

Children’s right to citizenship

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Introduction

The proliferations of bills of rights in constitutions throughout all regions of the world have been well documented. However, it is only now that tentative steps are being taken to examine the place of children within this development. Notwithstanding this new move, children remain legally partially invisible in that they are accorded no special treatment and very little recognition in constitutions. It is assumed, rightly or wrongly, that these rights encompass all persons – irrespective of the special position that children occupy as minors. In fact, despite ratifying the Convention on the Rights of the Child (CRC), the notion of children as rights-bearers remains a highly contentious issue.¹ Equally contentious is the view that children are citizens in their own right.²

According to Roche, much current discussion about children is marked by a series of interlocking discourses which serve to problematise and marginalise children.³ This dominant ‘negative agenda’ thrives despite recognition of the many complex and demanding responsibilities accepted by children, and the challenges that bear down as much on children as they do on adults.⁴ The topic of citizenship and children requires one to take up the long-overdue discussion on issues pertaining directly to children.

However, can one really talk of *citizenship* in Namibia where children are concerned? The concept itself seems very remote from the set-up an African child usually finds itself in, founded on the *we* concept: *citizenship* seems to emphasise an individual bearer of rights. But difficult as it might be to envisage a child as a bearer of rights, it is even more difficult to consider a child without an identity. Upon closer inspection, the *we* that the child belongs to will be shown to be the essence of citizenship: it says *we* belong to a certain group; it echoes *we* are Namibian. This is the point the court was at pains to make in *Swart v Minister of Home Affairs, Namibia*,⁵ where it stated the following:

Given the historical background within which our Constitution was framed, it had to address the diversity of origin of all Namibia’s people to bring about one nation under a common citizenship ...

1 See, in this regard, Campbell (2003:402); Guggenheim (2003:781); Jackson (1999:223); McGillivray (1994:243).
2 As will be discussed below, practice has shown that citizenship is based on the parents’ status to such a degree that the child’s status has become uncertain.
3 Roche (1999:475).
4 (ibid.).
5 *Swart v Minister of Home Affairs, Namibia*, 1997 NR 268 at 274.

It is from this history, which emphasised that different 'tribes' could not belong to a common heritage, let alone belong to the same group, that it became essential to denounce such an ideology and expressly declare a common citizenship. Therefore, the aim of this paper is to determine how children form part of Namibian citizenry: for example, in what ways do children acquire such status? What requirements need to be met before they can attain citizenship? Do any rights accrue to them based on such citizenship? What is the possibility of children losing their right to citizenship? The paper will also critically probe some of the issues that have arisen with regard to citizenship in relation to children.

The child's right to citizenship

One of the unique features characterising the Namibian Constitution is the incorporation of a substantial citizenship scheme not normally present in others.⁶ Usually, the question who qualifies for citizenship is a mandate given to Parliament. However, Namibia chose a substantially constitutional as opposed to purely legislative citizenship scheme so as to guarantee citizenship as a right.⁷ It is under this scheme that one finds a provision on the children's right to nationality.

The right to nationality is a traditional right for children enunciated in several international instruments.⁸ The importance of the right of nationality is to prevent statelessness, which has the further effect of denying an individual the rights that accrue from citizenship status.⁹ Experience has shown that nationality could be used to deprive certain persons the civil and political rights that accrue from such status, as was the case in South Africa before its democratisation in 1995.¹⁰ In recognition of this possibility, Namibia's Supreme Law enshrined detailed provisions regulating the acquisition and loss of citizenship. Chapter 2 of the Constitution, which is dedicated to citizenship, espouses ways in which citizenship can be obtained. It guarantees to all persons living in Namibia a mechanism for becoming a Namibian citizen. Its explicitness may also be attributed to the fact that Namibia was a new state and, hence, had no citizens.¹¹

In the case of children, a special constitutional provision was included under Article 15(1). It provides that –

6 Carpenter (1991:31–32).

7 *Thloro v Minister of Home Affairs*, (P) A 159/2000, High Court judgment delivered 2 July 2008.

8 Article 7, CRC; Principle 3, Declaration of the Rights of a Child; Article 15(1), Universal Declaration of Human Rights; Article 24(3), International Convention on Civil and Political Rights; and Article 20(1), American Convention on Human Rights.

9 Currie & De Waal (2005:272).

10 People associated with the former South African 'homelands' – Transkei, Bophuthatswana, Venda and Ciskei, or TBVC states – ceased to be South African citizens when 'independence' was conferred on their territories. Consequently, they could not enjoy civil and political rights in South Africa, and were not entitled to South African passports or diplomatic protection.

11 Light (2000:164).

[c]hildren shall have the right from birth to a name, the right to acquire right to acquire a nationality ...

This right echoes Namibia's international obligation under Article 7 of the United Nations Convention on the Rights of the Child, which is aimed at preventing the phenomenon of stateless children. This right to be registered as a national commences at birth. However, as noted by Davis et al., the ambit of the right is not clearly defined, especially in respect of a stateless child who resides in Namibia.¹² The question is whether such child is entitled to claim Namibian nationality or not. The South African legislature adopted the view that a stateless child has a right to be accorded South African nationality where such child is born in South Africa.¹³ This conclusion accords well with the possible course that Namibia will take once confronted with this scenario. This view is based on the fact that Namibia acceded¹⁴ to the Convention on the Reduction of Statelessness which expressly requires States Parties to grant their nationalities to persons within their territories who would otherwise be stateless.

It follows, therefore, that this right recognises that children born in Namibia should be recognised as nationals.¹⁵ Once such recognition has been conferred, then it follows that rights of citizenship and all other rights accrue to them – as was stated in the case *Planned Parenthood v Danforth*, where it was held that –¹⁶

[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess Constitutional rights.

This view accords with the finding of the Namibian Supreme Court in *Ex Parte Attorney General: In Re: Corporal Punishment by Organs of State*,¹⁷ where the infliction of corporal punishment in government schools pursuant to the existing code formulated by the Ministry of Education (then the Ministry of Education, Culture and Sport) or any other direction by any organ of government was found to be in conflict with Article 8 of the Constitution and, therefore, declared unconstitutional.¹⁸ It is clear from the foregoing that once the status of citizenship has been conferred to a child, certain rights as provided for in the Constitution accrue to him/her.

12 Davis et al. (1997:266).

13 See section 2(4)(b) of the Citizenship of South Africa Act, 1995 (No. 88 of 1995).

14 Namibia acceded to this Convention on 17 February 1995; see *States Parties to the 1961 Convention on the Reduction of Statelessness*; available at <http://rsq.oxfordjournals.org/cgi/reprint/21/4/246.pdf>; last accessed 5 October 2009.

15 Davis et al. (1997:266).

16 *Planned Parenthood v Danforth*, 428 US 52 (1976).

17 Text of the judgement available at <http://www.saflii.org/na/cases/NASC/1991/2.html>; last accessed 3 November 2009.

18 1991 NR 178.

Notably, both the CRC and the relevant provision in the Constitution dealing with children's citizenship do not make use of the word *citizenship*, and prefer the term *nationality* to define the right. Nevertheless, the terms *nationality* and *citizenship* have been used interchangeably and loosely to indicate a connection between the individual and the state. Devenish et al., who defined *citizenship* or *nationality* as the legal connection between a state and the persons deemed to be its nationals.¹⁹ However, as indicated by Dugard,²⁰ there is a clear distinction between the terms *nationality* and *citizenship*. According to Dugard, *nationality* is essentially a term of international law which denotes a legal connection between the individual and the state for external purposes.²¹ *Citizenship*, on the other hand, is a term relating to constitutional law, and is at best used to describe the status of the individual internally, particularly the aggregate of civil and political rights to which s/he is entitled.²² It follows from this that a Namibian national may travel on a Namibian passport and is entitled to protection by the Namibian government if s/he is injured in another country. This begs the question whether, in adopting the term *nationality*, the Namibian Constitution intended its literal meaning or is merely guilty of failing to draw a clear distinction between the two concepts.

This question was dealt with in *Thloro v Minister of Home Affairs*.²³ In the case, Maritz J stated the following:

Whilst I recognize the sometimes notional, sometimes subtle and sometimes very real difference between the legal concepts of "citizenship" and "nationality", they are, within the context of Namibian law, for the greater part, essentially two sides of the same coin: the one being definitive of the legal relationship between the Namibian State and its citizens in a notional context and the other definitive of the same legal relationship and its implications in the broader context of international law.

Thus, there is no material distinction between the legal consequences of the use of either of the terms under Namibian law: the rights of nationality and citizenship accrue irrespective of the term used. The question that remains, however, is which children are entitled to citizenship in Namibia?

Acquisition of Namibian citizenship by a child

It is trite law that each state has the prerogative to determine under its own law who can and who cannot qualify as a national. Equally trite is the fact that there are certain recognised grounds followed by most states in respect of the conferment of nationality.

19 Devenish (1999:283).

20 Dugard (2005:283).

21 (ibid).

22 (ibid).

23 *Thloro*, at 36. Text of the judgement available at <http://www.saflii.org/na/cases/NAHC/2008/65.html>; last accessed 3 November 2009.

These include birth (*jus soli*),²⁴ descent (*jus sanguinis*),²⁵ and naturalisation, which is usually acquired after a period of residence in the state concerned. The Namibian Citizenship Act,²⁶ as amended by the Immigration Control Act,²⁷ and Chapter 2 of the Constitution conform to these international standards as they provide for nationality to be acquired through the forms enunciated above.

Acquisition by birth

Article 4(1) of the Constitution recognises the acquisition of Namibian citizenship through birth (*jus soli*). As a general rule, the Article provides that the following children qualify to be Namibian citizens by birth:

- children whose fathers or mothers are Namibian citizens, and
- children whose fathers or mothers are ordinarily resident in Namibia.

Interpreting this Article, in *Thloro v Minister of Home Affairs* the court stated that –²⁸

[b]ut for a number of narrowly defined exceptions, Article 4(1) of the Namibian Constitution recognizes the automatic acquisition of Namibian citizenship as of right by the mere incidence of birth in the country ... The automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by Act of Parliament.

It was further stated that those falling within the ambit of this sub-Article become Namibian citizens purely by operation of law, and they are not required to do anything as a precondition to having Namibian citizenship conferred upon them.²⁹ From the foregoing, the question that arises is which categories of children born in Namibia are not eligible to acquire the right to citizenship by mere incidence of their birth in Namibia? In other words, can children that are, for example, born of illegal immigrants qualify for citizenship as of right by mere incidence of their birth?

This is a contentious issue in the United States of America,³⁰ where the 14th Amendment stipulates that –

... 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.

This provision was interpreted in *United States v Wong Kim Ark*,³¹ where Wong Kim Ark – the son of Chinese nationals who were not eligible for US citizenship – was born

24 Latin for “Law of the ground”.

25 Latin for “Law of the blood”.

26 No. 14 of 1990.

27 No. 7 of 1993.

28 (*ibid*).

29 (*ibid*).

30 Famiglietti (2007).

31 169 US 649 (1898).

in the USA but returned to China. Wong later came back to the USA, but was denied entry on the ground that he was not a US citizen. The Supreme Court interpreted the 14th Amendment as meaning that each and every child born in the USA, regardless of the status of their parents, is regarded as a US citizen.³² This was based on the *jus soli* birthright citizenship, which finds its roots in English common law.

Under Namibian law, it is contended that birth is not the sole requirement for citizenship. Several exceptions to the claim on citizenship based on *jus soli* are contained in Article 4(1) of the Constitution. In particular, Article 4(1)(d) of the Constitution lists children born from the following persons as not being eligible for citizenship – even if they were born in Namibia:

- Children of parents enjoying diplomatic immunity
- Children of career representatives of other countries
- Children whose parents are members of security forces deployed into Namibia by another country, and
- Children of illegal immigrants.

However, the above exceptions will not apply if denial of citizenship would result in statelessness as prohibited under the Convention on the Reduction of Statelessness. It follows, therefore, that the approach followed by the USA will not find application under Namibian law, as the Constitution has expressly limited the claim to citizenship by *jus soli*.

Furthermore, children of non-citizens whose parents are *ordinarily resident* in Namibia qualify to be citizens if they are born in Namibia at the time of such residency as provided under Article 4(1)(d) of the Constitution. The bone of contention is what the phrase *ordinarily resident* means, since neither the Constitution nor the Citizenship Act define it. In *Robinson v COT*,³³ however, the court had to define *residence*. It stated that –

[t]he authorities are clear that residence is a word which varies in meaning according to the circumstances under which it is used ... But a mere passer-by or casual visitor is not a resident, although in a sense he may be said to reside during the period of his visit. Perhaps the best description of what is imported by residence is that it means a man's home or one of his homes for the time being; though exactly what period or what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule. Clearly physical presence for a prolonged period would constitute residence.

However, in *Cohen v CIR*,³⁴ the court found that the word *resident* as opposed to *ordinarily resident* is wider in its meaning. *Ordinarily resident*, as the narrower term, was held to mean the following:

32 (ibid.).

33 1917 TPD 542.

34 1946 AD 174.

A person's ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.

Therefore, whether or not one is *ordinarily resident* is a question of fact that might need a court pronouncement to determine. This creates uncertainty with regard to children born of foreign nationals. Is one *ordinarily resident* if one holds a permanent residence permit? Some people have resided in Namibia for more than ten years on an employment permit only. These are some of the questions that make unclear the ambit of application of the *ordinarily resident* requirement. And what is the relationship between *ordinarily resident* and *domicile*?

According to section 22 of the Immigration Control Act, –

- [n]o person shall have a domicile in Namibia, unless such person –
- (a) is a Namibian citizen;
 - (b) is entitled to reside in Namibia and so resides therein, whether before or after the commencement of this Act, in terms of the provisions of section 7(2)(a) of the Namibian Citizenship Act, 1990 (Act 14 of 1990);
 - (c) is ordinarily resident in Namibia, whether before or after the commencement of this Act, by virtue of a marriage entered into with a person referred to in paragraph (a) in good faith as contemplated in Article 4(3) of the Namibian Constitution;
 - (d) in the case of any other person, he or she is lawfully resident in Namibia, whether before or after the commencement of this Act, and is so resident in Namibia, for a continuous period of two years.

Although section 22(1)(d) could clarify the question as to how long a person has to have resided in Namibia in order to attain domicile, section 22(2) states as follows:

- For the purposes of the computation of any period of residence referred to in subsection (1) (d), no period during which any person –
- (a) is or was confined in a prison, reformatory or mental institution or other place of detention established by or under any law;
 - (b) resided in Namibia only by virtue of a right obtained in terms of a provisional permit issued under section 11 or an employment permit issued under section 27 or a student's permit issued under section 28 or a visitor's entry permit issued under section 29;
 - (c) involuntarily resided or remained in Namibia;
 - (d) has entered or resided in Namibia through error, oversight, misrepresentation or in contravention of the provisions of this Act or any other law; or
 - (e) resided in Namibia in accordance with the provisions of paragraph (d), (e), (f) or (g) of section 2(1),
- shall be regarded as a period of residence in Namibia.

If one looks at the term *domicile*, it becomes clear that every person has domicile somewhere, and that is usually one's permanent home for legal purposes. *Domicile* is

a concept central to Roman–Dutch private international law. The concept of *domicile* determines which law governs a person, meaning there must be a link between person and place.³⁵

There are, however, various varieties of domicile. The first of these is the domicile by operation of law. Under common law, for example, one's domicile of origin is acquired automatically at birth. Under common law, for the so-called legitimate child, this was always the domicile of the child's father at the time of birth. The so-called illegitimate child acquired the domicile of his/her mother at the time of birth.³⁶ One's domicile of choice entails the free will of a person to establish his/her lawful presence in the chosen domiciliary area, with the intention of staying there for an indefinite period. Now if the father or mother of a newborn child has his/her domicile of choice in Namibia, would this not mean that the child would also acquire domicile in Namibia?

Courts in South Africa have gone so far as recognising that a person who has his/her residence in the country on the basis of an employment permit or while applying for a permanent residence permit, has, notwithstanding the precarious nature of his/her residence, established a domicile.³⁷ Courts in Botswana have made clear that even an employee on contract is not thereby precluded from acquiring domicile in his/her place of employment.³⁸ It remains unclear, however, whether *ordinarily resident* can be read as a synonym for *having domicile*. It is argued here that *domicile* is the narrower term.

What about the case of children born of refugees? Refugees do not acquire a domicile of choice in the place where they have found refuge: they retain their last domicile, which then also applies to their children.³⁹ Refugee children also do not fall under the exceptions listed in Article 4(1)(d) of the Namibian Constitution. Section 17 of the Namibia Refugees (Recognition and Control) Act⁴⁰ makes provision for the family of the refugee to be admitted in Namibia as well. It makes provision for the integration of the family by way of identity passes, among other things. Children born in refugee camps are accorded identity documents such as birth certificates – an obligation expressly provided for in the Refugee Conventions that Namibia has signed.⁴¹ However, it is contended that, if practice is anything to go by, children born in such camps are regarded as refugees, not residents.

Finally, no distinction is made between children born inside marriage or outside it when it comes to the acquisition of citizenship. The language of the Constitution is couched in

35 Kahn (1972:12ff).

36 *Govu v Stuart*, (1903) 24 NLR 440 a7 441f.

37 *Toumbis v Antoniou*, 1999 (1) SA 636 (W).

38 See particularly *Kenyon v Kenyon & Jenkins*, 1974 (1) BLR 2. For further reference see Forsyth (2007:138).

39 Davel & Jordaan (2005:46).

40 No. 2 of 1999.

41 United Nations Convention Relating to the Status of Refugees, of 28 July 1951.

such a way that the child can become a citizen, subject to the stated exceptions, on the basis of either parent or both parents. The phrase *whose fathers or mothers* permeates the provisions on citizenship in the Constitution. It follows logically from the use of the word *or* in such phrase that the status of either parent is enough to bestow citizenship. Therefore, a child born outside marriage whose mother or father is a Namibian citizen or is ordinarily resident in Namibia is eligible for citizenship.

Another question that arises is whether a child can acquire citizenship later in the case where the parents obtain citizenship after the birth of their child. The scenario envisaged in this case is where, say, both parents are illegal immigrants at the time of the child's birth, and they subsequently attain citizenship. In such a case, it is unclear if the child will be a Namibian citizen as well. The birth requirement explicitly states that, in order to acquire citizenship, the fathers or mothers must be Namibian citizens "at the time of birth of such persons".⁴² However, Article 14 of the Constitution, which provides for protection of the family unit, may justify a more liberal view. In fact, practice has shown that where parents later apply for citizenship, they include their minor children in the application to ensure that the whole family obtains the same status.

Acquisition by descent

Apart from acquiring citizenship by birth, a child born outside Namibia may acquire citizenship by descent if his/her father or mother is a Namibian citizen at the time of its birth (*ius sanguinis*). In this case, however, acquisition is regulated by section 2 of the Citizenship Act as per Article 4(2)(b) of the Namibian Constitution. The section provides that the child is obliged to be registered at any Namibian diplomatic mission in accordance with the laws of registration of birth. Alternatively, the child has to be registered within a year after re-entry into Namibia.

From the section, it follows that there is a condition precedent to acquisition of citizenship. This is in contrast with acquisition by birth, which is automatic if the child does not fall within the exceptions. The condition is that registration should occur within a stipulated time. Failure to register within the stipulated time may mean forfeiture of the right to citizenship. Consequently, parents may decide to deprive their child of Namibian citizenship by not adhering to the time limits set. There seems to be no way of claiming citizenship when the child attains majority, except at the discretion of the Minister, who may condone the non-compliance with the time limits.⁴³

Acquisition by registration

A child can also acquire citizenship through registration, as per Article 4(4) of the Constitution. A condition to acquisition in this way is residency in Namibia for at least five years. Although it is accepted that children do not have the capacity to apply for

42 See Article 4(1), Namibian Constitution.

43 See section 2(2)(ii), Namibian Citizenship Act.

citizenship by registration, this can be done on their behalf by a parent or guardian. Once the child has attained the age of 18, section 4(2)(b) of the Namibian Citizenship Act provides that s/he has a year in which to make a declaration to the effect that s/he no longer wishes to resume his/her Namibian citizenship, if that is the case.

Acquisition by naturalisation

Citizenship by naturalisation is at the discretion of the Minister. Section 5 of the Namibian Citizenship Act stipulates the requirements and conditions that have to be met in order to attain citizenship by these means. However, an applicant for naturalisation has to be full of age and capacity. As such, it is not possible for a child to acquire citizenship in this manner,⁴⁴ unless the application is made on the child's behalf by a parent or guardian.

Acquisition by adoption

The Constitution makes no provision for adopted children to acquire citizenship on the basis of an adoptive parent's citizenship. This omission is addressed under section 2(2) (b) of the Namibian Citizenship Act, which provides for adoptive children to acquire citizenship in Namibia. This section provides for deemed acquisition of citizenship by descent. Several requirements need to be met before citizenship can be deemed to have been acquired, however. They are as follows:

- (i) The child must be adopted in terms of the provisions of the laws regulating adoption in Namibia;
- (ii) By a Namibian citizen;
- (iii) The birth must be registered at a Namibian diplomatic mission or before a year lapses after re-entering Namibia; and
- (iv) An application for citizenship must be made to the Minister.

Once these requirements have been met, the child is deemed to have acquired citizenship by descent. However, the provision also regulates the status of adoptive children born outside Namibia. This limitation does not take into account a child born in Namibia who falls in the exceptions to citizenship as enunciated in Article 4(1)(d) of the Constitution. This limitation is addressed in section 2(3) of the Namibian Citizenship Act. This section prohibits the following persons from being capable of acquiring citizenship by descent:

- (a) A child who is a prohibited immigrant when s/he entered Namibia;
- (b) A child of illegal immigrants;
- (c) A child of parents who are security forces from another country performing their services in Namibia.

Therefore, once the child has been adopted, it enjoys the same rights as other children born in Namibia – and that includes assuming its adoptive parents' status as citizens. The question that arises is whether the aforementioned only applies to statutory adoption or

44 See section 5(1)(c), Namibian Citizenship Act.

to customary adoption as well.⁴⁵ This question becomes particularly relevant in northern Namibia, where the territorial borders between Namibia, Angola and Zambia do not physically split the communities there who share a common background, language, custom, etc.

Acquisition by special conferment

Parliament was granted plenary powers by Article 4(9) of the Constitution to make laws, not inconsistent with the Constitution, regulating the acquisition and loss of Namibian citizenship. It is under this provision that Parliament adopted the Namibian Citizenship Special Conferment Act.⁴⁶ The rationale for this special conferment lies in the country's unique historical foundations:⁴⁷

During the decades preceding independence many Namibians, unable to bear or unwilling to tolerate the inequalities 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 [had] been liberated from colonial rule.

While there are several ways of acquiring citizenship, there are also possibilities that children can lose their citizenship. This stems from the fact that citizenship has been attached to the status of the child's parents and, in some cases, when that status changes, it also affects the child's citizenship.

Loss of citizenship

As stated in the *Thloro* case –⁴⁸

... the tenor in which the Constitution frames the citizenship 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.

Therefore, just as the Constitution provides for acquisition of citizenship, it also provides for loss of citizenship. The general provision for loss of citizenship is found in Article 4(7), which states that –

Namibian citizenship shall be lost by persons who renounce their Namibian citizenship by voluntarily signing a formal declaration to that effect.

45 For similarities and differences between the two institutions, see the contribution on adoption by Oliver C Ruppel and Pombili L Shipila elsewhere in this volume.

46 No. 14 of 1991.

47 *Thloro*, at 18.

48 *Thloro*, at 22.

It is contended that a child lacks the capacity to legally renounce its citizenship. However, a child can still lose its citizenship under section 8(3) of the Namibian Citizenship Act:

Whenever a person ceases under subsection (2) to be a Namibian citizen, his or her child under the age of 18 years and who is not or has not been married shall also cease to be a Namibian citizen if the other parent of such child is not, or does not, remain a Namibian citizen.

This provision is questionable. It reinforces the idea that children's citizenship is subject to their parents' status as citizens. It does not recognise the child's right to nationality as guaranteed under Article 15(1) of the Constitution. It is inconceivable that the Constitution intended for children – especially those who acquired citizenship by birth or descent – to ever lose their citizenship. This loss of citizenship derogates from the purport of Article 4(1) and, as stated in the *Thloro* case, –⁴⁹

... the automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by an Act of Parliament. Parliament may not deprive individuals of Namibian citizenship by birth.

The rationale for this provision could be that parents are expected to make the best decisions for their children; but it is also contended that, should parents wish to act as legal guardians in this regard, an application can be made specifically for the child and then vetoed by the Master of the High Court as the super-guardian of minors.

It is no consolation that section 8(4) of the Namibian Citizenship Act allows the child, after attaining 18 years of age, to perform certain chores before it can re-claim its citizenship. The spirit of the Constitution points to a jealous protection of citizenship where it is acquired by birth or descent, and it goes against that spirit for children to lose that right so easily.

Article 4(8) of the Constitution empowers Parliament to enact legislation providing for the loss of Namibian citizenship by persons who did not acquire citizenship by birth or descent if such persons –

- (a) have acquired the citizenship of any other country by any voluntary act; or
- (b) have served or volunteered to serve in the armed or security forces of any other country without the written permission of the Namibian Government; or
- (c) have taken up permanent residence in any other country and have absented themselves thereafter from Namibia for a period in excess of two (2) years without the written permission of the Namibian Government:

provided that no person who is a citizen of Namibia by birth or descent may be deprived of Namibian citizenship by such legislation.

49 (ibid).

Section 9(3) of the Namibian Citizenship Act expands on this list by providing for involuntary loss where the person is convicted of an offence or is a prohibited immigrant, among other things. In relation to children, section 10(1) of the Act provides for deprivation of citizenship in the case of children, as follows:

[W]henever the responsible parent of a child under the age of 18 years and who is not or has not been married, has in terms of the provisions of section 7(1) ceased to be a Namibian citizen or has been deprived in terms of the provisions of section 9 of his or her Namibian citizenship, the Minister may order that such child, if he or she is a Namibian citizen by registration or naturalization, shall cease to be a Namibian citizen.

Once again, the impression is that a child cannot be a full holder of citizenship until s/he attained the age of 18. According to Carpenter,⁵⁰ the possibility that a Namibian citizen – albeit by naturalisation – may be deprived of his/her citizenship by the executive, by reason of conviction of a serious offence or even if the Minister concerned deems it not in the interests of the country that such a person should remain a citizen, is not provided for in the Constitution, and legislation to this effect is arguably in conflict with the fundamental rights in Chapter 3 of the Supreme Law. Even more contentious is if this discretion is extended to the children of such parent as per section 10(1) of the Namibian Citizenship Act.

Dual citizenship

The general understanding is that, where a child enjoys dual citizenship, that child is not compelled to make a decision as to which citizenship it wishes to assume. Thus, children are given a grace period until they turn 18 to choose between two (or more) citizenships. However, recent developments point to the possibility that the child can retain dual citizenship without having to choose one over the other. Be that as it may, the notion of *dual citizenship* in Namibia has been a contentious issue among academics. Light notes that there is a common misconception that dual nationality is not allowed under Namibian law.⁵¹ This misconception possibly stems from section 26 of the Namibian Citizenship Act, which provides the following:

Subject to the provisions of this Act or any other law, no Namibian citizen shall be a citizen of a foreign country.

The High Court interpreted this section in the *Thloro* case.⁵² In the latter, the court had to decide on the constitutionality of this section, as it was submitted by the applicant that the requirement to renounce citizenship under this section went contrary to the provision of Article 4(5) of the Constitution. With regard to this constitutional challenge, it was held that –

50 Carpenter (1991:32).

51 Light (2000:166).

52 *Thloro*, at 29.

[a]lthough the section prohibits Namibian citizens to also be citizens of other countries, it does so subject to “the provisions of this Act or any other law”. In as much as the Constitution is one “other” law contemplated in the proviso to the prohibition, the contention that the prohibition falls foul of the Constitution is clearly untenable. The prohibition is expressly made subject to the provisions of the Constitution and, therefore, no conflict can arise.

Admittedly, the Constitution does not expressly allow dual citizenship, but according to the interpretation given in the *Thloro* case, dual citizenship –⁵³

... follows naturally and logically from the implementation of the Constitution's provisions and was expressly contemplated as a possibility.

This case showed that whether or not one was entitled to dual citizenship was dependent on the way one's citizenship had been acquired.

Duality where acquisition was by birth or descent

According to Light, based on Article 4(8) of the Constitution, Namibian citizens by birth or by descent cannot be deprived of their Namibian citizenship under any circumstances.⁵⁴ Such citizens will remain Namibian regardless of whether or not they are citizens in other countries. This contention was adopted with approval in the *Thloro* case, where the following was stated:⁵⁵

The automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by an Act of Parliament. Parliament may not deprive individuals of Namibian citizenship by birth – not even if, after Independence, they have acquired the citizenship of any other country, or served in the armed forces of such a country without permission of the Namibian government or if they have taken up residence in such a country and absented themselves thereafter from Namibia for a period of more than two years without such permission. The only manner in which persons falling within this category may be deprived of Namibian citizenship is by voluntary renunciation in formal deed to that effect.

With regard to those who had attained citizenship by descent, the court stated that –⁵⁶

...much the same holds true for the second group: those who have acquired the right to Namibian citizenship by descent, except that in their case, Parliament may require of them to register as citizens as a precondition to acquisition of citizenship and, in relation to those born after independence, may require registration within the specific time and at a place mentioned in paragraph (b) of Article 4(2).

Therefore, it is legal as well as possible for Namibian citizens to have multiple citizenships.

53 (ibid).

54 Light (2000:166).

55 *Thloro*, at 22. See also *Alberts v Government of Namibia & Another*, 1993 NR 85.

56 *Thloro*, at 23.

Light gives the following example:⁵⁷

For example, a person born in Namibia, who is not excluded under any of the exceptions in Article 4(1), is a Namibian citizen by birth. If such a person's parents were South African citizens, the person would also be a South African citizen by operation of South African law. If the person marries a person who is a citizen of another country other than Namibia or South Africa, this person may also be entitled to assume the citizenship of their spouse.

This position was accepted by Judge Maritz who held as follows:⁵⁸

Moreover, if permitted under the laws of a foreign State, Namibian citizens by birth or descent are at liberty to acquire citizenship of those States even after Independence without being at risk of losing their Namibian citizenship.

According to Light, the Ministry of Home Affairs currently operates under the notion that Namibia does not allow dual citizenship.⁵⁹ This is so because an applicant is required to declare under oath that s/he has "no passport of another country in possession". Light concludes, therefore, that the form emphasises that dual nationality is prohibited.⁶⁰

Notwithstanding the above, to date, many Namibian citizens not only hold South African citizenship, but also a German passport. Of course, this phenomenon has historical implications.⁶¹ According to Von Münch, such dual or multiple citizenship can create legal problems,⁶² especially in terms of the principle of equality before the law.⁶³

Duality where acquisition was by registration or naturalisation

Article 4(4) of the Constitution expressly provides that the *conditio sine qua non* for acquiring citizenship by registration is the renunciation of the citizenship of any other country of which the person might be citizen. Equally important is section 7(1)(a) of the Namibian Citizenship Act, which provides that once a citizen by registration acquires another citizenship, then such citizen ceases to be a Namibian citizen. In *Thloro*,⁶⁴ the rationale for this requirement was explained as follows:

Whilst loyalty to the Namibian State may well be assumed from Namibian citizens tied to the country by birth or blood (*jus soli* or *jus sanguinis*), others not so intimately or closely

57 Light (2000:166).

58 *Thloro*, at 29.

59 Light (2000:167).

60 (*ibid*).

61 See Ruppel (2008).

62 Von Münch (2007:180ff).

63 See, for example, Article 10(1) of the Namibian Constitution and Article 3(I) of the *Grundgesetz*, or German Basic Law (serving as the Constitution of the Federal Republic of Germany).

64 *Thloro*, at 32.

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.

Article 4(5) of the Constitution deals with the acquisition of citizenship through naturalisation. It is silent as to the issue of duality. The foreign applicant who wishes to become a Namibian citizen needs to be willing to renounce his/her citizenship of any foreign country in which s/he is a citizen. After renouncing such other citizenship(s), section 7(1)(a) of the Namibian Citizenship Act prohibits such persons from acquiring citizenship of another country as this would again result in losing the Namibian citizenship.

The constitutionality of this restriction was challenged in the *Thloro* case. In *Thloro*, a South African citizen applied for citizenship in Namibia. She qualified on all grounds, until she was requested to renounce her citizenship as required by the section. She could not do so, as she had plans to go back and resettle in South Africa at some indefinite period in the future. The restriction was held to be based on security reasons, a restriction that the Constitution mandated Parliament to regulate. The court stated the following:⁶⁵

Unwavering allegiance and loyalty to Namibia and a willingness to sacrifice – if required – even your life for her is clearly one of the most important underlying reasons for the citizenship requirement in the Act. The security objectives and concerns may well be compromised if persons serve in the Force with divided loyalties or, worse, actual loyalties to foreign countries or Heads of State – more so if the belligerence of those foreign countries threatens the territorial or internal security of Namibia.

Concluding remarks

From the above discussion, it transpires that Namibia's citizenship law is largely in line with its international obligations, especially in relation to children. However, although the law is in place, some of the policies adopted in implementing it need an upgrade in order to comply with the rights it creates, especially with respect to duality, as explained by Light.⁶⁶

Furthermore, the unhealthy preoccupation with the status of the child's parents in determining its status runs contrary to the certainty that the Constitution desired to instil in the Namibian citizenry. Many questions as to the ambit of application of provisions such as section 10(1) in the Namibian Citizenship Act desperately need judicial pronouncement as they violate, *prima facie*, the spirit and tenor of the Constitution. In addition, the uncertainty with regard to *ordinarily resident* needs to be addressed because the wording of the Constitution, the Namibian Citizenship Act and the Immigration Control Act is inconsistent in this respect, and poses the danger of inconsistent application.

65 *Thloro*, at 39.

66 Light (2000:167).

Lastly, and this is more of an administrative nature, it is important to note that, in order to promote an efficient administration and good governance and to create a culture of accountability, what is needed are openness and transparency in public administration or in the exercise of public power.⁶⁷ One of the authors of this article – who has ordinarily resided in Namibia since 2006 – recently gave birth to a child here. Upon receipt of the full birth certificate she applied for the child's Namibian citizenship. Being a foreign national, the application was halted by the Ministry of Home Affairs “until proof has been provided of a permanent residence permit”. Upon request for the reasons, no such reasons were given. Upon referral to the rights stipulated in the Namibian Constitution and with reference to the relevant legislation, an immigration officer provided the applicant with the following verbal reasons regarding the halted application:

The Constitution does not apply to foreigners.

The only response the applicant can make to this utterance is to note that the Namibian Constitution deals with administrative justice in two of its Articles, as follows:

- Article 18 requires that administrative bodies act fairly and reasonably, and comply with the requirements stipulated in common law and relevant legislation, and
- Article 5 contains the fundamental obligation enshrined in modern constitutionalism according to which the three organs of the state – including the executive, therefore – are obliged to uphold and respect the fundamental rights and freedoms as spelled out in Chapter 3 of the Constitution.

In other words, whatever the state does is subject to these rights. Whatever the administration does is subject to these rights. And finally, the law that regulates the administration is subject to these rights.

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- 67 Hinz (2009:82f).

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