

Chapter 60

Citizenship

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3. Citizenship

(1) There is a common South African citizenship.

(2) All citizens are —

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

19. Political Rights

(1) Every citizen is free to make political choices, which includes the right — (a) to form a political party; (b) to participate in the activities of, or recruit members for, a political party; and (c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right — (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and (b) to stand for public office and, if elected, to hold office.

20. Citizenship

No citizen may be deprived of citizenship.

21. Freedom of movement and residence

...

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

22. Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation, or profession freely. The practice of a trade, occupation, or profession may be regulated by law.

60.1 Historical background

The origins of citizenship in South Africa lie in the regulation of the mobility of its people. By means of a working framework of mobility, law and citizenship, one can identify the initial structuring of South African citizenship between 1897 and 1937, as well as its development and change through the war years, the apartheid period, and the more recent years of constitutional democracy.

Three significant moments may be identified in the crucial initial forty years.¹ In the first moment, provincial elites drafted a series of comprehensive immigration laws before joining together in the Union. These laws responded to the Asian migration of the time and culminated in the Transvaal migration regime of 1907. In the second moment, which lasted until 1927, the Transvaal-based immigration and Asiatic affairs bureaucracy extended its influence across the incipient South

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African territory through the drafting and administration of the Union immigration law as well as through increasing national control of the Asian population. By contrast with the Native Affairs Department, which largely retreated from its putative role in the regulation of migration except in respect of large-scale recruitment, the Department of the Interior played a strong role in the regulation of Asian affairs and immigration. In the third moment, the establishment of the office of the Commissioner for Immigration and Asiatic Affairs began a process that consolidated and extended control of, as well as the conceptual framework for, nationality over the South African population. Such control was of particular importance for resident Asian and African populations.

Subsequent to 1937, the starting point for exploring the peculiar warping of South African citizenship must be, as Deborah Posel argues, the story of the modernising of the South African state.² Initially, the outbreak of global war and the consequent development of state capacity drove migration regulation: pass laws were, for example, suspended. Although administrative policies showed great organizational variation, there was relatively little change in the legislative framework or the longer-term orientation of the South African polity with respect to migration and nationality policy. The Commissioner for Immigration and Asiatic Affairs fully nationalized registration of the Asian population and added registration responsibilities with respect to aliens to its mandate. After the war's end in 1945, the pass laws were re-instated. Even with the experience of suspended pass laws, growing calls were made for improving the enforcement of influx control. The state attempted to implement a variety of administrative initiatives for migration regulation. These initiatives encompassed a foreign farm labour scheme that presaged legislative changes under apartheid.

1 See J Klaaren *Migrating to Citizenship: Mobility, Law, and Nationality in South Africa, 1897-1937* (PhD Dissertation, Department of Sociology, Yale University, 2004.)

2 D Posel 'Race as Common Sense: Racial Classification in Twentieth-Century South Africa' (2001) 44 *African Studies Review* 87, 99.

After the 1948 electoral victory of the National Party by the nearly entirely white electorate, the misnamed Abolition of Passes and Co-ordination of Documents Act 67 of 1952 together with the Population Registration Act 30 of 1950 attempted to completely regulate African movement and identity documentation.³ The legal struggles of the formal apartheid era often related to citizenship and the homelands were a particular site of struggle. Denationalization was a dominant theme. Slogans such as 'foreigners in the land of their birth' were repeated, and resonated, throughout the struggle.

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More recent history, from 1990 to 1994, has placed citizenship within the framework of a constitutional democracy. Within such an overarching framework, other specific narratives can be identified: these narratives embrace stories of a rainbow nation, of truth and reconciliation, and of an African Renaissance.⁴

60.2 Questions of interpretation

Accepting the relative determinacy of the historical account, the following relevant issue for understanding constitutional citizenship is the place that such an account might have in the interpretation of the right to citizenship. It could be the case that a generally preferred theory of constitutional interpretation would apply to constitutional citizenship. Nonetheless, there are reasons to investigate first the fit of interpretive theory to constitutional citizenship, since constitutional citizenship can itself be a constitution-determining and thus interpretation-determining concept.

Standard but nuanced South Africa-located accounts of interpretation identify five schools of interpretation: grammatical, systematic, teleological, historical, and comparative.⁵ Taking this five part set as a starting point, we can investigate their fit with constitutional citizenship. A grammatical theory investigates the linguistic nuances and the multiplicity of meanings.⁶ For citizenship, the texts — FC ss 3, 20 and 21 — are, of course, important but not crucial. They do not occupy the place within South African constitutionalism that the text of the US fourteenth amendment — forged in the American Civil War — does.⁷ A systematic theory looks at linkages to the rest of the document or system.⁸ The rest of the Final Constitution offers a variety of links to citizenship. However, citizenship is not the primary gatekeeper to the application and the force of the rest of the Final Constitution. (Nonetheless, the Department of Home Affairs, through its function of provision of identity documents,

3 J Klaaren 'Post-Apartheid Citizenship' in A Aleinikoff & D Klusmeyer (eds) *From Migrants to Citizens: Membership in a Changing World* (2000) 221-252 (Outlines the formal history of citizenship under apartheid.) For the classic text on South African law under apartheid, see J Dugard *Human Rights and the South African Legal Order* (1978). See also G Erasmus 'South African Citizenship in a Constitutional Context' (1998) 23(2) *Tydskrif vir Regswetenskap* 1.

4 See, eg, G Maharaj (ed) *Between Unity and Diversity: Essays on Nation-Building in Post-Apartheid South Africa* (1999).

5 See LM Du Plessis 'Interpretation' in *Law of South Africa*; LM Du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

6 See G Budlender 'On Citizenship and Residence Rights: Taking Words Seriously' (1989) 5 *SAJHR* 37 (Budlender argues — prior to the introduction of constitutional democracy — that statutory interpretation with respect to citizenship policy should take into account parliamentary speeches.)

is, ironically a key gatekeeper in practice.) A teleological theory looks at values. Of course, values and effect-directedness is

important for citizenship. But again such a theory seems to lend itself as much to the entire document as to constitutional citizenship in particular. A historical theory examines the specific situation from which a legal instrument emerges. This strategy has real appeal when it comes to the domain of citizenship. A comparative theory looks at either public international law or at comparative foreign contexts.⁹ Applied to constitutional citizenship, this approach would seem to miss specifically South African dimensions and determinants of citizenship.

This brief survey argues in favour of an historical approach to the interpretation of constitutional citizenship in South Africa — or at the least suggests that it is the best of the available options. That said, towards what substantive theory or vision of citizenship does this school of historical interpretation lead us?

60.3 Theories of citizenship

To answer our question, we need to take a step back into theory and then one forward into adjudicated cases. Widening the scope, we can identify four broad theories — four ideal types — of citizenship: cultural citizenship, membership citizenship, lawful status citizenship, and post-national citizenship.¹⁰ Cultural citizenship identifies a particular culture (which may or may not consist of narrow conceptions of race, ethnicity or religion) with constitutional citizenship.¹¹ As articulated by TH Marshall, membership citizenship draws a sharp distinction between the status of citizens (who are equals as citizens and members) and that of non-citizens (who are defined as aliens and non-members). Lawful status citizenship extends citizenship through law: it views all persons who are lawfully and permanently residing within a country to be presumptively full members of the national community. Post-national citizenship (or universal citizenship) views all persons as entitled to human rights on account of their identification as human beings.¹²

7 US Constitution, Amendment XIV, section 1 provides: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

8 See, eg, *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 233 (O'Regan J).

9 See A Katz & M du Plessis 'Citizenship' in I Currie & J de Waal (eds) *Bill of Rights Handbook* (5th Edition, 2005) 468-476 (Applies a comparative theory (public international law) to citizenship.)

10 For greater detail, see J Klaaren 'Contested Citizenship in South Africa' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 304-325.

11 For an interesting exploration of the Israeli example, see A Shachar 'Citizenship and Membership in the Israeli Polity' in A Aleinikoff & D Klusmeyer (eds) *From Migrants to Citizens* 386-433.

While traction on each of these theories may be gained through each interpretive school, certain affinities exist between the various ways of reading the Final Constitution and the theories of citizenship envisaged. A particularly strong affinity exists between the historical school of interpretation and the lawful status citizenship theory.¹³

One might initially think that a grammatical school would have an affinity for membership citizenship. But this does not appear to be the case. Here, the content of FC ss 19, 20, and 21 steps to the fore. Each of these sections reserves rights to citizens (as do other sections of the Final Constitution). What does one make of these special reservations (the extent and content of which is discussed in greater detail below)? Through its linkage of citizenship status with important rights of political exercise, FC s 19 initially supports a republican reading of South African citizenship, a reading within membership citizenship. But this interpretation works only at the most superficial level — though it certainly has some weight at the polling station level of voting in state (but not necessarily party) elections! Even within the grammatical or systematic schools, such interpretations should admit that citizenship has become and has been used at the level of a signifier such as 'employer', 'worker' or 'child'. As such a signifier, there is of course some real work that is being done. But in most instances of designating rights and rights holders, the linkage between the status and the rights is obvious and relatively uncontroversial. Thus, the Bill of Rights, in these reservations, does not place citizenship above other signifiers. This constitutional deployment of citizenship is thus an argument for the downplaying of constitutional citizenship.

Furthermore, the very use of citizenship as a reservation is a particular argument for the constitutional fit of lawful status citizenship rather than membership citizenship. The constitutional baseline is not a grant of rights to citizens as opposed to other lawful members — the grant of rights to citizens is done as a special reservation from the other operating baseline of rights granted to 'everyone'.¹⁴

Against the background of such a theoretical and interpretive spectrum, we may now ask where the judiciary's and the political branches' understanding of constitutional citizenship fits. The legislative branch's understanding can be relatively quickly dispatched.¹⁵ The South African Citizenship Act 88 of 1995¹⁶ was

12 For a judgment drawing, in part, on this vision of citizenship, see *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (CC) at para 25 ('Human dignity has no nationality.')

13 See G Budlender 'A Common Citizenship?' (1985) 1 *SAJHR* 210.

14 For more on the beneficiaries of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.3.

15 While one should not neglect the executive branch's interpretation of the Final Constitution, this branch (at least in the form of the Department of Home Affairs) has neglected to articulate a substantive vision of citizenship. Indeed, from 2007, the government has recognized the dire situation at this Department. Its lack of vision with respect to citizenship services and has pushed the government to implement a concerted 'Turn Around' strategy for a 'New Home Affairs'.

16 The 1995 Act has been amended by the South African Citizenship Amendment Act 17 of 2004.

largely a consolidation of pre-existing law.¹⁷ The primary impetus for the 1995 Act was to create a unified national citizenship regime and it repealed, in the process, the various statutes governing the citizenships of the homelands. Apart perhaps from affirming the South African policy of relative tolerance of dual

nationality and making several changes to naturalization policy and procedure,¹⁸ the first post-apartheid citizenship statute was by no means a radical transformation of pre-existing citizenship policy. It was more an exercise of legislative continuity than one of constitutional change.

In the area of citizenship policy, the Constitutional Court has served as the leading forum for articulation and contestation of principle. The principal tension in the Court's jurisprudence has been driven both by a lawful residence concept of citizenship and a more republican vision of citizenship, and, by the relative textual significance of citizenship in the Bill of Rights, including FC s 7, and the citizenship 'rights, privileges, and benefits' clause set forth in FC s 3. This tension is clearly on display in the Court's multiple judgments in *Kaunda*. Although *Kaunda* concerns events and persons largely beyond the borders of South Africa, when read with *Khosa*,¹⁹ this case provides the primary locus for discerning the Constitutional Court's vision of constitutional citizenship.

The majority in *Kaunda* denied the citizen applicants an order compelling the government to seek an assurance from Equatorial Guinea (to where the applicants faced extradition on serious charges) not to impose the death penalty on the applicants. Using a request and response paradigm, the majority judgment of Chaskalson CJ articulated a carefully circumscribed extra-territorial duty on the South African state to afford diplomatic protection of nationals where their rights in terms of international law were threatened. Chaskalson CJ's judgment rejected a strong view of the extraterritorial application of citizens' rights under the Bill of Rights.²⁰ The request and response obligation he did support entitles citizens to request diplomatic protection of their rights and requires the state to consider such requests fairly. The precise ambit and content of the right is considered below. As a number of commentators have noted, it is not 'a particularly strong right'.²¹

For present purposes, the conceptual reasoning behind the existence of the state's obligation is of interest. In the view of the majority, this duty was derived from an incident of citizenship, nationality, and hinged upon the national's request to have his or her international law rights respected. It was one of the privileges and the benefits of citizenship in FC s 3 to have such a request considered. In extreme

17 Klaaren 'Post-Apartheid Citizenship' (supra) at 233-235. The previous South African (as opposed to homelands legislation) Act was the South African Citizenship Act of 1949.

18 Klaaren 'Post-Apartheid Citizenship' (supra) at 235-241 (dual citizenship policy) and 241-243 (changes to naturalization).

19 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

20 On extraterritorial application, generally, see Woolman 'Application' (supra) at § 31.7.

21 M Du Plessis & G Penfold 'Bill of Rights Jurisprudence' (2004) *Annual Survey of South African Law* 18.

instances, the state might have an obligation to act even without such a request by one of its nationals. For the majority, the obligation thus was not founded in the Bill of Rights: even though FC s 7(2) does point towards the constitutional duty of the executive to protect the fundamental rights

of its nationals. Indeed, the rights that would be protected would be the international law rights of the nationals, rather than any extra-territorial application of fundamental rights found in the Bill of Rights.²² Chaskalson CJ relied upon the language of FC s 7(1): 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'²³ There is more to Chaskalson CJ's interpretation here than a mere textual reading of the word 'in'. This territorialized view is actually consistent with and draws down upon the lawful status conception of membership described above.

The main judgment may nonetheless be profitably contrasted with one of the concurrences and with the dissent.²⁴ The concurrence of Ngcobo J was driven by the status of the citizen and focused its attention on FC s 3(2) as a substantive domestic protection, rather than a mere vehicle for the protection of international law rights. Indeed, Ngcobo J's understanding of the rights at issue appears to envision multiple overlaps between the benefits flowing from citizenship status and benefits flowing from the Bill of Rights.²⁵ His analysis may be broken into several steps: the guarantee and the entrenchment of the right of citizenship is in the Bill of Rights (in particular FC s 20);²⁶ South African citizens have a right to 'rights, privileges, and benefits' in FC s 3(2)(a); the rights are at least those guaranteed in the Bill of Rights and reserved to citizens,²⁷ but there are privileges and benefits beyond such rights;²⁸

22 The import of *Kaunda* for the extra-territorial application of the Bill of Rights, and a criticism of a narrowly textual approach to the doctrine, is discussed in Woolman 'Application' (supra) at 31-113 — 31-122. While Chaskalson's reliance on the text of FC s 7(1) can be criticized as an over weighty interpretation of the preposition 'in', his interpretation of FC s 7(1) could also be argued to be directly supported by the lawful status citizenship theory that provides the best fit with the Final Constitution.

23 *Kaunda* (supra) at para 37.

24 Sachs J views the concurrence and the majority as saying virtually same thing. Ibid at para 275. Indeed, there is much that is shared in the three substantive judgments. Both the majority judgment of Chaskalson CJ and the concurrence of Ngcobo J mention, in an approving manner, an article in the academic literature. G Erasmus & L Davidson 'Do South Africans Have a Right to Diplomatic Protection' (2000) 25 *South African Yearbook of International Law* 113 (Discussed in *Kaunda* (supra) at paras 59 (Chaskalson CJ) and 184 (Ngcobo J)). Erasmus and Davidson argue that citizenship should include entitlement to diplomatic protection, harmonizing the national and international dimensions of citizenship.

25 *Kaunda* (supra) at para 180 ('Some of the rights to which citizens are entitled are spelt out in the Bill of Rights.')

26 Ibid at paras 176 and 185. This argument may constitute the strongest point of the opinion's difference from the majority's judgment.

27 O'Regan seems to feel that the rights referred to in FC s 3(2)(a) are only the rights reserved to citizens in the Bill of Rights. Ibid at para 234.

diplomatic protection is at least a benefit;²⁹ and thus one must read FC s 3 and FC s 7(2) together to impose an obligation on the

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state.³⁰ Ngcobo J's analysis is thus quite close to the classic TH Marshall understanding of membership citizenship: citizenship entitles the citizen to the right to have rights.

With some important differences of emphasis, O'Regan J also explored an obligation on the state to afford diplomatic protection to individual citizens through FC s 3(2)(a). Part of her reasoning is that one must avoid ascribing no meaning to that status.³¹ Still, her conclusion was reached as an extension of the values of the Final Constitution and motivated in terms of equality analysis.³² In O'Regan J's view, the privilege of diplomatic protection by a state created an entitlement rather than mere equal protection: 'It is proper to understand s 3 as imposing on government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms.'³³

The majority confirmed that the decision by the government to respond to the request for diplomatic protection would be justiciable, at least on grounds of irrationality and bad faith.³⁴ Review would be exercised, however, at the relatively low level of intensity currently the practice in England and Germany.³⁵

The concurrence and the dissent in *Kaunda* would have extended an obligatory mechanism of diplomatic protection to citizens that was, at the very least, stronger than the benefit offered by the majority. In any case, this regime of diplomatic protection would not be available to permanent residents or other non-nationals.

28 Ibid at para 176. On O'Regan J views on rights and privilege and benefits, respectively, see *Kaunda* (supra) at paras 234 and 235.

29 Ibid at para 186.

30 *Kaunda* (supra) at para 176.

31 Ibid at para 235.

32 By grounding her opinion in equality jurisprudence, O'Regan's analysis demonstrates an affinity for a post-national or universal citizenship.

33 Ibid at para 238.

34 Ibid at paras 78 and 80. The concurrence and the dissent are broadly in agreement on this point. Ibid at paras 193 and 244-47. In examining the claim for extradition from Zimbabwe or Equatorial Guinea to South Africa (eg for nationals to face process in SA), the court was willing to assume that the Promotion of Administrative Justice Act might apply to a decision not to prosecute. Ibid at para 84.

35 Ibid at paras 74-75. The German position is given in *Hess*. 55 BVerfGE 349, 90 ILR 386 (1980). The British position is laid out in *Abbasi & Another v Secretary of State for Foreign and Commonwealth Affairs & Another*. [2002] EWCA Civ 1598.

The content flowing from this distinction between citizens and non-citizens should not be over-emphasized. As the only extant duty specifically sourced to FC s 3, this relatively narrow protection would be the sum total of citizens' entitlements above (apart from the explicit political rights reservations discussed below) those possessed by other permanent residents in South Africa. The best theory of South African constitutional citizenship — perhaps paradoxically so for a nation that has struggled with citizenship questions since before 1910 — is one that downplays the significance of the concept.

This proposition is bolstered by an examination of *Khosa*. Here, the majority, per Mokgoro J, held unconstitutional the denial of social grants to permanent

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residents. The Court noted that the Final Constitution extended the socio-economic rights of social security to 'everyone' and that legislative policy presumptively equated the rights and duties of permanent residents and citizens.³⁶ Mokgoro J wrote:

In my view, the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the State relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance, does not constitute a reasonable legislative measure as contemplated by s 27(2) of the Constitution.³⁷

This holding is consistent only with a lawful status citizenship theory.³⁸ Indeed, within the forum of the *Khosa* Court, one should not be surprised to find Ngcobo J articulating an opposing position. In *Khosa*, Ngcobo J asserted that '[t]here are important differences between citizens and permanent residents.'³⁹ These differences amounted to the Final Constitutional rights of political rights and freedom of trade, occupation, and profession. Having particular regard to the benefits of a policy that would encourage naturalization, Ngcobo J was prepared to find the limitations of benefits to citizens reasonable.⁴⁰ While one might differ regarding the importance of these distinctions, Ngcobo J clearly relies upon a theory of membership citizenship.

36 *Khosa* (supra) at para 57 (Section 25(1) of Immigration Act reads: 'The holder of a permanent residence permit has all the rights, privileges, duties, obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.'). See also SACA s 1(b), as noted in *Khosa* (supra) at para 118, which provides, in part: "'South African citizen" includes any person who ... (b) is a member of a group or category of persons defined by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette'.

37 *Khosa* (supra) at para 82.

38 *Ibid* at para 59 ('While they do not have the rights tied to citizenship, such as political rights and the right to a South African passport, they are, for ... other purposes, ... in much the same position as citizens.')

39 *Ibid* at para 125.

40 *Ibid* at paras 130 and 134.

60.4 Concepts of constitutional citizenship

The Final Constitution does not define the requirements for South African citizenship. This textual silence should not be read as a failing. There are indeed a number of models of relationship between a constitutional text and the definition of citizenship. For instance, within the Southern African Development Community, the countries with their primary source of citizenship rules outside of their constitutions (Angola, Botswana, Lesotho, Malawi, Seychelles, South Africa, Swaziland, and Tanzania) outnumber those with detailed rules in their constitutions

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(Mauritius, Mozambique, Namibia, Zambia, and Zimbabwe).⁴¹ Instead of providing detailed rules, FC s 3(3) states: 'National legislation must provide for the acquisition, loss and restoration of citizenship.'

The scrutiny and the specific topics of such legislation will be discussed below. Apart from the requirement for such legislation, the Final Constitution further provides for at least three substantive concepts with respect to constitutional citizenship. First, it establishes a common South African citizenship. Second, and third, the Final Constitution mandates equality among citizens in terms of rights, privileges and benefits, as well as among citizens in terms of duties and responsibilities. The remainder of this section explores these concepts.

Initially, it should be recognized that there is a difference between the establishment of a common citizenship and the constitutional requirement of equal citizenship. Commonality is best understood as providing for the unity of the nation. The dangers being guarded against here are those usually associated with federalism and with provincialism. In *Mhlekwa v Head of the Western Tembuland Regional Authority*, the concept of Transkei citizenship was held not compatible with FC s 3 but nonetheless was authorized for use for jurisdictional purposes within the administration of justice.⁴² The commonality of citizenship requirement will mean that the doctrinal difficulties faced by federal states to the incorporation of international human rights law (as part of international law) will not apply in South Africa.⁴³

The equality requirement of citizenship likely does away with distinctions among classes of citizenship based on the acquisition of citizenship. Earlier citizenship policy has often used these concepts — for instance, citizenship by naturalization, by descent, or by birth — as the basis for different rights. Once one accepts the equality of citizenship, these classes can be used only for matters related to the acquisition of citizenship. For both the concurrence and the dissent in *Kaunda*, the content of the equality of citizens was understood to encompass more than formal equality.⁴⁴ This requirement is also consistent with the trend of contemporary South African citizenship legislation. The South African Citizenship Act 88 of 1995 ('SACA') no

41 J Klaaren & B Rutinwa 'Towards the Harmonization of Immigration and Refugee Law in SADC' (2004) 1 *MIDSA Report 14* 115-116.

42 2001 (1) SA 574 (Tk), 2000 (9) BCLR 979 (Tk).

43 The incorporation of international law into substantive domestic law in South Africa is discussed in H Strydom & K Hopkins 'International Law and International Agreements' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30, § 30.2.

longer makes any significant distinctions among these acquisition classes of citizens. Note that other classifications, including the distinction between dual citizens and citizens, apparently remain valid bases for policy distinctions.

An as-yet hypothetical constitutional question regarding the relationship of this common citizenship to other transnational citizenships may be posed. Drawing particularly from the European Union experience, some have seen a shift from a constitutionalism based on the sovereignty of the nation state to constitutionalism based more upon overlapping of domestic and international legal orders.⁴⁵ The immediately analogous situation for South Africa would be citizenship in the Southern African Development Community (SADC). Such a citizenship does not as yet exist. But it could be proclaimed and established by the Treaty of the Southern African Development Community, as amended.⁴⁶ And one might even argue that there are trace elements of the sociological substance of regional citizenship.⁴⁷ SADC citizenship appears as yet a distant prospect — all the more so with regard given the current Zimbabwean crisis. Nonetheless, it is at least worth asking the legal interpretive question: would the South African Constitution adopt a preclusive or facilitative attitude towards legal effect in South Africa of a SADC citizenship? To answer this question, we must assume that SADC citizenship provides some rights beyond those provided by the Final Constitution properly interpreted — an assumption that may not in fact be the case. But assuming it is, one potential route for such rights (of such persons who are SADC citizens and South African citizens) to enter the South African legal order is through the (South African) citizenship ensured by FC s 3. While the requirement of equality would seem clearly not to stand against such a development, the requirement of commonness might. As discussed above, the best interpretation of the requirement of commonness is one that promotes national unity and guards against federalism. In this interpretation, the requirement proscribes citizenships from legal orders 'below' the national legal system but says nothing of those citizenships from legal orders 'above' the national legal system. Nonetheless, an interpretation that views commonness as precluding legal effect of citizenship from any legal order other than the national legal order remains a possible, if not likely, interpretation. An alternative, and as yet unexplored, route to the importation of SADC rights through FC s 3 may be through the development of the common law.⁴⁸

60.5 National legislation

44 *Kaunda* (supra) at paras 237-238 (O'Regan J). Ngcobo is clear that differences are allowed. Ibid at para 177.

45 M Hunt *Using Human Rights Law in English Courts* (1997) 3-5.

46 The treaty is available at http://www.sadc.int/key_documents/treaties/sadc_treaty_amended.php (accessed 12 December 2007.)

47 J Klaaren 'Southern Africa: As Seen Through Mobility, Sexuality, and Citizenship' (2006) 9(2) *African Sociological Review* 168.

48 See *R v Secretary of State for the Home Department, ex parte McQuillan* [1995] 4 All ER 400 (Sedley J, as discussed in Hunt (supra) at 290-294.)

A number of subsidiary questions are raised by FC s 3(3)'s requirement that national legislation must provide for the acquisition, loss and restoration of citizenship. One initial question is the content of the national legislation. It seems

clear from the text that the constitutional mandate here is not for Parliament to enact a specific piece of legislation not yet enacted. This differentiates the constitutionally mandated citizenship legislation from the legislation that was enacted pursuant to the express directives contained within the right to equality, the right to just administrative action, and the right of access to information. While there is much legislation that has relevance to citizenship,⁴⁹ this section will limit itself to SACA. SACA satisfies the requirements of FC s 3(3) and is the primary piece of national legislation to do so.⁵⁰

Before one examines the content of SACA, we need to know how intensely the Final Constitution will examine the legislation. A number of questions might arise. To what extent does the constitutional legislation forcing provision in FC s 3(3) influence the interpretation of such legislation? Is the less forceful mandate of this legislation forcing provision a factor to be considered? Is the placement of FC s 3(3) outside of the Bill of Rights an indication of less intense review? Taken together, it would seem that the national legislation should be subjected to at least some intensity of review greater than 'normal' legislation. As discussed in the next section, the greatest scrutiny will be in matters of loss rather than in those of acquisition.

(a) National legislation: loss

One section of the Bill of Rights provides that '[n]o citizen may be deprived of citizenship.' The term used differs from the term used in FC s 3(3), 'loss'. 'Loss' of citizenship is constitutionally acceptable. 'Deprivation' is not.

Note also that the existence of FC s 20 leads one to afford less deference to the statutory framework in matters of loss. In evaluating the constitutionality of SACA's chapter 3, which provides for loss, one will be using FC s 20 (reinforcing s 3(3)), and courts will employ a higher intensity of review than elsewhere in SACA.

SACA provides for loss via voluntary relinquishment as well as through acts by a citizen resulting in loss.⁵¹ The constitutionality of acts automatically resulting in the loss of citizenship may be questioned. Foreign jurisdictions have found laws withdrawing citizenship from persons voting in foreign elections unconstitutional.⁵² Legislation is, however, on surer footing where the loss of citizenship is directed to dual citizens. In terms of SACA, citizens automatically lose their

49 For instance, the Department of Home Affairs administers a number of pieces of arguably relevant legislation: the Immigration Act 13 of 2002, the Refugees Act 130 of 1998, the South African Citizenship Act 88 of 1995, the Identification Act 68 of 1997, the Births and Deaths Registration Act 51 of 1992, the South African Passports and Travel Documents Act 4 of 1994, and the Alteration of Sex Description and Sex Status Act 49 of 2003 not to mention electoral and marriage/civil union legislation.

50 The principal Act was amended by the South African Citizenship Amendment Act 17 of 2004.

51 SACA s 7.

52 *Afroyim v Rusk* 387 US 253 (1967)(US federal law that withdraws citizenship from persons voting in foreign elections held to be unconstitutional.)

citizenship if they acquire the citizenship of another country than the Republic by engaging in some voluntary and formal act other than marriage.⁵³ Likewise, dual citizens engaging in the armed services of a country at war with the Republic may also lose their citizenship.⁵⁴

Ministerial deprivation of South African citizenship in the case of dual citizens presents a special statutory case. In terms of SACA, the Minister may deprive such citizens of their citizenship if such a citizen has been sentenced to 12 months or more of imprisonment resulting from an offence or if she is satisfied that it is in the public interest that such person cease being a South African citizen.⁵⁵ Both statutory powers would be susceptible to a reasonably strong constitutional challenge. One challenge would be that the SACA is overbroad: it allows for deprivation of citizenship without guidelines and thereby violates the principles articulated in *Dawood*.⁵⁶ Another potential challenge, based upon FC s 20, is that the deprivation must not leave the person deprived of South African citizenship stateless.⁵⁷

(b) National legislation: acquisition

As noted in the previous section, national legislation possesses the greatest latitude with respect to providing for the acquisition of citizenship. The South African Citizenship Act currently provides for South African citizenship to be granted in three ways: birth, descent, and naturalisation.⁵⁸ At least for the purposes of this chapter, restoration will be considered as a special case of naturalisation.

In terms of birth, while South Africa is technically a *jus soli* jurisdiction with a territorial right to citizenship, the ambit of that right is restricted at law. Citizenship by birth is limited by legislation to a child born in the Republic of a South African citizen or to parents who are both permanent residents.⁵⁹ It may be the case that this requirement is significantly relaxed in its application and in policy.⁶⁰ Reflecting

53 SACA s 6(1)(a).

54 SACA s 6(1)(b).

55 SACA s 8(2)(a) and (b).

56 A Katz & M Du Plessis 'Citizenship' in I Currie & J de Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 471-472.

57 F Venter 'Citizenship and Nationality' Volume 2(2), *Law of South Africa*; Katz & du Plessis (supra) at 471.

58 SACA ss 2, 3, and 4.

59 SACA s 2(2). There are exceptions to this rule in s 2 for children adopted by South African citizens and for stateless children registered in terms of the Births and Deaths Registration Act 51 of 1992.

60 Indeed, there may be a case for a legitimate expectation or right of continued relaxed requirements.

the *jus soli* norm, SACA provides citizenship by descent for persons born outside the Republic to at least one citizen parent (together with registration of birth).⁶¹

This putative bar against citizenship for a large class of persons born in South Africa makes the conditions for obtaining naturalisation of greater interest and importance. It only through naturalisation that such second generation persons have a chance of becoming citizens in the land of their birth. In terms of SACA, citizenship by naturalisation may be obtained if a person is not a minor, admitted for permanent residence, continuously resident for one year before applying for naturalisation, ordinarily resident for at least four of the eight years preceding the application⁶², of 'good character', intending to continue to reside in the Republic, able to communicate in one of the official languages, and has an adequate knowledge of the responsibilities and privileges of South African citizenship.⁶³ Minors admitted to permanent residence may be granted citizenship without these conditions.⁶⁴ In the case of permanent residents married to South African citizenship or in a partnership, the only requirement for citizenship is residence with the citizen spouse in South Africa for two years.⁶⁵ SACA s 13 provides for resumption of South African citizenship, particularly for those persons who have lost citizenship.

(c) National legislation: beyond acquisition and loss?

Are there topics within the legislation that are neither acquisition nor loss? There is at least one: criminalization of use of dual citizenship in order to gain an advantage over other citizens. SACA was amended in 2004 to add section 26B. Section 26B is entitled 'Use of foreign citizenship' and provides that:

A major citizen who (a) enters the Republic or departs from the Republic making use of the passport of another country; or (b) while in the Republic, makes use of his or her citizenship or national of another country in order to gain an advantage or avoid a responsibility or duty, is guilty upon conviction to a fine or to imprisonment for a period not exceeding 12 months.

While undeniably substantive, this single topic does not expand the national legislation much beyond acquisition and loss. Indeed, it may not even fall within the scope of FC s 3(3). In any case, this legislative enactment further bolsters the argument of this chapter in favour of a downplayed notion of constitutional citizenship.

60.6 Rights, privileges and benefits of citizenship

61 SACA s 3(1)(b)(i).

62 Ngcobo J seemed to view this five year period as relatively short in *Khosa* (supra) at para 115. He noted also the provision allowing for naturalization before the expiry of that five year period. Ibid at para 116 citing SACA section 5(9)(a).

63 SACA s 5(1).

64 SACA s 5(4).

65 SACA s 5(5).

When interpreting FC s 3(2)(a), we start with the recognition that one category of constitutional rights that belong to citizens includes those rights reserved to citizens. FC ss 19, 20, 21, and 22 have a series of provisions that provide benefits

exclusively to citizens. Other places of the Final Constitution do so as well: FC s 47(1), FC s 106(1), and FC s 158(1). These rights and provisions are covered elsewhere in this text.⁶⁶ In particular, the protection against loss contained in FC s 20 is covered above in this chapter. The real question here is whether there are any rights attaching to citizenship that have not already been covered.⁶⁷

Note that the citizen's right to have an extradition justified is based upon the protection afforded persons by the right to the freedom of movement and residence. This protection is restricted to citizens in terms of FC s 21(3).⁶⁸ Likewise, the right of a citizen to a passport is based upon FC s 21(4) and is implemented in terms of s 3 of the South African Passports and Travel Documents Act.

After *Kaunda*, there is at least one such right. What is clear from *Kaunda* is that part of the content of FC s 3's 'rights, privileges and benefits' consists of limited diplomatic protection. While the rationale and constitutional basis for this right of diplomatic protection is discussed elsewhere in this volume,⁶⁹ it is also appropriate to discuss here what the actual content of this duty is.

The majority in *Kaunda* views the obligation of the state (to the extent that it is an obligation) within a request and respond paradigm.⁷⁰ One suggested and reasonable interpretation is that the duty entails full consideration of the request, a fair procedure for the decision, and a duty to provide reasons for the decision regarding the request.⁷¹ Another interpretation is that diplomatic protection may not be denied

66 On FC s 19, see J Brickhill & R Babiuch 'Political Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 45. On FC s 21, see J Klaaren 'Movement and Residence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 66. On FC s 22, see D Davis 'Freedom of Trade, Occupation and Profession' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 54.

67 Note that what does not belong in this discussion is the doctrine of application and the place of nationality within that doctrine nor the doctrine of equality. See J Klaaren 'Movement and Residence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 66; C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 35; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

68 *Geuking v President of the RSA* 2002 (1) SA 204 (C), 2001 (11) BCLR 1208 (C).

69 See K Hopkins & H Strydom in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30.

70 *Kaunda* (supra) at paras 66 and 67.

71 See Katz & du Plessis (supra) at 475; du Plessis & Penfold (supra) at 18.

arbitrarily and without good cause.⁷² In any case (as noted above), the protections afforded to citizens regarding exercises of public power will apply.

Is there an entitlement beyond the request and respond paradigm? A fair reading of *Kaunda* would say that there is. Certainly and explicitly for O'Regan J, the government has an obligation 'to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms.'⁷³ The

OS 11-07, ch60-p16

obligation adumbrated in Ngcobo J's concurrence would be similar in effect to O'Regan J's dissent.⁷⁴ The *Kaunda* majority admits a similar possibility within its request and response paradigm:

There thus may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action. There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.⁷⁵

Note that this duty will not apply where the individual citizen does not qualify at international law for assertion of rights as a national. O'Regan J writes: 'In practice, save where a State's claim that persons are its nationals is contested in an international forum, a State's citizens are its nationals, as international law generally leaves it to States to determine who their nationals are.'⁷⁶ Nonetheless, apart from fraud,⁷⁷ or some instances of dual nationality,⁷⁸ this duty will apply.

Do companies with South African nationality enjoy a similar right or benefit to diplomatic protection? The answer given in *Van Zyl v Government of the RSA*⁷⁹ was in the negative.⁸⁰ The reasoning of the *Van Zyl* court is persuasive. Although they are legal persons, companies are not citizens:

72 *Kaunda* (supra) at para 184 (Ngcobo J citing views of Erasmus & Davidson).

73 *Kaunda* (supra) at para 238.

74 *Kaunda* (supra) at para 169.

75 *Ibid* at paras 69 and 70.

76 *Ibid* at para 241 (O'Regan J discusses the relationship between the concepts of citizen and national at paras 239-241.) For more on citizenship and nationality, see A Pantazis and A Friedman 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47.

77 *Ibid* at paras 63 and 239.

78 *Ibid* at para 240.

[They] 'enjoy no rights or privileges in terms of section 3 of the Constitution. In consequence, the guarantee to citizens under section 3 of the Constitution which gives rise to the entitlement to citizens who are nationals to request diplomatic protection, does not apply to companies.⁸¹

So, is there anything in the general right of citizenship beyond the obligation for diplomatic protection? The answer is 'no'.

79 [2005] 4 All SA 96 ('*Van Zyl*'). See J Dugard & G Abraham 'Public International Law' (2005) *Annual Survey of South African Law* 155-6. Leave to appeal in this matter was recently refused by the Constitutional Court.

80 *Van Zyl* (supra) at para 100.

81 *Ibid.*