period - not because they wanted to, but because they had to be a South African citizen - and who applies for registration as a citizen of Namibia within a period of six months after the date of independence."

by naturalisation would be sufficient, but concerns were raised that naturalisation would not suffice because it is not a citizenship *right*.<sup>56</sup>

Although South African citizens were likely to be most affected, it was agreed that a temporary provision for Namibian citizenship by registration should not be limited to citizens of any particular country.<sup>57</sup> One of the constitutional experts cautioned the committee that “you can’t by subsequent law on citizenship enact laws that will be in conflict with the constitution. The principles must be clear and no subsequent law can then be valid if it is in conflict with the constitution. So once registration is in, it is in.”<sup>58</sup> With reference to the Zambian example, the group decided that citizenship by registration should require renunciation of any other citizenship, in order “to instil patriotism”.<sup>59</sup>

This led to a more general debate on the concept of dual citizenship. A key concern was the possibility of a Namibian being conscripted into the army of another country. Although some seemed to favour the idea that Namibian citizenship by birth, descent, registration or naturalisation must all be predicated on the renunciation of any other citizenships, it was pointed out that this would be very far-reaching.

Drawing on the example of Nigeria, others suggested that the voluntary acquisition of the citizenship of another country should be treated as constituting an automatic renunciation of Namibian citizenship.<sup>60</sup> It was also noted, however, that Namibian law cannot dictate how another country’s laws would apply in the case of multiple citizenships.

Another idea put forward was to allow multiple citizenships during minority, but to force children to choose between Namibian citizenships and other citizenships upon reaching adulthood.<sup>61</sup> The eventual agreement was, as summarised by one of the constitutional lawyers, that “people shouldn’t lose their citizenship if, as a result of the operation of law, they acquire citizenship somewhere else, but they should lose Namibian citizenship if as a result of a voluntary act they acquire it somewhere else”.<sup>62</sup>

The concept of obtaining citizenship by marriage was generally accepted, although it was agreed that “marriages of convenience” should be excluded. Concerns were raised about how customary marriages would be proved since there was no legal requirement that they be registered with any authority. It was concluded that marriage

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<sup>56</sup> Constituent Assembly Committee Debates: 15 January 1989, 112-119.

<sup>57</sup> Constituent Assembly Committee Debates: 15 January 1989, 115-116. Mr Staby stated: “For instance, there are a few thousand German passport holders in this country, some of them who have lived here since 1935, who has never become a South African citizen and who sees Namibia as his homeland, his fatherland. That sort of person I think should be entitled to claim citizenship and not necessarily apply for naturalisation having lived here for a generation and more.”

<sup>58</sup> Constituent Assembly Committee Debates: 15 January 1989, 118, Adv Chaskalson. As related below, the government at one stage attempted to do just that, but with respect to ordinary residence rather than citizenship by registration.

<sup>59</sup> Constituent Assembly Committee Debates: 15 January 1989, 118, Chairman; 118-119, general discussion.

<sup>60</sup> Constituent Assembly Committee Debates: 15 January 1989, 121-122.

<sup>61</sup> Constituent Assembly Committee Debates: 15 January 1989, 122-124.

<sup>62</sup> Constituent Assembly Committee Debates: 15 January 1989, 125, Adv Chaskalson, confirmed as being the correct position by the Chairman.

as a basis for citizenship should apply to both civil and customary marriage, with the further details to be left to legislation.<sup>63</sup>

### 3. The current citizenship regime

#### 3.1 Citizenship in the Namibian Constitution

Namibia is somewhat unusual in that the Namibian Constitution provides a citizenship regime with a level of detail that is more frequently left to legislation.<sup>64</sup> The historical reasons for this are cogently described in a 2008 High Court case:

The reason behind the inclusion of the Namibian citizenship scheme in our Constitution lies in the long and painful history of our nation's birth. During the decades preceding Independence many Namibians, unable to bear or unwilling to tolerate the iniquities and injustices of colonialism, racism and apartheid, left the country – some fleeing to escape extermination by war upon them; others emigrating to find dignity, life and refuge elsewhere; many to take up the struggle against those injustices ... but most of those who had left, were determined that they and their descendants would return one day when the country of their birth has been liberated from colonial rule. During the years of exile, whether by necessity or choice, many expatriates married – not always with those who shared their origin or culture - and founded first or second generation families in many countries all over the world where they had been given sanctuary. Others, again, immigrated or migrated to the territory during German and South African rule and many remained and adopted the country as home for them and their families – some for a number of generations before Independence. There were also those who came to the territory as part of the German and South African security forces to enforce and maintain colonial rule. Not all of them had left before Independence.

Soon after the implementation of the United Nations Security Council Resolution 435 of 1978 on 1 April 1989 [...] many thousands of those who had left Namibia during the struggle for Independence returned to participate in the political process leading up to the Independence of Namibia through free and fair elections under the supervision and control of the United Nations. Having sacrificed so much during exile, it was important for them and those who had suffered in the war of liberation to take up their rightful places in a free, unified and sovereign Namibia and to ensure citizenship for them, their families and their descendants. So too, it must have been for the other inhabitants of the country – whatever their origins. Hence, it was an historical imperative for the Constitutional Assembly who had to draft and adopt the Namibian Constitution to define who would become citizens or qualify for

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<sup>63</sup> Constituent Assembly Committee Debates: 15 January 1989, 94-95, Mr Mudge; 97; 126-134.

<sup>64</sup> The Commonwealth states all included detailed provisions on transitional citizenship in their independence Constitutions –all initially provided for *ius soli* citizenship by birth in the territory after independence, although this rule was quickly repealed in most. Manby, 2016: 39.



citizenship of the Namibian nation upon Independence and to outline who would be citizens or qualify for citizenship thereafter.<sup>65</sup>

The Constitution provides five basic routes to citizenship, in a specific order of priority:<sup>66</sup>

- (1) **Citizenship by birth:** A person is a Namibian citizen by birth in four circumstances:
  - (a) if he or she was born in Namibia *before* independence to a father or mother who would have been a Namibian citizen at the time if the Constitution had been in force;
  - (b) if he or she was born in Namibia *after* independence to a father or mother who was a Namibian citizen at the time of the birth;
  - (c) if he or she was born in Namibia *before* independence to a father or mother who was *ordinarily resident* in Namibia at the time of the birth and did not fall into one of these exceptions:
    - persons with diplomatic immunity
    - career representatives of another country
    - police, military or security force members seconded for service in Namibia by the government of another country – provided that this exception does not apply to persons claiming citizenship of Namibia by birth who (i) had been ordinarily resident in Namibia for a continuous period of at least five years at the date of independence; or (ii) were born to a father or mother who had been ordinarily resident in Namibia for a continuous period of at least five years at the date of the birth of such persons;
  - (d) if he or she was born in Namibia *after* independence to a father or mother who was *ordinarily resident* in Namibia at the time of the birth and did not fall into one of these exceptions, as long as the application of the exception would not result in statelessness:
    - persons with diplomatic immunity
    - career representatives of another country
    - police, military or security force members seconded for service in Namibia by the government of another country; or
    - illegal immigrants.

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<sup>65</sup> *Tlthoro v Minister of Home Affairs* 2008 (1) NR 97 (HC), paragraphs 18-19, footnote omitted. One of the three constitutional law experts engaged to do the drafting advised the Constitutional Committee that “the principles of acquisition, renouncement and loss of citizenship must be in your constitution. It is very important, because the basic component of a state is its citizens and in order to apply a constitution to know what a state is, you must know who are the citizens and is one thing, to my mind, that should be in your constitution”. Constituent Assembly Committee Debates, Volume 2, page 99, Prof Wiechers.

<sup>66</sup> Namibian Constitution, Art 4.

- (2) **Citizenship by descent:** A person is a Namibian citizen by descent if he or she is not a citizen by birth and was born to a parent who is a Namibian citizen or would have qualified for Namibian citizenship by birth if the Constitution had been in force at the time. The Constitution specifically states that Parliament may add a requirement of registration for citizenship by descent, which it has done.<sup>67</sup>
- (3) **Citizenship by marriage:** A person who is not a Namibian citizen by birth or descent may become eligible to apply for citizenship by means of a good faith civil or customary marriage to a Namibian citizen (or, in the case of a marriage that took place before independence, to a person who would have been a Namibian citizen if the Constitution had been in force), after a specific period of ordinary residence in Namibia as the spouse of that person.<sup>68</sup> This period of residence was initially set at two years, but increased to 10 years in 2010.<sup>69</sup>
- (4) **Citizenship by registration:** A person who is not a Namibian citizen by birth, descent or marriage may claim Namibian citizenship by registration if they had been ordinarily resident in Namibia for a continuous period of at least five years at the date of Independence. Application for Namibian citizenship via this route was available only for 12 months from the date of Independence, and it required renunciation of any other citizenship.
- (5) **Citizenship by naturalisation:** A person who is not a Namibian citizen by birth, descent marriage or registration may apply for citizenship by naturalisation after a specified period of ordinary residence in Namibia. This period of residence was initially set at five years, but increased to 10 years in 2010.<sup>70</sup> Applicants must also “satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law”.

The Constitution also authorises Parliament to enact laws conferring Namibian citizenship “upon any fit and proper person by virtue of any special skill or experience or commitment to or services rendered to the Namibian nation either before or at any time after the date of Independence”. Legislation has been enacted to provide for citizenship pursuant to this authority.

The Constitution also contains a provision guaranteeing children “the right from birth to a name” and “the right to acquire a nationality”.<sup>71</sup>

The Constitution provides that Namibian citizenship may be voluntarily renounced by signing a formal declaration to that effect. It empowers Parliament to

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<sup>67</sup> *Namibian Citizenship Act 14 of 1990*, section 2.

<sup>68</sup> *Minister of Home Affairs v Dickson & Another* 2008 (2) NR 665 (SC) held that ordinary residence for purposes of acquiring citizenship by marriage means lawful residence.

<sup>69</sup> *Namibian Constitution Second Amendment Act 7 of 2010*.

<sup>70</sup> *Ibid.*

<sup>71</sup> Namibian Constitution, Art 15(1). The Namibian High Court has, while acknowledging the “sometimes subtle and sometimes very real difference between the legal concepts of ‘citizenship’ and ‘nationality’”, stated that these terms in the context of Namibian law are “essentially two sides of the same coin: the one being definitive of the legal relationship between the Namibian State and its citizens in a national context and the other definitive of the same legal relationship and its implications in the broader context of international law”. *Tlhoru v Minister of Home Affairs* 2008 (1) NR 97 (HC), paragraph 36, footnotes omitted.

enact legislation providing for the loss of Namibian citizenship by persons who, after the date of Independence, (a) acquire the citizenship of another country by a voluntary act; (b) serve or volunteer to serve in the armed or security forces of another country without the written permission of the Namibian government; or (c) take up permanent residence in another country and then absent themselves from Namibia for more than two years without the written permission of the Namibian government. However, the Constitution explicitly states that Namibian citizens by birth or descent may not be deprived of Namibian citizenship by such legislation.

It is noteworthy that the constitutional provisions on acquisition and loss of Namibian citizenship are all completely gender-neutral. Birth to a Namibian mother has the same effect as birth to a Namibian father, and the provisions on citizenship by marriage work identically for husbands and wives.

### 3.2 Namibian Citizenship Act 14 of 1990

The *Namibian Citizenship Act 14 of 1990* deals mainly with administrative procedures relating to the acquisition and loss of citizenship under the constitutional regime. For instance, as proposed when the Constitution was being drafted, it addresses the question of proof of customary marriage for purposes of **citizenship by marriage** – providing that there must be a declaration attesting to the marriage by the applicant and his or her spouse, and providing that further information may be required.<sup>72</sup>

This Act augments the constitutional requirements for **citizenship by naturalisation**. It limits this route to citizenship to persons of good character who have been lawfully admitted to Namibia for residence purposes. The applicant must intend to continue to reside in Namibia (or to be in the service of the Government of Namibia or a Namibian person or group). Applications for naturalisation of children under age 18 must be made by the responsible parent or guardian. The applicant must have “an adequate knowledge of the responsibilities and privileges of Namibian citizenship”, as well as being willing to renounce any other citizenship. A person is disqualified from eligibility for citizenship by naturalisation by convictions for certain offences in Namibia, including high treason or sedition; various crimes of violence (including murder, rape and public violence); certain property crimes (such as theft, housebreaking or receipt of stolen property); certain crimes of dishonesty (such as counterfeiting, fraud, forgery or bribery) or offences relating to illegal drugs or illegal dealing in precious metals or stones, or controlled wildlife products.<sup>73</sup>

The statute also establishes a sixth avenue to citizenship, in the form of **honorary citizenship** which may be granted to anyone who is considered by the President to have “rendered any distinguished service to Namibia”.<sup>74</sup> Honorary citizenship does not include the right to vote.<sup>75</sup>

<sup>72</sup> *Namibian Citizenship Act 14 of 1990*, section 3(3). Legislation which would provide a registration procedure for customary marriages was proposed by Namibia’s statutory Law Reform and Development Commission in 2004, but it has not yet made any headway. Law Reform and Development Commission, *Report on Customary Law Marriages*, LRDC 12, October 2004.

<sup>73</sup> *Namibian Citizenship Act 14 of 1990*, section 5 read with Second Schedule.

<sup>74</sup> *Id.*, section 6.

<sup>75</sup> The first person to receive honorary Namibian citizenship was Martti Ahtisaari, the United Nations Special Representative of the Secretary General for Namibia who oversaw the election process in

In addition, the Act provides for some circumstances which produce **automatic loss** of Namibian citizenship by registration or naturalisation under certain circumstances, as the Constitutional Committee had discussed:

- acquisition of citizenship of another country by a voluntary act after reaching age 18, or by marriage, unless this foreign citizenship is renounced within one year of its acquisition;
- otherwise acquiring or having citizenship of another country after reaching age 18, unless this foreign citizenship is renounced within one year (a provision that seems to exceed the Constitutional authority for such legislation, even though it has not yet been challenged in court);
- serving in the armed or security forces of a foreign country while that country is at war with Namibia, or serving or volunteering to serve in the armed or security forces of a foreign country at any time without the written permission of the Minister.<sup>76</sup>

The statutory elaboration of the procedures for **renunciation** of Namibian citizenship contains some provisions aimed at preventing statelessness. Where a parent of a child has renounced Namibian citizenship and the other parent is not a Namibian citizen, the child also ceases to be Namibian – but such a child who is resident in Namibia may resume Namibian citizenship by making a declaration of this wish within one year after reaching age 18. Also, where a person has renounced Namibian citizenship but failed to become a citizen of any other country within one year, that person is deemed to have remained a Namibian citizen notwithstanding the renunciation.<sup>77</sup>

**Deprivation** of Namibian citizenship applies only to Namibian citizens by registration or naturalisation, as the Constitution mandates. The Minister may issue an order for deprivation of such citizenship where the citizenship was obtained by fraud, false representation or concealment of a material fact, or where the person in question

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- has, while outside Namibia been disloyal towards Namibia or acted in a manner prejudicial to Namibia's public safety or order;
- has during any war engaged in by Namibia unlawfully traded or communicated with an enemy, or knowingly engaged in any business which assisted an enemy;
- has been sentenced in any foreign country to imprisonment of twelve months or more without the option of a fine;
- has been convicted in Namibia of one of the disqualifying offences and sentenced in respect of that conviction to imprisonment of twelve months or more without the option of a fine;
- was a prohibited immigrant in terms of any law in force relating to immigration in Namibia immediately before being registered as a Namibian citizen; or

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Namibia in 1989 and later became the President of Finland and winner of the Nobel Peace Prize in 2008. It is rarely utilised.

<sup>76</sup> *Namibian Citizenship Act 14 of 1990*, section 7.

<sup>77</sup> *Id.*, section 8.

- was deprived of the citizenship of a foreign country on grounds which the Minister considers are substantially similar to the grounds for deprivation of Namibian citizenship.

However, the Act states that none of these grounds for deprivation of citizenship may be applied in circumstances where the person in question would be rendered stateless – unless the Minister is satisfied that it is not “conducive to the public interest” to allow that person to remain a Namibian citizen.<sup>78</sup>

Whenever the responsible parent of a child under age 18 loses or is deprived of Namibian citizenship, the Minister has discretion to order that the child shall also cease to be a Namibian citizen (if the child is also a Namibian citizen by registration or naturalisation) – but the child may make a declaration stating that he or she wishes to resume Namibian citizenship within one year of turning 18, which will be granted if the Minister thinks it fit.

There are also procedures for application for the restoration of Namibian citizenship that has been lost, renounced or deprived, with the decision being at the Minister’s discretion.<sup>79</sup>

Other generous provisions include the possibility of registration of a child under age 18 as a citizen where the child “has associations which relate to Namibian citizenship by birth, descent, registration or naturalisation”,<sup>80</sup> and a provision for the discretionary grant of citizenship “in cases of doubt”.<sup>81</sup> However, no examples of the application of these provisions in practice have been located.

**Certificates** of Namibian citizenship are issued on application to serve as proof of citizenship,<sup>82</sup> but the more common proof of citizenship in practice is a Namibian identification document.<sup>83</sup>

The gender-neutrality of the constitutional scheme is reinforced by a provision of the legislation which explicitly states that a married woman is “capable of acquiring, losing or being deprived of Namibian citizenship, in all respects as if she were an unmarried person”.<sup>84</sup>

### 3.3 Special conferment of citizenship to address colonial persecution

Namibia has adopted two successive pieces of legislation aimed at offering Namibian citizenship to “persons who left Namibia owing to persecution by the colonial government which was in control of the country before 1915”. Both statutes provided for the conferment of Namibian citizenship upon descendants of persons who are Namibian citizens by birth - or would have been if they were still alive – and who fled

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<sup>78</sup> Id, section 9.

<sup>79</sup> Id, section 13.

<sup>80</sup> Id, section 14.

<sup>81</sup> Id, section 15.

<sup>82</sup> Id, section 16.

<sup>83</sup> *Identification Act 21 of 1996*, section 5(3)(c), which requires that an identification document must state whether or not the holder is a Namibian citizen. (Permanent residents are also issued with identification documents.)

<sup>84</sup> *Namibian Citizenship Act 14 of 1990*, section 27.

Namibia due to colonial persecution, if the person in question does not qualify for Namibian citizenship on any other basis. The primary targets of these laws are Herero whose ancestors fled Namibia during the German genocide from 1904 to 1907.<sup>85</sup> A person seeking citizenship by this route must renounce the citizenship of any other country and must be (or intend to become) ordinarily resident in Namibia.

The first statute came into force on 7 December 1991 and required that application for citizenship on this basis must be made with five years of that date.<sup>86</sup> The second statute, which was almost identical, came into force on 3 July 2015 and provided for applications for 10 years from that date,<sup>87</sup> to cater for those who missed the first deadline.

One newspaper article reported that some 4,000 persons in Namibia's Otjozondjupa region (which borders Botswana) have benefitted from these laws.<sup>88</sup> A news article in a Botswana newspaper reported that some such descendants who wished to return to Namibia worried that they might be barred from gaining Namibian citizenship under the conferment statute if the renunciation of their Botswana citizenship was not accepted - because the procedure in Botswana requires them to advance reasons for their desire to renounce which may or may not be approved. They called on the governments of Namibia and Botswana to harmonise the process.<sup>89</sup>

### 3.4 Reintegration of Walvis Bay

The strategic port area of Walvis Bay was not immediately part of Namibia at independence. Walvis Bay had been treated differently from the rest of "South West Africa" due to its differing colonial history – having been annexed by Britain in 1878 and initially treated as a part of the Province of the Cape of Good Hope of South Africa. From 1922, after the Mandate for South West Africa had been established, the area was administered "as if it were part of the mandated territory and as if inhabitants of the said port and settlement were inhabitants of the mandated territory".<sup>90</sup> However, as international pressure for Namibian independence began to mount. South Africa made moves to detach Walvis Bay from the rest of Namibia and claim it as part of South Africa.<sup>91</sup>

The United Nations Security Council declared that the territorial integrity of Namibia must be assured through the "reintegration" of Walvis Bay,<sup>92</sup> but resolution of the area's status was postponed as part of the negotiations around the independence process. The Namibian Constitution explicitly states that the national territory of

<sup>85</sup> Manby, forthcoming 2020: 71-72.

<sup>86</sup> *Namibian Citizenship Special Conferment Act 14 of 1991*.

<sup>87</sup> *Namibian Citizenship (Second) Special Conferment Act 6 of 2015*.

<sup>88</sup> Tuyeimo Haidula, 'Gam, Eiseb Block residents receive national documents', *The Namibian*, 21 August 2015.

<sup>89</sup> Esther Mmolai, 'Botswana: Official Explains Citizenship Renunciation Procedures', *Botswana Daily News*, 24 September 2019.

<sup>90</sup> The *South West Africa Affairs Act 24 of 1922* gave the Governor-General of South Africa the power to set a date for the administration of Walvis Bay "as if it were part of the mandated territory". This date was set as 1 October 1922 by *SA Proclamation 145 of 1922*.

<sup>91</sup> Walvis Bay reverted to being administered as part the Cape Province of South Africa on 1 September 1977 in terms of the *Walvis Bay Administration Proclamation, RSA Proclamation No. R.202 of 1977*.

<sup>92</sup> UN Security Council Resolution 432 of 27 July 1978.

Namibia includes the enclave, harbour and port of Walvis Bay(Art 1(4)), but in practice, reincorporation of Walvis Bay into independent Namibia was achieved only on 1 March 1994 after South Africa had completed its own transition to democratic, non-racial rule.

The peculiar situation of Walvis Bay between independence and reintegration led to one of the first post-independence cases on citizenship. The applicant was a Namibian citizen by birth who lived in Walvis Bay, where he was employed as a member of the South African Police. He was selected to play for the National Rugby Team of Namibia, but then told by the Minister of Youth and Sport that he would be ineligible to play for the team unless he resigned from the police force due to the constitutional provision allowing Parliament to enact legislation providing for the loss of Namibian citizenship by persons who serve in the armed or security forces of any other country. The High Court noted that the government seems to have overlooked the proviso to this constitutional provision which states that it may not be applied to citizens by birth or descent. The *Namibian Citizenship Act* correctly did not go beyond what the Constitution allows in this regard, and the Court held that it was impermissible for the government to go farther by means of a policy decision (although this did not apply to the Namibian Rugby Union as a private body).<sup>93</sup>

The *Walvis Bay and Off-Shore Islands Act 1 of 1994* which actioned the legal reintegration included specific provisions relating to the citizenship of Walvis Bay residents. Anyone without Namibian citizenship who was ordinarily resident in Walvis Bay on the date of its reintegration and was a citizen or permanent resident of South Africa was eligible to become a permanent resident of Namibia if application was made for this status before a prescribed deadline. Furthermore, there was a shortcut to Namibian citizenship for anyone who had been in Walvis Bay (or in some combination of some other part of Namibia and Walvis Bay) for at least five years. Such persons could become naturalised Namibian citizens by means of application before the statutory deadline if they renounced any foreign citizenship – provided that they had not been convicted of any of the disqualifying criminal offences that apply generally to citizenship by naturalisation.<sup>94</sup>

The *Tlthoro* case decided by the Namibian High Court in 2008 analysed the reasons behind the renunciation requirement in this law:

Many persons resident in the enclave at the time of its reintegration were South African citizens. Provision had to be made to also allow those residents willing to renounce their South African citizenship to be integrated into Namibia and that was done by allowing for naturalisation on condition of renunciation in s. 3(2) of the Act. If the renunciation requirement had not been set and those residents could become Namibian citizens without willingly forfeiting their citizenship of and allegiance to South Africa, the management of such a strategically important area (at least on local authority level) might well have been compromised by persons holding public office whilst having a foreign allegiance. This, in turn, would have undoubtedly raised a number of security concerns.<sup>95</sup>

Walvis Bay was henceforth an integral part of Namibia for all purposes.<sup>96</sup>

<sup>93</sup> *Alberts v Government of Namibia & Another* 1993 NR 85 (HC).

<sup>94</sup> *Walvis Bay and Off-Shore Islands Act 1 of 1994*, section 3.

<sup>95</sup> *Tlthoro v Minister of Home Affairs* 2008 (1) NR 97 (HC), paragraph 44.

<sup>96</sup> For a detailed account of the legal history of Walvis Bay, see generally Berat, 1990.

### 3.5 Dual citizenship

The *Namibian Citizenship Act 14 of 1990* contain a blanket prohibition of dual citizenship which gave rise to litigation. It states:

Subject to the provisions of this Act or any other law, no Namibian citizen shall also be a citizen of a foreign country.<sup>97</sup>

In the 2010 *Tlthoro* case, the High Court was asked to consider whether it was constitutionally permissible for Namibian legislation to condition citizenship by naturalisation on the renunciation of other citizenships.<sup>98</sup> The applicant's argument was that the renunciation requirement imposed by legislation fell outside the reference to "other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law" which were constitutionally authorised. To consider this question, the Court analysed the "purpose, tenor and spirit of the constitutional citizenship scheme".<sup>99</sup>

The Court found that the Constitutional scheme "reflects an inverted relationship between the intimacy of a person's bond with Namibia and the powers entrusted to Parliament to regulate the acquisition or loss of citizenship". Citizens by birth acquire their citizenship automatically simply by being born within the country and can lose their citizenship only by voluntary renunciation. Citizens by descent may be required to register their citizenship within a certain time period. Citizenship by marriage or registration, both of which involve looser ties to Namibia, are subject to certain residency requirements, and the Constitution authorizes Parliament to provide for the loss of these categories of citizenship under certain circumstances. The Constitution gives Parliament greater powers to impose rules for citizenship by naturalisation, including authority to set additional criteria pertaining to health, morality, security or legality of residence. The decision on whether and how to bestow honorary citizenship is completely within Parliament's discretion. Thus, Parliament's regulatory powers vary depending on the closeness of the person's connection with the country, the reason being that "[w]hilst loyalty to the Namibian State may well be assumed from Namibian citizens tied to the country by birth or blood, others not so intimately or closely connected may be required to demonstrate their loyalty and allegiance to Namibia by renouncing their citizenship of the other State and to take an oath of allegiance to Namibia".<sup>100</sup>

In light of this analysis, the Court found that making citizenship by naturalisation dependent on the renunciation of other citizenships fell within the constitutional authority to impose criteria related to security, considering the possibility of divided loyalties in times of armed conflict or in respect of holding public office.<sup>101</sup> Failure to require renunciation might also threaten national security by giving rise to xenophobic unrest if persons could become Namibian citizens without renouncing their foreign citizenship and qualify for preferential treatment as

<sup>97</sup> *Namibian Citizenship Act 14 of 1990*, section 26.

<sup>98</sup> The applicant was a South African citizen who resided in "South West Africa" for many years prior to independence. She sought Namibian citizenship by naturalisation so as to leave no doubt about her residence rights in Namibia, but did not want to give up her South African citizenship as she intended to return to South Africa at some point in the future.

<sup>99</sup> *Tlthoro v Minister of Home Affairs* 2008 (1) NR 97 (HC), paragraph 15.

<sup>100</sup> *Id.*, paragraph 32.

<sup>101</sup> *Id.*, paragraphs 37-45.



Namibians in the competition for jobs or become eligible for other benefits reserved for Namibians.<sup>102</sup> At an international level, it could give rise to problematic overlaps between the “rights, duties and obligations in international law vested in two sovereign states in relation to the same individual”, which could also affect the security of the individual and the two states concerned.<sup>103</sup> The Court thus concluded that Parliament acted within its powers under the Constitution to set criteria based on security when it prohibited dual citizenship for Namibian citizens by naturalisation.<sup>104</sup>

The Court’s conclusion that Parliament had more limited powers to regulate citizenship by birth or descent was equally significant. The Court’s analysis pointed to the logic of the Constitutional prohibition on legislation that deprives a citizen of Namibia by birth or descent of Namibian citizenship by virtue of the voluntary acquisition of the citizenship of another country – and to the fact that the wording of the legislation in question violated this Constitutional provision. The consequence of the ruling is that the provision prohibiting dual citizenship may not be constitutionally applied to Namibian citizens by birth or descent, but is a permissible requirement for citizenship by naturalisation.<sup>105</sup>

### 3.6 Ordinary residence and Namibia’s constitutional crisis

In 2016, in the *De Wilde* case, the Supreme Court of Namibia made a ruling on the meaning of the term “ordinarily resident” in the Namibian’ Constitution’s provisions on citizenship by birth. The Ministry of Home Affairs had argued that this term should be equated with permanent residence, and the High Court had agreed, holding that the term must be construed to enable the Ministry to establish whether or not the criterion had been met “without undue difficulty” and “with appreciable certainty”.<sup>106</sup>

The Supreme Court overruled this decision, however, holding that “the framers of the Namibian Constitution intended the phrase ‘ordinarily resident’ to have a meaning distinct from permanent residence”.<sup>107</sup> The Supreme Court found that the question of whether a person is ordinarily resident in Namibia must be decided on a case-by-case basis:

Key considerations will include whether the person concerned normally lives in Namibia, and is therefore not merely visiting Namibia, and whether the person has no immediate intention of permanent departure. Moreover, proof of ordinary residence will require more than a person’s mere say-so. The intention to make Namibia one’s habitual home must be established by facts which are capable of objective proof. Evidence will thus need to be led to show that the person is indeed normally resident in Namibia. Such evidence will include the

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<sup>102</sup> Id, paragraphs 46-48.

<sup>103</sup> Id, paragraphs 49-52.

<sup>104</sup> Id, paragraph 53.

<sup>105</sup> This was confirmed in *Le Roux v Minister of Home Affairs and Immigration & Others* 2011 (2) NR 606 (HC).

<sup>106</sup> *De Wilde v The Minister of Home Affairs* (A 147/2013) [2014] NAHCMD 160 (22 May 2014), paras 11-12.

<sup>107</sup> *De Wilde v Minister of Home Affairs* (SA 48/2014) [2016] NASC 12 (23 June 2016), reported as *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC).

person's place of residence, the period of residence in Namibia, as well as his or her livelihood, and other relevant factors.<sup>108</sup>

In the case at hand, the Court found that the De Wilde family had been living in Namibia for an uninterrupted period of over three years at the time of the birth of the child whose citizenship was contested. They had a clear intention to make Namibia their home, having sold all their property and assets in their home country and invested in a business in Namibia. They were present in Namibia on work permits which had been renewed. The Court found that even though the De Wildes has no permanent guarantee of being allowed to remain in Namibia, they had "a settled routine of life which shows that they normally and customarily live in Namibia".<sup>109</sup> Furthermore, the Supreme Court noted that administrative convenience cannot be prioritised over the interests of a child,<sup>110</sup> and that the Constitution "must be given a generous and purposive interpretation that advances the interests of a child born in Namibia rather than one that limits such interests".<sup>111</sup>

The government was unhappy with this interpretation and so attempted to overrule it by introducing a bill reinstating their preferred approach and, even more shockingly, stating that "no rights may arise as a result of the decision of the Supreme Court of Namibia prior to the passage of this Bill".<sup>112</sup>

The government asserted that this bill was justified by Article 81 of the Namibian Constitution which says that a decision of the Supreme Court "shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted."<sup>113</sup> It interpreted this provision to mean that Parliament has the final say on the meaning of the Constitution. This provoked an outcry from the legal profession,<sup>114</sup> which argued that "lawfully enacted" means "subject to the Constitution" as interpreted by the Supreme Court.<sup>115</sup>

The Legal Assistance Centre (a public interest law firm) asserted that the Bill "would subvert the separation of powers, which is the essence of Namibia's Constitutional framework". It stated further: "If parliament can overrule any interpretation of the Constitution which it does not like, then the Constitution is no longer the supreme law of Namibia. If this bill is allowed to pass, it means that parliament is supreme, and the Constitution and the courts have become irrelevant. This would change the very nature of Namibian democracy." The Legal Assistance Centre pointed out that if government was unhappy with the Court's interpretation of the constitutional provisions on citizenship, then the correct recourse would be to propose a constitutional amendment.<sup>116</sup> A statement by the Society of Advocates of Namibia warned that the proposed Bill "constitutes the most serious challenge since

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<sup>108</sup> Id, paragraph 70.

<sup>109</sup> Id, paragraph 75.

<sup>110</sup> Id, paragraph 56.

<sup>111</sup> Id, paragraph 58.

<sup>112</sup> Republic of Namibian Citizenship Amendment Bill [B. 11 - 2016].

<sup>113</sup> See, for instance, Pendukeni Iivula-Ithana [then Minister of Home Affairs and Immigration] 'Changing the Law Does Not Undermine Rule of Law', *The Namibian*, 2 August 2016.

<sup>114</sup> Ndanki Kahiurika, 'Supreme Court might become irrelevant', *The Namibian*, 1 August 2016.

<sup>115</sup> Toni Hancox and Dianne Hubbard, 'A Constitutional Crisis?', *The Namibian*, 22 July 2016.

<sup>116</sup> Ibid.

independence to the supremacy of the Namibian Constitution, the rule of law and the separation of powers within our constitutional democracy.”<sup>117</sup>

Despite the protests, the Bill was quickly approved by one house of Parliament, the National Assembly, and sent to the second house, the National Council, which referred it to a Select Committee for public consultation. Stakeholders including the Legal Assistance Centre, the Law Society of Namibia and the Ombudsman made submissions to the committee that the Bill was unconstitutional. The Select Committee agreed, and referred the Bill back to the National Assembly for reconsideration. The government withdrew the Bill at this stage, and Namibia’s President Hage Geingob stated that lawmakers and the executive should not be seen as trying to circumvent Supreme Court decisions.<sup>118</sup>

There are rumours that a constitutional amendment to change “ordinary residence” into “permanent residence” may still be considered at some stage, but no such amendment appears to be imminent.

### 3.7 Permanent residence and citizenship by naturalisation

In practice, the 10-year period of “ordinary residence” which applies to applications for citizenship by naturalisation must be fulfilled under a permanent residence permit.<sup>119</sup> This is not a specific legal requirement in the Constitution or the *Namibian Citizenship Act 14 of 1990* - and it is doubtful that it is a correct interpretation of the Constitution in light of the *De Wilde* case on the meaning of that term in relation to citizenship by birth.

The government has taken steps to make both permanent residence and citizenship by naturalisation harder to achieve. As noted above, the Constitution was amended in 2010 to double the period of residency required for naturalisation.<sup>120</sup> The gazetted fees for obtaining permanent residence have been hiked steeply over the years, starting out at N\$20 in 1994 (now equivalent to less than US\$1.50), increasing to N\$12 173 in 2008 (now equivalent to about US\$837) and currently standing at N\$18 000 (US\$ 1238) (compared to \$ 2 500 or US\$ 172 for an employment permit).<sup>121</sup>

There seems to be suspicion on the part of both the public and the government about the motivation behind applications for naturalisation, as well as their impact. For instance, citizenship-seekers were blamed in Parliament for driving up property prices, with the Minister stating that applicants were under the mistaken impression

<sup>117</sup> Society of Advocates press statement, ‘Parliament’s Challenge to the Separation of Powers and the Rule of Law in Namibia’, 26 July 2016; Werner Menges ‘Lawyers raise alarm over citizenship bill’ The Namibian 29 July 2016.

<sup>118</sup> Kaity Cooper & Dianne Hubbard, ‘By the Skin of its Teeth: How Namibia narrowly avoided a Constitutional crisis’, Citizenship Rights in Africa Initiative (blog post), 7 February 2017, available at <<http://citizenshiprightsafrika.org/by-the-skin-of-its-teeth-how-namibia-narrowly-avoided-a-constitutional-crisis/>> (last accessed 15 November 2020); Shinovene Immanue, ‘President rejects citizenship bill’, 15 August 2016.

<sup>119</sup> See, for instance, the citizenship page of the Ministry of Home Affairs, Immigration, Safety and Security: <<https://mha.gov.na/web/mhai/citizenship-citizenship-act-act-no-14-of-1990>>.

<sup>120</sup> *Namibian Constitution Second Amendment Act 7 of 2010*.

<sup>121</sup> Immigration Regulations (made in terms of the *Immigration Control Act 7 of 1993*), Government Notice 134 of 1994, regulation 24.

that property ownership would ensure their qualification for naturalisation.<sup>122</sup> In 2017, to quell rumours that large numbers of Chinese nationals were flooding Namibia, the Home Affairs Minister announced that government had issued a total of only 1 350 permanent residence permits to Chinese nationals between 1990 and February 2017.<sup>123</sup>

On the other hand, the figures reported for recent years indicate that most applications for citizenship by naturalisation are approved (with recent figures for naturalised citizens being cited in the following section).<sup>124</sup> It may be that the many applicants are weeded out at the permanent residence stage – although the reported statistics on this issue are hard to analyse. During the 2007-2008 financial year, Namibia approved 26 permanent residence applications, rejected 21 and deferred 24.<sup>125</sup> In the following financial year, 2008-2009, only 5 permanent residence permits were issued.<sup>126</sup> In contrast, during financial year 2014-2015, it was reported that 648 applications for permanent residence permit were approved while 141 were rejected.<sup>127</sup> According to the compilation in the *2018 Yearbook of Immigration Statistics*, Namibia granted permanent residence status to 87 persons in 2016, 130 in 2017 and 75 in 2018.<sup>128</sup>

### 3.8 Statistics on citizenship

Namibia's last census, in 2011, found that 97% of the population of 2.1 million were Namibian citizens.<sup>129</sup> This percentage has not changed at the time of the 2016 inter-censal survey, when the population was estimated at 2.3 million.<sup>130</sup>

Snapshots of citizenship applications are available for various recent years through statistics presented to Parliament.<sup>131</sup>

In the 2007-2008 financial year, Namibia granted a total of 1,640 citizenship applications for descent, marriage, naturalisation and registration combined.<sup>132</sup> In the following financial year (2008-2009), 948 citizenship applications were granted.<sup>133</sup>

In the 2009-2010 financial year, the following figures were reported to Parliament for categories of citizenship granted:

<sup>122</sup> Hansard, Volume 125, 8 April 2010, page 150.

<sup>123</sup> Tataleni Pinchas, 'Permanent residence status for 1 350 Chinese', *The Namibian*, 14 June 2017. The Minister indicated that this was in addition to some 4 400 employment permits and 1 100 temporary residence permits issued to Chinese citizens.

<sup>124</sup> See section 3.8 below.

<sup>125</sup> Hansard, Volume 108, 17 April 2008, page 105.

<sup>126</sup> Hansard, Volume 118, 20 April 2009, page 26.

<sup>127</sup> Hansard, Volume 174, 16 June 2015, page 69.

<sup>128</sup> U. S. Department of Homeland Security website, 'Persons Obtaining Lawful Permanent Resident Status by Region and Country of Birth: Fiscal Years 2016 to 2018', available at <[www.dhs.gov/immigration-statistics/yearbook/2018/table3](http://www.dhs.gov/immigration-statistics/yearbook/2018/table3)>. The number of applications is not indicated.

<sup>129</sup> Namibia Statistics Agency, *Namibia 2011 Population and Housing Census Indicators*: 1.

<sup>130</sup> Namibia Statistics Agency, *Namibia Inter-censal Demographic Survey 2016 Report*: 14.

<sup>131</sup> At the time of writing, the author had access to electronic versions of only selected volumes of the Hansards. Other figures may be available in the complete hard copy versions of the Hansards.

<sup>132</sup> Hansard, Volume 108, 17 April 2008, page 105. No breakdowns by type were provided.

<sup>133</sup> Hansard, Volume 118, 20 April 2009, page 26. No breakdowns by type were provided.

Descent - 1,175 (mostly children from exile)

Registration - 104 (mostly from Botswana)

Naturalisation - 109

Marriage - 146

**Grand total - 1,534.**<sup>134</sup>

For financial year 2010-2011, the figures were as follows (summarised from the text):

Descent - 635

Registration - 132

Naturalisation - 555

Marriage - 77

**Grand total - 1,399.**<sup>135</sup>

For financial year 2014-2015, the Ministry reported the following citizenship figures (summarised from the text):

Descent – 1,195 applications: 1,171 granted, 24 rejected.

Naturalisation – 839 applications: 835 granted, 4 rejected

Marriage – 91 applications: 82 granted, 9 rejected.

**Total – 2,125 applications: 2088 granted, 37 rejected.**<sup>136</sup>

There is a fee of N\$1000 (US\$69) for certificates of citizenship by marriage or naturalisation, while those for citizenship by descent or registration are free.<sup>137</sup>

## 4. Current issues and debates

### 4.1 Birth registration and citizenship

One barrier to citizenship in the past has been somewhat low birth registration. Namibia's 2000 Namibia Demographic and Health Survey reported that 70.5% of births in Namibia were registered,<sup>138</sup> with this declining to 60.4% in the 2006-07 Namibia Demographic and Health Survey.<sup>139</sup> The Government responded with increased regional and sub-regional offices as well as the introduction of hospital-

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<sup>134</sup> Hansard, Volume 169, 23 April 2015, page 101.

<sup>135</sup> Hansard, Volume 133, 18 April 2011, page 232.

<sup>136</sup> The Minister had previously reported that a total of 2 088 applications for citizenship by descent, naturalisation or marriage were approved during this period, with only 37 applications being rejected on the basis of non-compliance with the necessary requirements. Hansard, Volume 169, 23 April 2015. She later gave a more detailed breakdown Hansard, Volume 174, 16 June 2015, page 67.

<sup>137</sup> Regulations made under the *Namibian Citizenship Act 14 of 1990*, Government Notice 14 of 1991, regulation 12.

<sup>138</sup> Ministry of Health and Social Services (MoHSS), *Demographic and Health Survey 2000*, Windhoek: MoHSS, 2003: 128.

<sup>139</sup> Ministry of Health and Social Services (MoHSS), *Demographic and Health Survey 2006-07*, Windhoek: MoHSS, 2008: 23.

based birth registration facilities.<sup>140</sup> This produced a significant increase in birth registration, which was estimated to have reached 80% coverage by 2015.<sup>141</sup>

There is a complex relationship between birth registration and citizenship. Birth certificates provide crucial evidence of the place of birth and the citizenship of the parents, but it has been reported that the most common reason given by Ministry staff for denying a birth certificate to both children and adults is concern that the person seeking registration is not a Namibian citizen.<sup>142</sup> There are, for instance, fears that Angolan children (whose mothers may have crossed the border to give birth in Namibian health facilities) may be registered as Namibian citizens, or that Namibian women may be paid to register a foreign child as their own so that the child can be identified as a Namibian citizen and claim social benefits reserved for Namibian citizens. There are also fears that false claims to Namibian citizenship might influence election outcomes.<sup>143</sup>

However, it also flows from the apartheid era that the births of many Namibians were never registered, meaning that they have no proof of their own entitlement to Namibian citizenship which in turn hampers their ability to prove that their children qualify as Namibian citizens.<sup>144</sup>

The Ministry has at times, issued “non-Namibian birth certificates” to children born in Namibia to non-Namibian parents, which is problematic since there is no legal authority for this approach, and because Ministry staff in the field do not have training on how to determine ordinary residence. Such a designation on a birth certificate could also lead to unwarranted discrimination.<sup>145</sup>

The Ministry has developed a new *Civil Registration and Identification Bill* that would contain improved procedures for birth registration generally. The Bill proposes a legal framework for three types of birth certificates: Namibian, non-Namibian and undetermined – with the latter being applicable to any situation where an immediate determination could not be made. However, to prevent any disadvantage, the holders of such birth certificates would be treated as Namibian citizens for every purpose other than voting or running for office until a definite determination of citizenship could be made – and if entitlement to Namibian citizenship was not disproved by the Ministry within a specified time period, then the person in question would be given a Namibian birth certificate and viewed as a Namibian citizen by birth.<sup>146</sup>

However, there is likely to be much more political debate on the way forward on this issue before a solution is settled upon, if the Constitution remains as it stands.<sup>147</sup>

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<sup>140</sup> UNICEF, *A Rapid Overview of Birth Registration Systems in Namibia: Taking Stock, Birth Registration Field Assessment 2012*, Windhoek: UNICEF, 2012: 5.

<sup>141</sup> World Bank Group, 2016: 3. 47.

<sup>142</sup> World Bank Group, 2016: 88.

<sup>143</sup> World Bank Group, 2016: 90.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Ministry of Home Affairs, Immigration, Safety and Security, *Civil Registration and Identification Bill*.

<sup>147</sup> Personal communication with Ministry officials, October 2020.

## 4.2 Citizenship by marriage

A major and legitimate concern about this category of citizenship has been sham marriages. A good faith marriage to a Namibian citizen gives a foreign spouse domicile in Namibia, meaning that no additional papers are required for work or study – as well as a route to Namibian citizenship. Domicile by marriage can be retained after divorce if the marriage has subsisted for at least two years, and it is not lost upon the death of the Namibian spouse.<sup>148</sup>

There have been reports that foreigners have entered marriages of convenience to gain entry to Namibia for business deals or even criminal purposes, with reports that they sometimes bribe or dupe Namibian women to assist them and then abandon their Namibian wives and children once their domicile is assured.<sup>149</sup>

This problem was cited as a justification for the increase from 2 to 10 years in the waiting period for citizenship by marriage, but this step on its own does not provide any tools for addressing fraud.<sup>150</sup> More helpful reforms are forthcoming in a *Marriage Bill* expected to be tabled in Parliament in 2021. This Bill is set to introduce marriage permits for all marriages, allowing time for records to be checked for potential bigamy or, in the case of foreign spouses, outstanding warrants of arrest. The Bill also proposes a specific procedure for investigating any marriage suspected of not being in good faith, which could disqualify the marriage from having any consequences for residence or citizenship in Namibia. Another helpful innovation would be mechanisms for tighter control over marriage officers – some of whom are currently suspected of having accepted bribes to conclude marriages of convenience.<sup>151</sup> The government also plans to introduce a requirement of spousal visas to increase control over this issue.<sup>152</sup>

In the meantime, a recent case has provided some criteria to give content to the concept of a "good faith marriage" as referred to in the Namibian Constitution; although this case considered good faith marriage in a different context, it may provide some guidance on what constitutes a "good faith marriage" for citizenship purposes.<sup>153</sup>

Another issue currently making its way through the Namibian courts concerns the impact of same-sex marriages concluded outside Namibia and involving a Namibian spouse. Namibia limits marriages to those between a man and a woman, but the courts are being asked to decide if a same-sex marriage to a Namibian citizen validly concluded elsewhere can justify residence rights in Namibia. There are several cases on this issue, all of which are as yet unresolved.<sup>154</sup> This line of jurisprudence

<sup>148</sup> *Immigration Control Act 7 of 1993*, sections 22-23; Werner Menges, 'Permit relief for foreign spouses', *The Namibian*, 9 June 2011.

<sup>149</sup> See, for example, Hansard, Volume 116, debates on 26-27 March 2009; Luqman Cloete, 'Minister worried about weddings', *The Namibian*, 30 April 2008.

<sup>150</sup> See Dianne Hubbard and Ruth Y Chun, 'What 'I Do' Could Mean For You If You Are Not Namibian', *The Namibian*, 9 May 2008.

<sup>151</sup> Ministry of Home Affairs, Immigration, Safety and Security, *Marriage Bill*.

<sup>152</sup> Personal communication with Ministry officials, October 2020. This is expected to be accomplished by a re-working of the *Immigration Control Act 7 of 1993*.

<sup>153</sup> *Ex parte: Mukondomi* [2020] NAHCNLD 89 (20 July 2020). This case deals with the question of domicile rather than citizenship, for purposes of an application for admission as a legal practitioner.

<sup>154</sup> See *Vorster & Another v Minister of Home Affairs and Immigration & Others*, Case No: HC-MD-CIV-MOT-GEN-2019/00307. In 1991, the *Frank* case held that a lesbian relationship with a Namibian

may ultimately address the question of whether a spouse in such a marriage could qualify for citizenship by marriage.

### 4.3 Statelessness

One issue of concern is the gap in the wording of the Constitution on statelessness. It provides that the exceptions to citizenship by birth to a non-Namibian who is ordinarily resident in Namibia will be ignored if they would produce a stateless child, but they do not assist a child who would be stateless by virtue of some problem not covered by these exceptions - such as an abandoned child found in Namibia or a child born to parents without any documentation of their citizenship. Namibia has not yet become party to any of the international conventions on statelessness, but it does have obligations under both the *African Charter on the Rights and Welfare of the Child* and the *Convention on the Rights of the Child* to prevent statelessness.<sup>155</sup>

There are a number of persons in Namibia who are stateless as a result of lack of documentation. In 2010-11, with the assistance of UNHCR, the Namibian government embarked on a joint identification exercise with Angola, South Africa and Zambia to resolve the situation of undocumented populations at risk of statelessness in its border areas. This exercise resulted in the naturalisation or recognition of over 900 persons as Namibian citizens – including about 200 members of a group known as the Riemvasmaakers who were forcibly removed from South Africa to “South West Africa” in the 1970s and some people who fled to Namibia from Angola during the Angolan civil war.<sup>156</sup>

In 2011, the Minister informed Parliament that most of the stateless persons in Namibia came from South Africa, Angola, Zambia and Botswana and have been resident in Namibia for years; they “regard Namibia as their only country and have indicated to the Ministry that they do not have any intention of going back to their countries of origin. The Ministry, after consulting Cabinet, has decided to grant them Namibian citizenship by naturalisation.” The Minister also noted that the bulk of all

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citizen was not relevant to an application for permanent residence by the non-Namibian partner, but the issue has not been further addressed by the Namibian courts. *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

<sup>155</sup> See Article 6(4) of the *African Charter on the Rights and Welfare of the Child* and Article 7(2) of the *Convention on the Rights of the Child*. International treaties binding on Namibia are automatically part of Namibian law in terms of Art 144 of the Namibian Constitution.

<sup>156</sup> Manby, forthcoming 2020: 70; Manby, 2016: 121. The Minister of Home Affairs introduced this scheme in Parliament in 2010:

The Ministry is aware of a number of stateless persons who came from our neighbouring countries who do not have any National documents till now. Some came from as far as Angola, Zambia and other countries. As a Ministry responsible for the issuance of National documents to all citizens, we have a concern towards these stateless individuals. To that effect, we are having a programme to register all those stateless persons. We have started with this programme in the southern Regions and 112 individuals have been registered in order to issue them with Namibian citizenship by naturalisation, which will subsequently allow elderly to benefit from the old-age pension grants. The programme will continue with the remaining regions.

Hansard, Volume 126, 30 April 2010, page 135.



persons granted Namibian citizenship by naturalisation at that stage came from this pool of otherwise stateless persons.<sup>157</sup>

The Minister of Home Affairs stated in 2018 that the process of registering persons without documentation was still ongoing - particularly those who arrived in Namibia between 1978 and 1990, a period which was not covered by the previous Cabinet decisions. He noted that the aim of the exercise is to eventually eliminate the problem of statelessness in Namibia, estimating that over 3 000 persons had been granted Namibian citizenship through this effort since it was inaugurated in 2010.<sup>158</sup>

Another group of potentially stateless persons is abandoned children. Recent Ministry policy has been to issue birth certificates containing whatever much information is known, and to treat such children as being Namibian citizens unless evidence comes to light that they are not. This policy is expected to be made into law in the forthcoming *Civil Registration and Identification Bill*. More generally, this Bill is premised on the theory that a similar approach should be taken in any circumstance where a child is born to parents without documentation of their identity or citizenship, in order to break the cycle of undocumented persons.<sup>159</sup> The government is also reportedly considering ratification of the *1954 Convention Relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness*.<sup>160</sup>

## 5. Conclusion

Since Independence, the government's approach to citizenship issues has on several occasions had to be corrected by the courts. The issue of citizenship is an emotive one, so much so that the difference of opinion between government and the courts almost derailed the constitutional separation of powers at one stage.

However, Namibia has also been very successful at transforming its civil registration system into a more modern, computerised system that will provide a better basis for the application of the rules on citizenship.

Law reforms on civil registration, marriage solemnisation and immigration procedures that have been in preparation for several years are now poised to move forward to support the citizenship scheme detailed in the Constitution, consistent with the judicial pronouncements on the constitutional requirements.

No exclusions of specific groups have been identified - aside from the fact that the lack of documentation tends to affect rural and marginalised communities more intensely.

The issue of residency and citizenship rights for foreign same-sex partners of Namibian citizens in marriages concluded outside Namibia is not yet resolved, but court cases currently in process are expected to give guidance.

<sup>157</sup> Hansard, Volume 133, 18 April 2011, page 232.

<sup>158</sup> Okeri Ngutjinazo, 'Namibia: Citizenship granted to 3 000 foreigners', *The Namibian*, 12 March 2018.

<sup>159</sup> Ministry of Home Affairs, Immigration, Safety and Security, *Civil Registration and Identification Bill*.

<sup>160</sup> See UNHCR, 'Results of the High-Level Segment on Statelessness', October 2019, <[www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/](http://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/)>; Legal Assistance Centre, 'Statelessness in Namibia', January 2017, available on request from [info@lac.org.na](mailto:info@lac.org.na).

Corruption has not been discussed here – it is problematic in many Namibian sectors, and the officials who administer the citizenship laws seem to be no exception.<sup>161</sup>

But great strides have been made in reducing statelessness, despite Namibia’s jealous safeguarding of the Namibian identity.

Namibia’s approach to citizenship at the moment can be described as being generally fair and stable.

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<sup>161</sup> See, for example, [Kuzeeko Tjitemisa](https://neweralive.na/posts/kapofi-warns-corrupt-officials-selling-country), “Kapofi warns corrupt officials ‘selling country’”, *New Era*, 11 February 2020, <<https://neweralive.na/posts/kapofi-warns-corrupt-officials-selling-country>>.

