Vanderbilt Journal of Transnational Law

Volume 19
Issue 3 *Summer 1986*

Article 3

1986

The Concept of Citizenship: Challenging South Africa's Policy

Joe W. (Chip) Pitts III

The Concept of Citizenship: Challenging South Africa's Policy

*Joe W. (Chip) Pitts III**

TABLE OF CONTENTS

* Associate, Carrington, Coleman, Sloman & Blumenthal, Dallas, Texas; Spec. Dip. 1981, Oxford University; B.A. 1982, Tulane University; J.D. 1985, Stanford University. Formerly Visiting Scholar, The Legal Resources Centre, Johannesburg, South Africa.

Now, say, would it be worth for man on earth, if he were not a citizen?
— Dante, *The Divine Comedy*

I. INTRODUCTION

The concept of citizenship has come to represent the full cluster of civil rights held by individuals as members of modern states. Therefore, of all the "reforms" undertaken by South Africa in response to the economic and political instability of the last two years, the most potentially far reaching was State President P. W. Botha's announcement that citizenship would be restored[1] to South African blacks.[2] In September 1985, Botha affirmed that some form of citizenship would be extended to all South Africans.[3] Finally, on July 2, 1986, the South African government passed The Restoration of South African Citizenship Act.[4]

Unfortunately, the new South African legislation grants only the possibility of dual *nationality* in the guise of "citizenship." This disembowled "citizenship" extends only to a limited number of blacks, and then only if the individual affirmatively applies. Meanwhile, South Africa plans to continue to denationalize blacks. Apparently unbeknownest to leaders of the United States,[5] South Africa's new citizenship policy

---

1. The first intimation of a possible shift in South Africa's policy of denying citizenship to all blacks came in January 1985, when Executive State President P. W. Botha established a Special Cabinet Committee to consider and recommend changes in the citizenship policy. *See* SOUTH AFRICAN HOUSE OF ASSEMBLY DEBATES, col. 15 (January 25, 1985). On April 19, 1985, President Botha stated that "[t]he Government does not regard the loss of South African citizenship to be the inevitable result of a national state becoming independent." SOUTH AFRICAN HOUSE OF ASSEMBLY DEBATES, col. 3813 (April 19, 1985).

2. As used in this article, "blacks" refers to those classified in South Africa as Africans, as opposed to those classified as Colored or Indians.

3. DIRECTORATE LIAISON AND INFORMATION OFFICE OF THE STATE PRESIDENT OF SOUTH AFRICA, *Statement by State President P. W. Botha DMS at the Congress of the National Party, Bloemfontein* (Sept. 11, 1985) [hereinafter September Statement by P. W. Botha].

4. No. 73 (S. Afr. 1986), *reprinted in* STAATSKOERANT VAN DIE REPUBLICK VAN SUID-AFRIKA [REPUBLIC OF SOUTH AFRICA GOVERNMENT GAZETTE], July 2, 1986, at 3 (effective July 1, 1986) [hereinafter Restoration of South African Citizenship Act]. This new legislation did not get much immediate attention in the United States or international press, perhaps due to the continued violence in South Africa under the most recently imposed state of emergency.

5. In major policy speeches made weeks after the new South African citizenship legislation, both President Ronald Reagan and Secretary of State George Shultz accepted the legislation at face value, as restoring citizenship to all black South Africans. This, the legislation clearly does not do. *See* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, ENDING APARTHEID IN SOUTH AFRICA, CURRENT POLICY NO. 853 (July 22, 1986)

aims at the apotheosis of apartheid (an Afrikaans word meaning "apartness" or "separateness"). Consequently, citizenship is the issue most crucial to South Africa's future. For over a decade, the South African government imaginatively, but invidiously, has conceived of black "homelands" or "reserves" as progressively becoming "independent states."[6] All blacks inside and outside these states who even remotely are affiliated with the states have been deprived of South African citizenship and nationality. They then have been made citizens and nationals of an "independent state." No member of the international community other than South Africa has recognized any of these putatively "independent" states.

Millions of blacks born in South Africa under this policy, as well as their children born after independence — even those born in urban areas of South Africa — thus became aliens in the land of their birth.[7] Aliens are subject to deportation at any time if the whim of the executive so dictates.[8] Until this year, the ultimate goal of the government has been the creation of a residual all-white[9] South Africa in which no black had any claim to the political rights of a citizen. As articulated by Dr. C. P. Mulder, former Minister of "Bantu Administration and Development:"

> [I]f our policy is taken to its full logical conclusion as far as the black people are concerned, there will not be one black man with South Africa citizenship. . . . [E]very black man in South Africa will eventually be

---

(speech of President Reagan) ("Citizenship, wrongly stripped away, has been restored to nearly 6 million blacks"); BUREAU OF PUBLIC AFFAIRS, U. S. DEP'T OF STATE, THE U.S. APPROACH TO SOUTH AFRICA, CURRENT POLICY No. 854 (July 23, 1986) (speech of Secretary Shultz).

6. The entire process of denationalization is analyzed carefully in Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DEN. J. INT'L L. & POL'Y 11 (1980).

7. Aliens Act, No. 1 (S. Afr. 1937), defines an alien as "a person who is not a South African citizen." *Id.*, § 1. According to the Black Sash, a public interest organization in South Africa, approximately nine million people have lost their citizenship through the denationalization process. THE BLACK SASH, WORKING NOTES FOR ADVICE OFFICES: FREEDOM OF MOVEMENT, IDENTITY DOCUMENTS, RESTORATION OF CITIZENSHIP 3 (1986) (South African publication on file with the Vanderbilt Journal of Transnational Law). Other sources estimate the number as closer to ten million. *See* Wash. Post, July 28, 1986, at A13, col. 3.

8. *See* Aliens Act § 8, No. 1 (S. Afr. 1937); Admission of Persons to the Republic Regulation Act 16, No. 59 (S. Afr. 1972); *infra* text accompanying notes 109-23.

9. At the very least, the Government has attempted to create a "nonblack" South Africa by including Indians and Coloreds as citizens with rights subordinate to the white majority, a status which the Government is now offering — in an even more subordinate form — to some blacks.

> accommodated in some independent new state in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically.[10]

Under the new legislation, the goal of the government has shifted only slightly; now the architects of grand apartheid merely want to limit the number of blacks in "white" South Africa to as few as possible.

South Africa's citizenship policy has deep historical roots. The policy springs from historical uses of citizenship to deny certain persons civil rights, uses which inform methods of "influx control" traditionally employed by successive white governments to exclude blacks from white areas. Now the justification for racial discrimination has changed from the *baasskap* approach of white domination to the new ideology of separate development. The retention of the Group Areas Act[11] and the homelands/"independent state" structure indicates the government's commitment to separate development. The implications of racial discrimination are at least as bad under this new ideology as under the old, and quite probably are worse. According to the ideology of separate development, each racial subgroup will reach its utmost potential by preserving racial purity through geographic isolation. The "areas" and "states" to which most blacks are relegated are the most arid, economically depressed and poverty-stricken regions in the country. To these tragic conditions, one may add the tragedy of a person forcibly removed from familiar surroundings of home to a strange and unpleasant land. In addition to being equitably flawed, the new citizenship policy is logically and legally flawed.

Section II of this article elaborates the history of the modern concept of citizenship, its significance, and its gradual convergence with the international law of human rights. Section III traces the history of South Africa's citizenship policy, describing its place in the ideology of separate development, its manifestation in "independent states," and its culmination in the new "restored citizenship" or "orderly urbanisation" touted by the South African government. Section III also describes the expected

---

10. SOUTH AFRICAN HOUSE OF ASSEMBLY DEBATES, col. 579 (Feb. 7, 1978). The South African Government has, if anything, retreated to this position in reaction to recent United States sanctions and in preparation for the election to be held May 6, 1987. *See* Christian Science Monitor, Dec. 2, 1986, at 1, col. 2. The new sanctions prohibit "new investment" in South Africa (including loans to the private sector, but excluding most purchases and sales of goods), most new loans to the government of South Africa, and U.S. Government contracting for goods or services from South African "parastatal" organizations. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 207, 305, 310, 315 (1986).

11. No. 36 (S. Afr. 1966).

implementation of the new citizenship policy and its effects on the lives of the individuals involved. Section IV considers domestic and international legal methods of challenging the policy. This article concludes that while use of both approaches might not give rise immediately to recognition of effective citizenship, it might achieve extension of nationality to all blacks. Concrete benefits to blacks will result even if the legal challenges prove unsuccessful. If the South African Government ever gives substance to the rhetoric of citizenship, blacks could achieve significant political rights; therefore domestic and international litigation constitute the best means of challenging the Government's policy.

II. THE CONCEPT OF CITIZENSHIP

A. The Basic Concept

Citizenship has special legal, psychological and political value. It is a domestic law concept entitling the citizen to all of the rights, and binding the citizen to all of the duties, of members of the body politic.[12] It implies full membership in a state or political community.[13] The very word "citizenship" derives from the Latin noun *civitas*, which refers to a member of a city. In short, the concept evokes a communitarian ideal of free and equal civic participation based on political organization.[14] The

---

12. *Accord* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 214 Reporters' note 6 (Tent. Draft No. 6, 1985) [hereinafter RESTATEMENT FOR. REL. LAW, T.D. No. 6]; *see* P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 4-5 (2d ed. rev. 1979); Koessler, *"Subject," "Citizen," "National," and "Permanent Allegiance,"* 56 YALE L.J. 58, 63 (1946). Today the "ancient concept" of citizenship "generally entails full political rights including the right to vote and participate in political processes." RESTATEMENT FOR. REL. LAW, T.D. No. 6, *supra*, § 214 Reporters' note 6. In states where the Roman conception of nationality as a personal relationship instead of a territorial link exists, it is appropriate to speak of the terms as meaning the same thing. But more frequently the different meanings of citizenship and nationality are confused.

13. The crucial link between citizenship (as membership in a community) and liberty is called to mind by political philosophers ranging from Aristotle, whose *polis* was organized in order to actualize the individual citizen's potential, to Mill, whose idea of negative liberty held that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. . ." J. S. MILL, ON LIBERTY 120 (1948). Despite the archaic qualification of community by "civilised," the fact remains that social contract theorists of various persuasions have viewed membership in a given community as entitling one to certain rights. The positive liberty sketched by Marx and other idealist philosophers is even more on point.

14. *See, e.g.*, the number of articles dealing with citizenship in the recent Michigan Law Review symposium on "Law and Community," 84 MICH. L. REV. 1 (1986).

increasing recognition of human rights since World War II, inspired by the same ideal, has given the domestic law concept of citizenship new international law overtones.

Nationality, by contrast, is an international law concept denoting the connection between an individual and a state that results in, for example, diplomatic protection.[15] Whereas "nationality" conveys a sense of belonging to a state, "citizenship" usually conveys the richer sense of belonging to a community. In many ways, denationalization more accurately describes the process of creating new "nations" and "nationalities" to which blacks in South Africa have been assigned.[16] Blacks persisently have been defined as nonmembers of the South African community.

While the "independent states" are conceived by the South African and "independent state" governments as sovereign states in international law, the legislation involved[17] speaks solely of "citizenship." Clearly, however, South Africa's new approach actually offers the alternative of dual *nationality* to those blacks who have been deprived of South African citizenship and given "citizenship" (and "nationality") of the independent states. Thus, the failure of the legislation to draw the distinction is not a sufficient reason in itself for preferring "citizenship" to "nationality" as the relevant term; but the relevance of citizenship to the present and future civil and political rights of blacks — that is, their status in domestic municipal law — is a sufficient reason.

B. *The History of Citizenship*

Although citizenship in its modern form is a recent phenomenon, the concept has ancient roots. Centuries ago the city states of Greece distinguished citizens from slaves and aliens. Among other rights, citizens, unlike slaves and aliens, had the right to vote, to speak at Assembly[18] and to demand defense or public assistance from the government. Citizens

---

15. Koessler, *supra* note 12, at 63; P. WEIS, *supra* note 12, at 4-5.

16. Most of the literature thus urges that "nationality" is the more appropriate concept. *See* Dean, *A Citizen of Transkei*, 11 COMP. & INT'L L.J. S. AFR. 57 (1978); Dugard, *supra* note 6, at 21; Heyne, *A Transkeian Citizen of South African Nationality*, 26 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG. 44 (1963).

17. The National States Citizenship Act, § 3, No. 26 (S. Afr. 1970) (formerly known as the "Bantu" States Citizenship Act and later as the "Black" States Citizenship Act). See also the various independence-conferring statutes: Status of Transkei Act, No. 100 (S. Afr. 1976); Status of Bophuthatswana Act, No. 89 (S. Afr. 1977); Status of Venda Act, No. 107 (S. Afr. 1979); Status of Ciskei Act, No. 110 (S. Afr. 1981); and The Restoration of South African Citizenship Act, *supra* note 4.

18. That is, the classic Athenian Assembly at which all citizens had the right to vote and raise matters for public consideration.

also had many, and often correlative duties including jury service, military service, and the duty to vote and attend the Assembly.[19] Significantly, however, the earliest concept of citizenship entailed more than merely negative liberty. A Greek citizen "had positive claims against the state, not merely the right not to be interfered with in the private sphere."[20] Stoic philosophy, with its emphasis on the brotherhood of man, influenced the extension of the idea of citizenship from the few to the many.[21] The expansion of the Roman Empire extended citizenship further still.[22] With the rise of feudal structures in the middle ages, the concept of citizenship lay relatively dormant and rights attenuated severely.[23] Once modern states emerged after the middle ages, however, the concept of a "citizen" owing allegiance to a state gradually replaced the notion of a "subject" owing allegiance to a feudal lord and, ultimately, the king.[24] Only in the nineteenth century did the idea of expatriation — voluntary relinquishment of citizenship after it is possessed — gain currency among the community of nations.[25] Until that time, the principal of *jus soli* apparently meant that one would always be a citizen of a country of one's birth no matter where one resided.[26]

Citizenship always has been thought of as conferring a unique status, a sense of belonging that also afforded certain concrete advantages. Thus, when Rome offered citizenship to members of the Latin confederacy, the Latins grasped the citizenship as protection against arbitrary violence by Roman officials.[27]

A person may acquire citizenship by birth or by naturalization. All

---

19. *See, e.g.*, M. I. FINLEY, ECONOMY AND SOCIETY IN ANCIENT GREECE 83 (1981).

20. *Id.* at 92.

21. *See, e.g.*, 1 F. COPLESTON, A HISTORY OF PHILOSOPHY (rev. ed. 1955).

22. By way of the *Constitutio Antoniniana*, "the most famous legal measure of antiquity," Caesar's nephew Octavian (later the Emperor Augustus), in 28 B.C., began a subtle policy of enfranchisement, sponsored by Augustus, which increased the number of Roman citizens considerably. M. GRANT, HISTORY OF ROME 247 (1978). The Roman Emperor Caracalla granted citizenship to all free men (nonslaves) in the Empire in 212 A.D. *Id.* at 382. He intended to increase revenue from taxation but incidentally promoted liberty and equality.

23. "Citizens" in the middle ages were those who lived in the communal associations that were "towns"; consequently, these citizens developed relative autonomy from feudal structures. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1085-87 (1980); *see also* Koessler, *supra* note 12, at 59-60 nn. 9-10.

24. Koessler, *supra* note 12, at 59-60.

25. *See infra* note 51.

26. Koessler, *supra* note 12, at 72 n.88.

27. M. GRANT, HISTORY OF ROME 55 (1978).

persons born in the United States are automatically citizens, according to the United States Constitution.[28] Historically, though, birth in a country has not automatically conferred the legal status of citizenship. The rule of *jus soli*, or law of place, confers citizenship on a child born within the boundaries of a certain country regardless of the nationality of the child's parents.[29] The rule of *jus sanguinis*, or law of blood, confers citizenship on the child according to the nationality of the child's parents.[30] Some countries, in order to maximize individual choice, emphasize one rule but follow versions of both.[31]

Citizenship as a concept developed from pragmatic, as opposed to moral, concerns of protecting the power and privilege of the elite. The rule of *jus sanguinis*, in particular, smacks of status distinctions based on race or blood of the sort that international law increasingly disfavors. Yet it too served the pragmatic purposes of allowing a child to keep the nationality or citizenship of its parent, and allowing others a choice of nationality or citizenship based on their birth or parents. But citizenship was historically very exclusive. In ancient Greece, freedom of the Greeks was "severely restricted by law in any activity that entailed the introduction of new members into the closed circle of the citizen-body."[32] Ancient Rome also used citizenship as a tool to distinguish the Roman citizen (*civis*) from the alien or Roman subject who did not possess citizenship (*peregrinus*), a category which grew as Rome annexed territory abroad.[33] Pragmatic concerns continue to underlie the enormous discretion that nations retain over who can be made a citizen.[34] But this is not

28. Citizenship in the classical Greek *polis* was acquired by birth in all but exceptional cases. *See, e.g.*, M. I. FINLEY, ECONOMY AND SOCIETY IN ANCIENT GREECE 79 (1981). The rule of place of birth became part of the United States Constitution when the Fourteenth Amendment was adopted in 1868. In 1898, the United States Supreme Court confirmed that Congress could not deny citizenship to any person born within the boundaries of the United States, regardless of the nationality or citizenship of the child's parents. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

29. Koessler, *supra* note 12, at 72 n. 88.

30. *Id.*

31. *See id.*; *see also* 8 U.S.C. § 1401(a)(3)-(7) (1982).

32. M. I. FINLEY, ECONOMY AND SOCIETY IN ANCIENT GREECE 87 (1981). "In the middle of the fifth century the Athenians adopted a law restricting citizenship to the legitimate children of marriages in which both parents were themselves of citizen stock." M. I. FINLEY, THE ANCIENT GREEKS 40 (1964). Ancient Greek citizenship was so exclusive that no routine naturalization procedure existed; formal action by the sovereign assembly was necessary before an outsider could become a citizen of Athens. *Id.*

33. M. GRANT, HISTORY OF ROME 104 (1978).

34. Consider, for example, legislation to restrict the automatic right to French citizenship, which has been proposed (but not yet enacted) in response to increasing an-

to say that today a party in power may legitimately reduce citizenship to a mere tool; constraints imposed by domestic and international law exist.

Because the rights and duties established by the recognition of citizenship are not universal across societies, problems arise. Realistically, governments must have substantial discretion not only over who they make citizens, but also over the cluster of rights inhering in the particular form of citizenship recognized by that country. Originally, the rights attaching to citizenship were thought to be the sole province of sovereign states. Nevertheless, international norms of liberty and equality increasingly give content to the modern concept of citizenship.

C. *The Modern Meaning of Citizenship*

The increasing recognition since 1945 that a binding code of human rights exists in international law has strengthened the concept of citizenship as a cross-societal vessel containing significant human rights.[35] In fact, citizenship provides a conceptual link between the outdated idea that human rights was strictly a matter between an individual and a state,[36] and the modern idea that basic rights which properly may be made the subject of international law exist in all individual-state relationships. Rights of citizenship are not only a subset of those broader human rights recognized by international law; increasingly, the rights of a nation's citizens are identical to the human rights guaranteed by international law.

The law of state responsibility for injury to aliens developed because injury by one state to the nationals of another state could threaten relations between states.[37] Writing in 1946, a leading commentator on nationality and citizenship dismissed the possibility that an international law concept like nationality could be a vehicle for specific rights.[38] Yet now, international law extends to treatment of citizens as well:

> It reflects general acceptance that every individual should have rights in his or her society which the state should recognize, respect and ensure. . . . It reflects general acceptance, too, that how a state treats indi-

---

tiforeign sentiment in France. E.g., N.Y. Times, Mar. 30, 1986, at A1, col. 1.

35. *See, e.g.*, P. SIEGHART, THE LAWFUL RIGHTS OF MANKIND (1985).

36. *See* Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW & POLICY 1 (1979).

37. *See, e.g.*, RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) Part VII introductory note (Tent. Draft No. 3, 1982) [hereinafter RESTATEMENT FOR. REL. LAW, T.D. No. 3].

38. Koessler, *supra* note 12, at 75-76.

> vidual human beings, including its own citizens, in respect of their human rights, is not the state's own business alone and therefore exclusively within its "domestic jurisdiction," but is a matter of international concern and a proper subject for regulation by international law.[39]

Thus, a move toward a definition of universal citizenship in a world community has accompanied the human rights movement.

Whether or not each nation in the world labels the members of its community "citizens," this observation recognizes that something like the concept of citizenship exists or *should* exist in every nation of the world. Additionally, the observation goes further to assert that as a normative matter citizenship should be defined liberally to encourage the reciprocal recognition of rights of states and individuals at the heart of international law. Customary international law establishes certain minimal equal rights of citizens that stem from the concept itself and that nations cannot legally abridge. While in one sense synonymous with "human rights," these distinctive rights of citizens in another sense relate precisely to participation in political decisionmaking of the sort denied South African blacks.

1. The Right of Political Participation

Within the class of citizens, the right to vote often has been limited, historically, to those who met certain age, sex, property or literacy qualifications. The right to the franchise, or a voice in government, however, is another right that states should grant citizens unless justifications for limitations based on age, or some other rational criteria exist.[40]

---

39. RESTATEMENT FOR. REL. LAW, T.D. No. 3, *supra* note 37, at 138. The South African government, of course, is not alone in "discomfiture" at the idea that international law extends to the rights of citizens against their own governments. More skeptical academicians, lay people, and even the Reagan Administration have been accused of feeling the same way. *E.g.*, D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1111 (1982).

40. Rawls' principle of equal liberty under the constitution, or the principle of equal participation requires that:

> all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented. The principle of participation transfers this notion from the original position to the constitution as the highest-order system of social rules for making rules. If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently men's prospects in life, then

Although the original Greek concept of citizenship included both the right and the duty to vote, the Romans first conceived the possibility of separating the franchise from citizenship in an "ingenious" arrangement designed to contain Latin political power after the breakup of the Latin League in 338 B.C.

> Rome granted the male inhabitants of this category of city a new sort of right, citizenship without franchise (*civitas sine suffragio*). This was, in effect, a partial, halfway Roman citizenship, by virtue of which the men of these places, while not normally given the "public" right to vote in Rome's election (which they could in any case rarely have exercised since they lived too far away), were granted "private" rights, notably the right to enter into contracts with a Roman according to Roman law (*commercium*) and the entitlement to marry a Roman without forfeiting inheritance of paternity rights (*conubium*).[41]

Because of the historical context, and the modifications in the civic duties of military service and taxation allowed these halfway Roman citizens, the Latins "escaped the slur of inferior status"[42] and the Roman mechanism of social control worked. This use of citizenship as a means of social control relates more to early development of international law, because it accommodates relations between what were truly distinct international political entities, than to domestic law segregation of portions of a nation's populace. A similar example comes from Senegal, West Africa. There, France qualified and revoked French citizenship in the years immediately preceding the outbreak of World War I. Blaise Diagne, the first African elected to the position of Representative from Senegal in the French Chamber of Deputies, secured a full and complete restoration of citizenship for the Senegalese, basing his legal arguments on the need for blacks' votes to protect their interests. According to one

---

> the constitutional process should preserve the equal representation of the original position to the degree that this is practicable.

J. RAWLS, A THEORY OF JUSTICE 221-22 (1971). The right of political participation recognized in the Western liberal tradition in which Rawls is writing, and in which South Africa very much would like to place itself, of course, is implemented imperfectly even in states authentically in the tradition. *E.g.*, Elk v. Wilkins, 112 U.S. 94 (1884) (Indians denied right to vote because of effect of tribes on their U.S. citizenship); Dred Scott v. Sanford, 19 How. 393 (1857) (black slaves held to be nationals eligible for diplomatic protection, but not citizens). *But see* Basson, *Representation in South African Constitutional Law*, 101 S. AFR. L.J. 142, 155 (1984) (finding a right of universal suffrage in South African constitutional law).

41. M. GRANT, HISTORY OF ROME 58 (1978).

42. *Id.* at 59.

commentator, the inhabitants felt a renewed "sense of dignity and self-respect."[43] The "universal suffrage" movement of the late nineteenth and early twentieth centuries went even further toward establishing the unreasonableness of denying the franchise based on criteria such as race or sex. Historically, however, citizenship almost always has implied the right to vote, unless social perceptions resulted in the denial of the franchise to some subset of citizens on grounds of some legal incapacity.[44] With the concurrent explosion of citizenship and suffrage in the twentieth century, it is hard to deny that the right to vote and even hold office is part of the modern meaning of citizenship.

The right to free and equal access to the courts is, in addition to the franchise, also encompassed in the citizen's right to political participation.[45] South Africa denies residents of "independent states" in South Africa the right of equal access to South African courts:

> People who live in residential areas which form part of constitutionally independent 'homelands' have been found to be peregrini in South Africa. This is so even where they live in a residential area such as Mdantsane, which is geographically part of East London but constitutionally part of the Ciskei. As a consequence, they have been required to furnish security for costs when instituting action against a South African incola.[46]

As international law models of due process as well as the facts of world history suggest, the right to citizenship is "limited in its value" without the right of free and equal access to independent courts.[47]

2. The Right Not to be Deprived Arbitrarily of Citizenship

Another special human right attaching to citizens is the right not to be deprived arbitrarily of citizenship. One element of citizenship and the

---

43. R. W. JULY, A HISTORY OF THE AFRICAN PEOPLE 445 (1970); *see also id.* at 443-45; Ancel, *The French Law of Naturalization*, 10 TUL. L. REV. 231, 234-36 (1936).

44. The outrageous historical denial of the vote to women in this country (until passage of the nineteenth amendment) does not disprove the historical connection between citizenship and the franchise. Unfortunately, women were branded legally incompetent in this area, along with such citizens as children, convicted felons, or certain mentally retarded individuals.

45. Address by A.J. Milne, Annual General Meeting of Lawyers for Human Rights (Aug. 6, 1983), *reprinted in Equal Access to Free & Independent Courts*, 100 S. AFR. L.J. 681 (1983).

46. Budlender, *A Common Citizenship?*, 1 S. AFR. J. HUM. RTS. 210, 216 (1985) (footnotes omitted).

47. *Id.*

freedom of equality it traditionally has implied is the difficulty of losing citizenship. The earliest citizens, in classical Athens, could not be enslaved publicly or privately (except according to the peculiar law of ransom).[48] While special legislation providing for naturalization or cession of territory may grant citizenship, instances of wholesale deprivations of citizenship by legislation without the consent of the populace are rare, and of dubious legality.[49] This is especially true of deprivations based explicitly or implicitly on racial factors, which would violate international norms against racial discrimination.[50]

Beyond voluntary expatriation,[51] nations have recognized ways in

---

48. M. I. FINLEY, ECONOMY AND SOCIETY IN ANCIENT GREECE 148 (1981).

49. While instances of denationalization have occurred before, after the Bolshevik Revolution or the Fascist takeover in Italy, for example, the most directly analogous precedent to South Africa's action, the Nazi divisions of citizenship and denationalization of the Jews under, respectively, the Nuremburg laws of 1935 and Hitler's decree of 1941, has been roundly criticized as violating fundamental rights. Garner, *Recent German Nationality Legislation*, 30 AM. J. INT'L L. 96, 99 (1936) (although probably within the legislative competence of domestic law, statute is disapproved as racial discrimination and violation of fundamental rights); Mann, *The Present Validity of Nazi Nationality Laws*, 89 LAW Q. REV. 194, 199 (1973) (on natural law grounds). The 1935 laws divided the population into two classes based on possession of German or Jewish racial qualities. The *Staatsanehorigen*, or nationals of the Reich were entitled to some protection, many duties and few rights. The *Reichsburger*, or Citizen of the Reich, was entitled to full potential rights based on possession of racial qualities. "In this report it is believed that the new German law is without precedent in the nationality legislation of modern civilized states." Garner, *supra*, at 98.

The other primary documented instances spring from the experience of colonialism, where imperial citizenship was taken away upon the grant of independence. Citizenship in the colonial context was, of course, a desired source of valuable rights. Presumably, the existence of popular consent in genuine grants of independence to colonial countries distinguishes such relinquishments of citizenship from the deprivation at issue in South Africa. South Africa's deprivation of extant citizenship also may be distinguished, for example, from the refusal of a state such as the United States to extend citizenship to inhabitants of "unincorporated" territories over which the United States has exerted authority. *See* McGovney, *Our Non-Citizen Nationals, Who Are They?*, 22 CALIF. L. REV. 593 (1934).

Because of traditional state discretion over nationality, some doubt exists whether denationalization alone violates international law, arbitrary deprivation of nationality (based on race, for example) raises more questions. *See* H. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW 163 (1959). The present day rule of general international law seems to be that *discriminatory* denationalization is prohibited in international law — certainly on the basis of race, but probably also on the grounds of sex, language or religion which are mentioned in the U.N. Charter. P. WEIS, *supra* note 12, at 125.

50. *See infra* notes 187-92 and accompanying text.

51. The right of voluntary expatriation was first given to Americans by Congress in

which citizenship or nationality can be lost as a penalty for conduct which a government may consider as unbecoming of its citizens. In the United States, for example, a citizen was formerly subject to automatic expatriation for committing treason, taking an oath of allegiance to another country, or serving in another country's armed forces. Now a United States citizen can lose citizenship only by voluntarily renouncing it.[52] South Africa still has provisions similar to the former United States law.[53] Statelessness therefore has occasionally resulted from a person's renunciation of citizenship or a homeland withdrawing citizenship or nationality as a punishment of some sort.[54] The lowest common denominator among these legal means of losing citizenship, however, is that all involve a crime, or some other voluntary action by the individual whose citizenship is at risk, which amounts to a breach of the bond of community which is citizenship. International law today recognizes as illegal any deprivation of citizenship or nationality on arbitrary grounds, such as racial features over which an individual has no control.[55]

Inherent within the modern concept of citizenship, therefore, are general concepts of liberty and equality[56] as well as specific rights such as the right to political participation and the right not to be deprived arbitrarily of citizenship. The recent rhetoric of the South African govern-

---

1868, elaborated in 1907, and carried through in the Immigration and Nationality Act of 1952. *See* 8 U.S.C. §§ 1481-89 (1982). An individual born in the United States can now only lose United States citizenship by voluntarily renouncing it. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958). South Africa provides for a similar right of voluntary expatriation, The South African Citizenship Act, §§ 15-16, No. 44 (S. Afr. 1949).

52. *See supra* note 50.

53. South African Citizenship Act § 19, No. 44 (S. Afr. 1949).

54. *See* P. WEIS, *supra* note 12, at 118.

55. *See supra* note 49.

56. For this reason, Rawls assumes equal citizenship as a constituent condition of his just society and writes that "equal citizenship defines a general point of view. The problems of adjudicating among the fundamental liberties are settled by reference to it." J. RAWLS, A THEORY OF JUSTICE 97 (1971). Daniel Bell describes the legitimacy of the policy in similar terms:

> The implicit condition is the idea of equality, that all men are to have an equal voice in [the consensus which forges the consent of the governed]. . . . [T]he idea of citizenship which embodies this conception has in the past 100 years been expanded to include equality not only in the public sphere, but in all other dimensions of social life as well — equality before the law, equality of civil rights, equality of opportunity, even equality of results — so that a person is able to participate fully, as a citizen, in the society.

D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 11 (1976).

ment rings with new affirmations of the ideal of equal rights.[57] Yet South Africa continues to deny equal rights because its concept of citizenship differs so radically from the modern concept of citizenship outlined above. Not only has South African citizenship been taken away arbitrarily and restored selectively, but race as well as citizenship persists as a qualification for the franchise.[58]

III. The Evolution of South African Citizenship Policy

Blacks have never been full citizens of South Africa in the sense employed in the domestic municipal law of either South Africa or the United States. Citizenship, as discussed above, usually refers to the status of an individual in terms of state civil and political rights. Yet the tradition of racial prejudice against blacks in South Africa, perhaps combined with the keen sense of Afrikaner cultural identity which emerged especially after the two Boer wars at the turn of this century, has persistently resulted in the denial of citizenship to blacks. White South Africans have been unwilling or unable, in general, to recognize the communitarian bond with blacks which would form the essence of citizenship.

The lack of a sense of community among blacks and whites in South Africa stems in part from the lack of a national constitution symbolizing common political ideals. Citizenship in the American constitutional scheme serves as a "fellowship which binds people together."[59] Attachment to "the principles of the Constitution" is the essence of this fellowship.[60] Such attachment if, of course, impossible for blacks in South Africa as presently constituted. Nevertheless, it is unreal to say that blacks, whites, and the other races in South Africa do not form an actual "community." Empirically, the close relationship in South African blacks and whites is communal, in the sense that black and white alike has each used the relationship to define the other's sense of self. This remains true

---

57. *See, e.g.*, Remarks of Dr. P.G.J. Koornhof, then Minister of Cooperation and Development, in 1980: "We can be, and are, well on the way to achieving [in South Africa] equality for all people before the law and equal chances and opportunities." Financial Times, Feb. 1, 1980, at 1; *see also* Liaison Services of the Department of Constitutional Development and Planning, A Summary of the White Paper on Urbanisation 3 (1985) (government reaffirms its commitment to respect human dignity and implement "a democratic dispensation . . . with equal treatment and opportunities for everybody") [hereinafter Summary of The White Paper on Urbanisation].

58. From the Diaries of Felix Frankfurter 211-12 (J. Lash ed. 1975).

59. *Id.*; *see also* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. Rev. 303 (1986).

60. *See* Republic of South Africa Constitution Act § 52, No. 110 (S. Afr. 1983).

despite the serious conflicts over values in South Africa. Racist whites need to open themselves up to the real community that exists, even if it exists as a result of interdependence, shared history and geography more than shared values. In this way, shared values might ultimately be achieved.

Although the laws and the franchise of the early Cape (under British influence from 1806 onwards) were formally color blind, the franchise in the Orange Free State and the South African Republic (Transvaal) was limited to citizens. Unfortunately, citizenship was limited to whites.[61] Upon union in 1910, the Cape retained its qualified franchise based on economic and educational requirements, but the northern provinces continued to limit "burgerskap," or full citizenship, to whites. As the Cape became more legally integrated with the rest of South Africa, especially under the Nationalist Party of 1948, even this franchise for blacks became separate representation and eventually was eliminated altogether. The new constitution approved in late 1983 still excludes blacks.[62] In light of conventional or legal standards, blacks have never been more than second-class citizens in South Africa.[63]

A. *Influx Control*

Influx control laws have substantially influenced current citizenship policy. Influx control in the form of legislation designed to exclude blacks from colonized white areas has existed in South Africa for centuries. What became known as "the pass laws" required blacks to have a pass to enter the Cape Colony as early as 1797. Thus, severe restrictions on freedom of movement existed long before blacks were relegated to "independent states." Some pass laws allowed cheap black labor to remain in the colony as the interests of the white populace dictated, but the history of influx control is primarily exclusionary, rather than inclusionary.[64] Although the government announced the repeal of the pass laws and the Urban Areas Act on April 22, 1986,[65] the Group Areas Act[66]

---

61. *See* H. R. HAHLO & E. KAHN, SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 74-76, 84-110 (1960).

62. Republic of South Africa Constitution Act § 52, No. 110 (S. Afr. 1983).

63. *See* A. SACHS, JUSTICE IN SOUTH AFRICA 63, 70 (1973); *accord* J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 22 (1978).

64. *See* Budlender, *Incorporation and Exclusion: Recent Developments in Labour Law and Influx Control*, 1 S. AFR. J. HUM. RTS. 3, 3-4 (1985).

65. *See* N.Y. Times, Apr. 24, 1986, at A1, col. 6.

66. No. 36 (S. Afr. 1966); *see supra* note 11 and accompanying text. The South African Government has made clear that "existing measures with regard to separate living areas for the various population groups in towns and cities will still be observed."

and the current citizenship policy of homelands and independent states continue in force. The current citizenship policy carries the exclusionary imperative to an extreme. Influx control reaches its peak when those the executive deals with have been classified and treated as "aliens" under the citizenship policy. Yet, the citizenship policy retains inclusionary aspects in the form of an expanded migrant labor system.[67]

Land reservation has been a key to influx control and remains a foundation of South Africa's citizenship policy. The legislative structure of influx control established prescribed (usually urban) and nonprescribed (rural farmland and mines) areas within residual "white" South Africa.[68] Separate "states" were a logical outgrowth of these separate "areas".

The concept of separate territories hearkens back at least as far as the "Bantu" Land Act of 1913,[69] which set aside about seven percent of the country for black ownership and occupation, and the "Bantu" Land and Trust Act of 1936,[70] which increased the total area to thirteen percent of the country. Black acquisition of land outside these territories was prohibited. These reservations of land have been called various names as separate development has proceeded: reserves, Bantustans, homelands, territories, and now "independent" and nonindependent states. The land reservations have resulted in only patchwork units, and an "independent" state is often discontinuous and fragmented.

B. The Evolution of Separate Development

In 1948, the Nationalist party was elected on a platform of apartheid, but not the sophisticated "separate development" form of apartheid dominant today. The 1948 form of apartheid was a crude *baasskap*[71] form, premised on white domination. With this mandate, the Nationalists proceeded to intensify and broaden racial discrimination through a spate of repressive statutes. Implicit within the *baasskap* approach, however, was always a germ of separate development. The Reservation of Separate Amenities Act of 1953,[72] which set in place the "separate but unequal"

SUMMARY OF THE WHITE PAPER ON URBANISATION, *supra* note 57, at 3.

67. *See* Budlender, *supra* note 64, at 6.

68. *See* Blacks (Urban Areas) Consolidation Act, No. 25 (S. Afr. 1945), *repealed by* The Abolition of Influx Control Act of 1986, No. ___ (S. Afr. 1986) (effective July 1, 1986).

69. No. 27 (S. Afr. 1913).

70. No. 18 (S. Afr. 1936).

71. Literally, "boss-ship."

72. No. 49 (S. Afr. 1953). The long-expected intent to repeal this anachronistic leg-

doctrine of South Africa at the very time the United States Supreme Court[73] was preparing to repudiate the "separate but equal" doctrine,[74] illustrates this plan of separate development. Even as the international community edged away from the sort of racial discrimination exposed after Nazi Germany's atrocities in World War II, South Africa continued to emphasize separate development.

The Bantu Authorities Act of 1951[75] approved tribal authorities for the homelands, and further steps toward self-government occurred during the remainder of the 1950s. The South African government paid and appointed black chiefs to replace white magistrates. The government eliminated white representation of blacks in South Africa's Parliament, partly because it did not promote the goal of preparing for black territorial self-government. Near the close of the decade, Prime Minister Dr. H. F. Verwoerd, the late architect of South Africa's current citizenship policy, directed the passage of the Promotion of Bantu Self-Government Act of 1959.[76] At the time of this act's passage, Verwoerd justified the policy by appealing to the principle of self-determination present in the United Nations Charter and the driving force of the emergent decolonization movement. The new policy, said Verwoerd, was "in line with the objects of the world at large."[77]

In the 1960s, South Africa granted Transkei the singular status of becoming a "self-governing" territory with its own flag, national anthem, and language (Xhosa). Black Transkeians received Transkeian "citizenship" (on explicitly racial grounds) but retained their South African citizenship. After this action, the pace of separate development slowed. Professor John Dugard explains the grant of self-government to only one territory by South Africa's need to appease the international community while the first *South West Africa Cases* were pending.[78] After South Africa won a technical victory in the World Court,[79] and Verwoerd died,

---

islation was confirmed by President P. W. Botha on October 1, 1986. *See* Wall St. J., Oct. 8, 1986, at 39, col. 2.

73. *See* Brown v. Board of Education, 347 U.S. 483 (1954).

74. Plessy v. Ferguson, 163 U.S. 537 (1896), established the separate but equal doctrine repudiated by *Brown*.

75. No. 68 (S. Afr. 1951).

76. No. 46 (S. Afr. 1959).

77. SOUTH AFRICAN HOUSE OF ASSEMBLY DEBATES, col. 6221 (May 20, 1959); *see* Note, *The Transkei: South Africa's Illegitimate Child*, 12 NEW ENG. L. REV. 585, 598-99 (1977).

78. J. DUGARD, *supra* note 63, at 91.

79. South West African Cases, Second Phase, 1966 I.C.J. 6.

the impetus for granting self-government had disappeared.[80]

With the coming of detente with other African nations in the 1970s, the South African legislature again appealed to the principle of self-determination by passing the "Bantu States" (now "National States") Citizenship Act of 1970.[81] Section three of this act made *all* blacks not already citizens of self-governing territories into citizens of the territory to which they were attached through birth, domicile, or cultural affiliation. This determination of citizenship occurred without regard to whether blacks had lived in the relevant area. Unlike later legislation, however, this Act did not remove South African citizenship, and consequently blacks did not notice the legislation because it did not cause them any concrete disadvantages. The "Bantu Homelands" (now "National States") Constitution Act 21 of 1971[82] issued each territory a constitution. In 1974, the self-governing territory of Transkei opted for "independence," which was officially granted in 1976. Of the ten ethnic homelands that remained constitutionally within South Africa, seven — Bophuthatswana, Venda, Ciskei, Lebowa, Gazankulu, QwaQwa, and KwaZulu — had achieved self-government by 1977.

The South African government expected recognition for Transkei, but the international community denied recognition. The United Nations General Assembly condemned the grant of independence, a position later affirmed by the Security Council.[83] Riots in Soweto and elsewhere in South Africa in 1976 were one factor in refusing recognition, but the primary justification for denying recognition was the broad reach of the independence-conferring statute. It purported to extend Transkeian citizenship to individuals attached to Transkei only by the most remote and tenuous link. Bophuthatswana, Venda, and Ciskei became independent in 1977, 1979, and 1981 respectively, but the South African government has given up any serious hopes that they will be accepted by the world community.[84]

Despite P. W. Botha's announcement in September 1985 that the government would discontinue the policy of stripping blacks of their citizen-

---

80. J. Dugard, *supra* note 6, at 14.

81. No. 26 (S. Afr. 1970).

82. No. 21 (S. Afr. 1971).

83. J. DUGARD, *supra* note 63, at 96.

84. On the other hand, South Africa's recent insistence, via Bophuthatswana's Internal Affairs Ministry, that nationals of neighboring states recognize Bophuthatswana and obtain "visas," seems to indicate a new interest in securing external recognition for the "independent state." *Summary of World Broadcasts* (British Broadcasting Corporation Jan. 12, 1987). Such border restrictions also are designed to demonstrate the dependence of truly independent neighboring states on South Africa.

ship, South Africa's ideology of separate development remains strong.[85] The curiosity of legal commentators about Botha's commitment to separate development through manipulation of citizenship[86] unfortunately has been satisfied. Botha was elected in 1979. Venda became independent in 1979 and Ciskei in 1981. KwaNdebele was scheduled for independence in 1986; that it did not receive independence is wholly attributable to internal protest, as opposed to any action or attitude of the South African government.[87] Moreover, despite the dwindling legislative structure of petty apartheid (the many old laws of overtly discriminatory white domination), grand apartheid (the new laws stressing separate development) remains intact. If there were any doubt, the evidence of the new constitution, which co-opts Indians and Coloreds into mainstream national politics but still manifests the idea of racial segregation (although in different houses of Parliament) and completely excludes blacks, makes clear the degree to which separate development is fundamental. Many observers continue to link limited local government participation by blacks with the "independent states"; indeed local authorities have only minor powers, subject to white authority. In short, the new constitution considers members of the black majority to be primarily citizens of the homelands or "independent states," with no provision for meaningful political accommodation in South Africa.

C. *The Legislative Process of Independence*

The statutes by which the South African Parliament has deprived ten million people of citizenship by conferring independence on four homelands[88] are substantially alike. Each statute concisely confers independence as of a certain date, and the territory's legislative assembly then

---

85. It is only the "purity" of the separate development ideology which has been abandoned by the Botha government. Dugard, *supra* note 6, at 12.

86. *Id.* at 16-19.

87. KwaNdebele, established to supply labor to Pretoria, is a small homeland in which four-fifths of the residents commute to "white" Pretoria daily. On May 8, 1986, KwaNdebele's Chief Minister Simon Skosaha, elected by only 600 of the 400,000 residents, confirmed plans for a December 11, 1986 independence date. The Chief of the Ndebele tribe, and the vast majority of KwaNdebele's citizens, opposed independence. After seven months of violence in which 125 people were killed and one-half the territory's businesses closed, and which culminated in the car bomb murder of independence supporter Piet Ntuli, the KwaNdebele assembly reversed its position and rejected independence on the grounds that it would deprive inhabitants of South African citizenship. *See* Christian Science Monitor, Aug. 13, 1986, at 2, col. 1.

88. Transkei (1976); Bophuthatswana (1977); Venda (1979); and Ciskei (1981). *See* the independence-conferring statutes cited in note 16, *supra.*

enacts its own constitution. The constitutions vary somewhat, but basically are modeled on South Africa's constitution. Bophuthatswana's constitution contains a bill of rights based on the European Convention on Human Rights, but the bill of rights has been granted only limited effectiveness since its inception.

After independence is conferred, each statute contains a "section 6" which provides that

> Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of [the "independent state"] and shall cease to be a South African citizen. . .

. . . .No citizens of [the "independent state"] resident in the Republic at the commencement of this Act shall, except as regards citizenship, forfeit any existing rights, privileges or benefits by reason only of the other provisions of this Act.[89]

Although Schedule B differs slightly from statute to statute, it essentially lists the following ethno-linguistic categories of persons who become citizens of the "independent state" and "cease to be" South African citizens:

> 1) Every person already designated as a citizen of the homeland under the National States Citizenship Act of 1970 (which attributes citizenship based on birth, language or cultural links with the homeland).
> 2) Every person born in or outside of the independent state of parents one or both of whom were citizens of the homeland under the National States Citizenship Act.
> 3) Every person who has been lawfully domiciled in the homeland for at least five years.
> 4) Every South African citizen who is not already a citizen of another homeland or this independent state, who speaks a language used by members of any tribe of the independent states, or any dialect of such language.
> 5) Every South African citizen who is not already a citizen of another homeland or this independent state who is (a) related to any one who speaks a language of the independent state's tribes, or (b) "has identified himself with any part of such population or is culturally or otherwise associated with any member" of such population.

By focusing on language and culture, as well as birth, descent, and domicile, the categories scrupulously avoid specific reference to race. They even contain sweeping language which would deprive *any* person

89. *See, e.g.*, Restoration of South African Citizenship Act § 6(1)-(2).

— including a white person — who speaks a tribal language (or is otherwise "identified" or "associated with" any member of the independent state populace) of South African citizenship. The language is thus not strictly limited to blacks, but the comprehensive reach of the statute is geared primarily toward encompassing the racial characteristics which have made blacks "citizens" of the homelands in the first place. In practice, implementing authorities have construed the statute as applying only to blacks. No white (or Colored or Indian) South African has been deprived of his or her citizenship under the independence-conferring statutes.[90] If Transkei can for a moment be spoken of as "independent," the Transkeian government put up some initial resistance to the attempt of the South African government to confer Transkeian citizenship on the millions of Xhosa speakers living within the Republic of South Africa. The squatter settlement of Crossroads outside of Capetown, which contained many Xhosa speakers (labeled citizens of Transkei and Ciskei), was consequently the temporary focus of a dispute with the Transkeian government. The issue has become moot because South Africa has dealt with the Crossroads settlement through a combination of repressive resettlement and conciliatory "negotiation" techniques, while continuing to view citizens of Transkei as noncitizens of South Africa. In any event, the function of the Transkeian government in conferring citizenship is less objectionable than the attempt of the South African government to deprive almost ten million people of citizenship and then selectively make citizenship available again to only a small fraction of that number.[91]

In addition to the grant of independence, the statutes view the new fictional entities created by South Africa as true sovereign states and full actors on the scene of international relations. South Africa sees these entities as having rights to issue passports, hold elections and levy taxes. In fact, the language of international law is even applied anomalously to pre-"independence" relationships. The statutes provide that South African legislation and "agreements" in force in the homeland prior to independence continue in force. These pre-"independence" agreements between the "independent states" and the Republic of South Africa continue as "international treaties," or "interstate agreements." These define the practical responsibilities of South Africa and the "independent states" in such areas as travel, transport, industrial development and defense. Because the agreements leave major power and influence in the hands of South Africa, they also work to defeat the characterization of

90. Dugard, *supra* note 6, at 25.

91. *See* J. DUGARD, *supra* note 63, at 95.

the new states as "independent." Local authorities, however, are given at least nominal authority to repeal or amend such legislation and treaties.

D. *Citizenship "Restored"*

The South African government is adept at using labels as a means of social control. As in the United States under slavery, blacks are not "persons" subject to equal dignity and respect. Until 1979 South African law excluded blacks from the statutory definition of "employee" and therefore they were not allowed to form unions under the Labour Relations Act.[92] The Blacks (Abolition of Passes and Co-ordination of Documents) Act of 1952[93] actually required blacks to carry separate passes containing information identifying them as a member of a particular ethnic group with a certain tax and employment history. Similarly, the effect of the Restoration of South African Citizenship Act is not exactly what its title suggests.

President Botha had led black South Africans and the international community to believe that all ten million blacks who had been dispossessed of South African citizenship would be restored to South African citizenship.[94] South African officials have made clear, however, that they do not consider it possible or desirable to abolish the "independent states," and have stated that the new legislation affects only 1.75 million of those designated citizens of the independent states.[95] These citizens are

---

92. Labour Relations Act, No. 28 (S. Afr. 1956), *amended by* Industrial Conciliation Amendment Act, No. 94 (S. Afr. 1979).

93. No. 67 (S. Afr. 1952).

94. The United States Administration apparently still accepts the thrust of this representation as being true. *See supra* note 5.

95. South African Minister of Home Affairs Stoffel Botha and Director General of the Home Affairs Ministry Gerrie Van Zyl confirmed this interpretation of the law in statements widely reported in the international press in late July, 1986. *See, e.g.*, Christian Science Monitor, July 29, 1986, at 1, col. 1; Wash. Post, July 28, 1986, at A13, col. 3; Johannesburg Sunday Star, July 27, 1986. Member of Parliament and Chief Research Officer for the opposition Progressive Federal Party Nie Olivier accused the South African Government of a "clear breach of an undertaking." Even the President of Bophuthatswana, Lucas Mangope, regarded as a close ally of Pretoria, charged that the government had broken undertakings given in negotiations with his administration. Reuters North European News Service, July 29, 1986, A.M. Cycle (NEXIS News file). Mangope has gone on record against dual citizenship. *See, e.g.*, Claiborne, *Transvaal Blacks Face Dilemma*, Wash. Post, Sept. 22, 1986, at A25, col. 1. This position could be the show of ego of the head of an "independent" state, but it also might be the position that the South African government desires Mangope to take: refusing to agree to the restoration of citizenship. The Johannesburg Sunday Star called the Government's action a "massive breach of faith," and the conservative newspaper Business Day said that

predominately urban blacks who permanently reside in "white" South Africa and who lost South African citizenship upon independence of their "homeland."[96] Rural blacks in non-independent homelands will also be eligible to reapply for citizenship. The Act still excludes blacks born in independent states after independence, who never had South African citizenship to lose, along with the approximately eight million residents of the independent states themselves.

The South African Government's position is in keeping with its new acceptance of "the permanency of urban blacks" and recognition of the need to accommodate the "legitimate political aspirations" of urban blacks by structures within South Africa.[97] Apparently, the legislation was not intended to assist the bulk of those blacks stripped of citizenship who are resident in the independent states. The South African Government certainly desired this state of affairs, but the legal and conceptual difficulties the government foresaw with a re-extension of citizenship to the residents of what are considered "independent states" probably reinforced South Africa's decision.[98]

Although the Restoration of Citizenship statute appears to be intentionally vague, complex and confusing, it defines the crucial "citizenship by birth" by resurrecting the key concept of "permanent residence" from the now repealed Urban Areas Act.[99] Although this crucial term designating the primary qualifications for South African citizenship remains undefined in the new Act, it presumably would take its meaning

---

"gullible folk who took President Botha at his word have been tricked." Wash. Post, July 28, 1986, at A13, col. 3. Far from offering a "direct contradiction of grand apartheid," as stated by Alan Cowell, N.Y. Times, July 6, 1986, at 8, col. 5, the legislation more accurately appears to streamline grand apartheid to accommodate a limited number of black laborers.

96. As was the intent made clear by President Botha in September of 1985. *See* September Statement by P. W. Botha, *supra* note 3, at 8-9.

97. *See* SUMMARY OF THE WHITE PAPER ON URBANIZATION, *supra* note 57, at 5; *see also* September Statement of P. W. Botha, *supra* note 3, at 7-8.

98. Though the Government had no such difficulties when it passed the National States Citizenship Act, No. 26 (S. Afr. 1970).

99. *See* Restoration of South African Citizenship Act § 2(a)(i-ii), No. 73 (S. Afr. 1986), which sets out the primary grounds for restoration of citizenship as follows: A citizen of an independent state shall be a South African citizen by birth if born in the Republic before the independence-conferring statute and ceased to be a South African citizen by way of that statute and (i) immediately before the commencement of this Act was permanently resident in the Republic and has been so resident since becoming a citizen of that independent state; and (ii) informs the Director-General in writing of desire to regain South African citizenship. *See also, e.g.*, Mathebula v. Ermelo Municipality, 1955 (IV) S. Afr. L. Rep. 443, 444-45 (discussing permanent residence).

from section 10 of the old Urban Areas Act which delineated the exemptions allowing blacks to live in urban areas.[100] These exemptions at least would be valid evidence of permanent residence. While those who had the exemptions entitling them to section 10(1)(a) through (c)[101] rights under the Urban Areas act would almost certainly be permanent residents under the Restoration of Citizenship Act, the government might view those with mere administrative permission under section 10(1)(d)[102]

---

100. The explicitly discriminatory legislation prohibited blacks from remaining in prescribed urban areas for more than 72 hours unless they had obtained an exemption by way of: a sustained period of continuous lawful residence since birth in the area; continuous employment within the area for one employer for not less than ten years; continuous residence within the area for not less than fifteen years as the wife or dependent of such a person and resident with him in that area; or permission to remain in the urban area. Blacks (Urban Areas) Consolidation Act § 10(1)(a)-(d), No. 25 (S. Afr. 1945), *repealed by* The Abolition of Influx Control Act, No. ___ (S. Afr. 1986) (effective July 1, 1986). The fact that blacks may no longer acquire a right of permanent residence under section 10 means that blacks are ironically in a worse position than they were prior to the repeal of the pass laws and related influx control legislation. *See infra* note 124 and accompanying text.

101. Blacks (Urban Areas) Consolidation Act, § 10(1)(a)-(c), No. 15 (S. Afr. 1945), reads:

> 10. Restriction of right of Blacks to remain in certain areas.—(1) No Black shall remain for more than seventy-two hours in a prescribed area unless he produces proof in the manner prescribed that—
>
> (a) he has, since birth, resided continuously in such area; or
>
> (b) he has worked continuously in such area for one employer for a period of not less than ten years or has lawfully resided continously in such area for a period of not less than fifteen years, and has thereafter continued to reside in such area and is not employed outside such area and has not during either period or thereafter been sentenced to a fine not exceeding five hundred rand or to imprisonment for a period exceeding six months; or
>
> [Para. (b) substituted by § 3 of Act No. 97 of 1978.]
>
> (c) such Black is the wife, the unmarried daughter, or the son under the age of eighteen years, of any Black mentioned in paragraph (a) or (b) of this subsection and, after lawful entry into such prescribed area, ordinarily resides with that Black in such area; or . . .
>
> [Para. (c) amended by § 6 of Act No. 16 of 1979.]

102. *Id.*, § 10(1)(d).

> 10. Restriction of right of Blacks to remain in certain areas.—(1) No Black shall remain for more than seventy-two hours in a prescribed area unless he produces proof in the manner prescribed that—. . .
>
> (d) in the case of any other Black, permission so to remain has been granted by an officer appointed to manage a labour bureau in terms of the provisions of paragraph (a) of sub-section (6) of section *twenty-one ter* of the Black Labour Regulation Act, 1911 (Act No. 15 of 1911), due regard being had to the availabiity of accommodation in a Black residential area. . .

— typically, migrant laborers on successive one year contracts — as residents elsewhere.

Moreover, only those eligible blacks who affirmatively apply in writing to have their citizenship restored under the new statute will reacquire citizenship. An effective prerequisite for the restoration of citizenship is thus awareness of the right to citizenship and either the ability to act on that right or access to someone who can help claim the right, two attributes unavailable to many politically unaware, isolated, and illiterate or uneducated South African blacks.

The cumbersome application process required is also extremely discouraging. According to the basic terms of the Act, a person must prove birth in the Republic of South Africa before the independence date of the relevant homeland, as well as permanent residence in "non-black" South Africa (that is, outside of the "independent state") since the date of independence and immediately prior to July 1, 1986. In some cases, proof of permanent residence may require affidavits or more complex evidence. The application lines for citizenship have proven to be long and the forms difficult to complete. Worse still, the government issues the identity and citizenship documents only after approximately two months.[103] Many blacks view with suspicion the new identity documents which gradually will replace the old pass books[104] since the books contain much of the same information as the old reference books. Other blacks simply will not apply for the new identity documents because they distrust the white authorities[105] who have insisted for years that the old reference books be carried at all times. This fear, combined with the gradual phase-in of the new identity documents,[106] means that the old reference books probably will continue to be used for quite some time.

The South African government made clear in regulations published on July 25, 1986, that the eight million blacks living in the nominally inde-

---

103. *See* N.Y. Times, July 6, 1986, at 8, col. 5.

104. The Identification Act of 1986, No. ___ (S. Afr. 1986). This Act only partially repeals the Population Registration Act, No. 30 (S. Afr. 1950), which classifies all South Africans on the basis of race as either White ("European"), Indian, Coloured or African. The classifications in the Population Registration Act continue to be cross-referenced as part of the information required by the new identity documents.

105. *See* N.Y. Times, July 6, 1986 at 8, col. 5.

106. The Identification Act of 1986 § 8(3), No. ___ (S. Afr. 1986). An important object of the Act is "the gradual phasing in of the proposed new identity documents and coupled therewith the gradual phasing out of the existing identity documents and reference books, as it is not possible to replace at once the approximately 13 million reference books already issued with new identity documents." Memorandum on the Objects of the Identification Bill, 1986, § 3.

pendent states will continue to be viewed as noncitizen aliens in the land of their birth.[107] Black children born in the independent homelands after independence also will be aliens. That the government actually views the citizen-residents of the independent states as "aliens" is indicated by a comment made by Dr. Johan Pretorius, Chief Director of Migration, shortly after the new regulations were issued: the regulations would bring "alien blacks in line with other aliens."[108] Although the "independent" and nonindependent homelands are integrally connected geographically, historically and economically to "non-black" South Africa, and no other country besides South Africa even recognizes the existence of the "independent" states, the South African government will treat migrant workers from those states as if they were full aliens, for example, from France or the United States. Yet the black "alien" migrant worker from the "independent" state would not be treated as hospitably as a white national from France or the United States. The black "alien" migrant worker, unlike the white foreign visitor, almost certainly would be disabled from acquiring citizenship by naturalization. Even if the naturalization criterion of ready assimilation "with the European inhabitants of the Republic"[109] were not present, the naturalization provision in the South African Citizenship Act, like that of the Restoration of South African Citizenship Act, requires proof of right to permanent residence in South Africa.[110] As if that were not difficult enough, the Aliens Act makes it especially difficult for a foreigner to get permanent residence rights unless the Immigrants Selection Board determines that the alien is going to fulfill a job need not already sufficiently met by inhabitants of

---

107. *See* Memorandum of the Home Affairs Department of the Republic of South Africa (July 25, 1986). The regulations provide that migrant workers from the independent states are "aliens" whose employment is governed by the Aliens Act, No. 1 (S. Afr. 1937), which requires that employers have work permits in order to hire aliens, that prior to aliens' employment a "no objection to recruiting" recommendation be acquired from the Department of Manpower, and that consent from the Department of Home Affairs also be acquired. Failure to observe these requirements is an offense with heavier penalties than those under the Urban Areas Act. *See* Christian Science Monitor, July 29, 1986, at 36, col. 4; *see also* SUMMARY OF THE WHITE PAPER ON URBANISATION, *supra* note 57, at 8 (international migration control). The regulations thus prevent employers from hiring independent state residents without the consent of the Department of Home Affairs because they are considered aliens.

108. *Summary of World Broadcasts* (British Broadcasting Corporation, July 29, 1986).

109. *See* Aliens Act § 4(3)(b), No. 1 (S. Afr. 1937); *see also* South African Citizenship Act § 10(1)(c), No. 44 (S. Afr. 1949).

110. South African Citizenship Act § 10(1)(c), No. 44 (S. Afr. 1949); Restoration of South African Citizenship Act § 2(a)(i), No. 73 (S. Afr. 1986).

South Africa.[111] Thus, citizenship policy has become the new form of influx control, granting bureaucrats discretion over whether "independent state" citizens have established housing and employment so as to be able to move to "white" urban areas.[112] Passports have, in essence, replaced passes.

In summary, the new situation may be described as follows. The South African government's geographical frame of reference has changed; when officials speak of the "Republic of South Africa" they mean the residual geographic area including the homelands but excluding the "independent states." The nonindependent homelands will retain the "option" of "independence." The government envisions Indians and Coloreds as formally equal citizens of this new South Africa, but the segregated chambers of Parliament confirm that in terms of social position and power Indians and Coloreds will be essentially second-class citizens. Urban (and rural) blacks permanently residing in South Africa, including the nonindependent homelands, have the option of applying for restoration of South African "citizenship." Although this could result in an individual gaining the status of dual citizenship of both South Africa and the independent state, the added layer of South African citizenship more closely approximates a layer of nationality, or international legal protection, because South Africa continues to deny significant domestic law rights including the franchise.[113] Thus, "black citizenship" would not even amount to a third-class citizenship under the South African government's distorted concept of citizenship. Yet South Africa conceivably could afford to grant some form of franchise to its new urban black "citizens," because so many black South Africans remain aliens, completely excluded from the South African community. "Orderly Urbanisation" is simply the latest euphemism for separate development because separate living areas, the "independent states," and the migrant labor system will be preserved.[114] Not only has "citizenship" not been restored as the government promised the disenfranchised black majority, since the equal rights implied by the concept of citizenship are absent from the term as used by the South African government, but even this nationality in the guise of citizenship is available only to a limited number of peo-

111. Aliens Act § 4(3)(d), No. 1 (S. Afr. 1937).

112. *Cf.* West, *From Pass Courts to Deportation: Changing Patterns of Influx Control in Cape Town*, AFRICAN AFFAIRS 476 (1983); Budlender, *supra* note 64, at 7.

113. The citizenship afforded those blacks who apply for it thus more resembles the status of United States blacks under slavery than it does modern citizenship. *See* Dred Scott v. Sanford, 19 How. 343 (1857).

114. *See* SUMMARY OF THE WHITE PAPER ON URBANISATION, *supra* note 57, *passim.*

ple. For about eight million South African blacks, the severe consequences of exclusion from citizenship will continue.

E. *The Consequences of Continued Alien Status*

"Aliens" from the "independent states" are subject to almost unbridled administrative discretion due to the traditional executive power granted over aliens by South African legislation and English common law. The South African Aliens Act of 1937 reveals a remarkable xenophobia that has led to severe restrictions on aliens' freedom of movement, residence rights and labor rights. The Aliens Act does not distinguish between aliens of the "independent states" and aliens of legitimate sovereign states. Aliens may not enter the Republic without permission and are subject to summary arrest and deportation.[115]

South African common law, which grants broad reign to executive power as a result of the English notion of the Crown's prerogative, complements the harsh provision of the Aliens Act.[116] The Republic of South Africa Constitution Act of 1961 and the new constitution codify many of the executive powers.[117] Under the English notion of the Crown's prerogative, any rights granted to aliens exist strictly at the whim and license of the Crown. The discretion of the executive over aliens is absolute, especially with regard to issues of admission and deportation. In *Musgrove v. Chun Teeong Toy,*[118] the Lord Chancellor wrote that the plaintiff, a Chinese alien, could maintain his action in British Court only "if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right."[119]

This position has led to quite expansive language in a number of South African decisions and academic commentaries, to the effect that aliens have "no rights" and the discretion of the executive over aliens is "absolute."[120] Yet usually the context in which this expansive language

---

115. *See* Aliens Act §§ 2.5, 5 *bis*, 5 *ter*, No. 1 (S. Afr. 1937).

116. Union Government of Estate of Whittaker, 1916 A.D. 194, 210; H. R. HAHLO & E. KAHN, SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION, ch. 4 (1960).

117. *See* South African Constitution Act § 7(4), No. 32 (S. Afr. 1961); Republic of South Africa Constitution Act § 19, No. 110 (S. Afr. 1983).

118. 1891 A.C. 272.

119. *Id.* at 282; *accord* Atty. Gen. for Canada v. Cain, 1906 A.C. 542, 546 (State has supreme power to refuse aliens entry or deport them at will).

120. *See, e.g.*, Maluleke v. Minister of Internal Affairs, 1981 (I) S. Afr. L. Rep. 707, 711, 713; Administrateur Van Suidwes-Afrika v. Pieters, 1973 (I) S. Afr. L. Rep. 850, 861; Winter v. Administrator-In-Executive-Committee, 1973 (I) S. Afr. L. Rep.

appears is narrower than the language itself would dictate.[121] Even if aliens are present in the Republic at the "license of the Crown," surely their having this license is relevant to the issue of what rights they possess.

Obliterating the distinction between belligerant, enemy aliens, and friendly aliens has further confused the issue. In the case of enemy aliens, the "leave and license of the Crown" is understandably broader.[122] Yet judicial interpretation of restrictive South African legislation (like English common law) usually fails to distinguish between different types of aliens when taking rights away, even though the deprivation of rights should be reason for heightened judicial solicitude.[123] The primary areas of administrative discretion which will concern the members of the black majority who continue to be "aliens" are immigration, residence, and labor rights.

1. Immigration Rights and Deportation

In the area of immigration law, those blacks who have lost South African citizenship do not qualify for South African passports and, even if lawful residents, may be deported at the whim of the executive.[124] The government's arbitrary denial of passports[125] to citizens of independent

---

873, 891; BOOYSEN, VOLKEREG 347 (1980).

121. The decision of the Bophuthatswana Supreme Court is the only reported decision on the applicability in South Africa of "international agreements" between the Republic and its former homelands, and the application of the *audi alterum partum* rule (regarding the due process opportunity to be heard) was the narrow issue. Most of the English precedent cited by South African judges and commentators relates to entry or deportation. *See, e.g.*, Maluleke v. Minister of Internal Affairs, 1981 (I) S. Afr. L. Rep. 708.

122. *See, e.g.*, Beier v. Minister of the Interior, 1948 (III) S. Afr. L. Rep. 409, 452; Hoch v. Soble, 1916 [Transvaal Provincial Div.] S. Afr. L. Rep. 642, 646; Labuschagne v. Maarburger, 1915 [Cape Provincial Div.] S. Afr. L. Rep. 423, 429; Booysen, *Admission of Aliens into the Republic*, 90 S. AFR. L.J. 345, 347 (1973); Booysen, *Treaties, Enemy Aliens and Prisoners of War in South African Law*, 90 S. AFR. L.J. 386, 388 (1973).

123. *Cf.* Graham v. Richardson, 403 U.S. 365, 372 (1971).

124. *See* Aliens Act § 8(2), No. 1 (S. Afr. 1937); *see also* Admission of Persons to the Republic Regulation Act §§ 13(1), 16, No. 59 (S. Afr. 1972) (authorizing Minister of the Interior to order removal of even lawful entrants if he deems it in the public interest). The Internal Security Act § 14, No. 44 (S. Afr. 1950), also authorizes the deportation of any person who is not a South African citizen and who has committed an offense under the act or who is deemed undesirable because of "communist" affiliations.

125. When elder statesman of black protest Dr. Nthatho Motlana of Soweto's Civic Association wanted to travel, South Africa insisted that he use a Bophuthatswanan passport. Dr. Motlana refused dozens of invitations from overseas because he did not want to

states amounts to a serious deprivation of liberty, for although South Africa does not recognize a right to domestic or international travel,[126] the administrative discretion exercised under the influx control laws was at least subject to a limited judicial review. The repeal of the influx control laws combined with the traditional deference to the executive by the judiciary in the field of foreign affairs, however, has increased the scope of administrative power dramatically.

South African law does not deviate from international law by allowing the state executive to deport and exclude aliens. By the fiction of creating "independent states" carved out of South Africa, however, the government has created a unique and efficient means of ridding itself of "undesirable" (namely black) inhabitants of the country. The Minister of the Interior's decision to remove even lawful entrants under the Admission of Persons to the Republic Regulation Act is not subject to review, and he is not required to give any justification for his decision.[127] In the past, the government has used this Act to get rid of political opponents, but increasingly, however, the government uses it for routine population removals. This law was invoked to deport thousands of the Crossroads squatters outside Capetown in late 1981 to their "independent states" of Ciskei and Transkei without court proceedings.

The inverse of deportation is the government's ability to exclude non-South African citizens by refusing them admission into the Republic.[128] By compounding fiction on fiction, the government has for several years refused admission post hoc to those deemed citizens of "independent states" who reside in the Republic and ordinarily would qualify for urban residence rights under influx control legislation. The Local Development Board often responds to the applications of these people for residence rights by alleging that the only way they can be admitted would be through "diplomatic channels." As authority for this position the Local Development Board cites "interstate agreements" between the Republic of South Africa and the "independent states" which require the permis-

---

accept the implication that he was not a South African citizen, or take the risk that if he went without a passport he would be unable to return. N.Y. Times, Oct. 13, 1985, at 30, col. 1.

126. Nor is there an international right to travel recognized by the United States. *Compare* Kent v. Dulles, 357 U.S. 116 (1958) (passport may not be denied on basis of political beliefs) *with* Haig v. Agee, 453 U.S. 280 (1981) (revocation of passport authorized by Congress).

127. Admission of Persons to the Republic Regulation Act §§ 13-16, No. 59 (S. Afr. 1972); *see also*, *supra* note 118.

128. Admission of Persons to the Republic Regulation Act §§ 32-37, No. 59 (S. Afr. 1972).

sion of the respective governments before entry is allowed. The only changes are that now residence rights no longer may be achieved through influx control legislation, and residence or work permits for "immigrants" and their families from the "independent states" must be sought from the Department of Manpower and the Department of Home Affairs. The residence or work permit so granted, moreover, will be no shield against summary deportation.[129]

2. Residence Rights

Because permanent residence in the Republic is the key to restoration of South African citizenship, residence rights are precisely what the "aliens" of the "independent states" do not have. Although the Restoration of South African Citizenship Act leaves "permanent residence" undefined, the new regulations make clear that residents of any of the independent states who work in "white" South Africa while their families remain in the independent state will be considered alien migrant laborers ineligible for permanent residence.[130] "Independent state citizens" in South Africa usually were present illegally under the now repealed pass laws. Consequently, as with illegal aliens in other countries, they desperately sought to avoid seeking the very sort of evidence they now need to establish permanent residence.[131] Both "independent state" and nonindependent state citizens will continue to be subject to the provisions of the Prevention of Illegal Squatting Act.[132] This Act prevents squatting on public or private land and allows for the summary removal of squatters. Those who successfully apply for work permits will receive only temporary residence permits. Nor will the issuance of a work permit entitle the

---

129. Aliens Act § 2(a) (permanent residence permits issued only to those capable of ready assimilation with the European inhabitants of the Republic), § 5 (temporary residence permits, subject to cancellation at any time under § 8(2)), § 7 (Ministerial exemption from prohibition on aliens' residence, which may be withdrawn at any time under § 7(3)-(4)), No. 1 (S. Afr. 1937); *see also*, *supra* notes 118-19 and accompanying text.

130. Compare the position of most migrant laborers under the now repealed Urban Areas Act. *See supra* note 93; *cf.* Rikhoto v. East Rand Administration Board, 1983 (IV) S. Afr. L. Rep. 278, *aff'd*, Oos-Randse Administrasieraad v. Rikhoto, 1983 (III) S. Afr. Rep. 595 (holding invalid state policy of refusing to consider ten successive one-year migrant labor contracts to be continuous employment for ten years so as to meet the requirements for permanent residence rights under section 10 of the Urban Areas Act).

131. This is precisely the problem facing many illegal aliens otherwise eligible under the amnesty provision of the Immigration Reform and Control Act of 1986, No. ___ (S. Afr. 1986) (effective Nov. 6, 1986).

132. Prevention of Illegal Squatting Act, No. 52 (S. Afr. 1951).

wife or family of the worker to live with him.[133] "Aliens" have no right to reside in South Africa.

3. Employment Rights

As suggested in the discussions of immigration and residence rights above, the future position of the "independent state" worker in South Africa will be tenuous. He will work only as a migrant worker, and only so long as the authorities wish to allow him to work. Criminal penalties, including imprisonment as well as stiff fines, will apply to employers who hire illegal "aliens" or employ them on terms contrary to their permission to be in South Africa.[134] "Aliens" have no right to work in South Africa.

4. Life in the Homelands

Life in the homelands, "independent" or nonindependent, is a dreary affair at best.[135] The homelands are situated on the most arid, unattractive land in the country, and are extremely underdeveloped and overpopulated. Incredibly, but not surprisingly, the South African government has persisted in relocating blacks to the homelands despite government-commissioned studies which indicate that the land can tolerate no more people.[136] Overgrazing and soil erosion are severe problems. Less than one-fourth of Ciskei, for example, is free of soil erosion. During the international crusade in the last two years to help victims of famine in Ethiopia and other African nations, starvation, malnutrition, and infant mortality in parts of certain homelands were as bad as that in Ethiopia. Yet this starvation exists in South Africa, one of the wealthiest countries in the world.

In theory, the homelands are supposed to be economically viable; in practice, they are wholly dependent on South Africa. Separate develop-

---

133. In contrast to the situation of migrant laborers from the nonindependent homelands as determined in Komani v. Bantu Affairs Administration Board, Peninsula Area, 1980 (IV) S. Afr. L. Rep. 448. A woman who is an "independent state" citizen and wants to reside with her husband in South Africa, assuming he has accommodation, must apply to the Foreign Affairs Department in each "state." There is already a shortage of more than 400,000 homes for blacks in "white" South Africa. Financial Times, Apr. 2, 1986, at 3. Housing policy is thus another new form of influx control.

134. Aliens Act §§ 5(1)-(2), 10(2), No. 1 (S. Afr. 1937). Immigration Reform and Control Act of 1986 § 274A, No. ___ (S. Afr. 1986) (effective Nov. 6, 1986) (employer sanction adopted for the first time in the United States).

135. *See generally*, B. ROGERS, DIVIDE AND RULE: SOUTH AFRICA'S BANTUSTANS (1980).

136. *E.g.*, Tomlinson Commission Report (1955).

ment leads white South Africans to believe that the homelands are no longer part of the wider South African economy.[137] South Africa produces on the average sixteen times as much output per head as the homelands.[138] Of economically active people in the homelands, only one-fifth actually work there, two-thirds of these in subsistence agriculture. Of the remaining four-fifths, two-thirds commute to work in "white" South Africa.[139] Tens of thousands of black workers must get up hours before dawn in homelands like KwaNdebele to begin the three-hour journey to Pretoria, Johannesburg or Witbank.[140] The South African government has been forced to give the private bus company transporting workers on these long routes, Putco, huge subsidies.[141] Seventy-one cents on every dollar earned by residents of homelands is spent on imported products, and thus, leaks back into the white economy.[142] South Africa has used the tool of citizenship to deny economic responsibility for the homelands, spending far less than fifty percent per capita on homelands' inhabitants than on inhabitants of "white" South Africa.[143]

The physical poverty is paralleled by poverty of leadership. The South African government usually establishes homeland leaders.[144] The departure of South African power in the independent homelands has left power vacuums often filled by self-serving and corrupt officials. A high degree of official lawlessness and repressive force prevails.[145]

Millions of South Africans are citizens of homelands to which they have never been or to which they have little connection. As one black South African executive, now a citizen of QwaQwa, said:

> By definition I'm South Sotho and my homeland is QwaQwa. But I don't think of myself as South Sotho really. . . . I'm a cosmopolitan person. I come from a rich, intertribal background. . . . In any case, QwaQwa hasn't opted for independence yet. But the whole thing is ridiculous. Can

---

137. *Accord* Nattrass, *South Africa's Status in the International Development Stakes*, 1 Indicator South Africa, Economic Monitor No. 3, at 3, 4 (1983).

138. *Id.* at 6, table 1.

139. *Id.* at 7.

140. Financial Times, May 6, 1986, at 4.

141. *Id.*

142. Nattrass, *supra* note 137, at 7-8.

143. *See id.* at 9, figure 2.

144. Some homeland leaders, like KwaZulu's Gatsha Buthelezi, are more independent than others but still are viewed by many as serving the purposes of Pretoria. Buthelezi, however, has made a point of consistently refusing "independence" for KwaZulu. *E.g.*, L.A. Times, Aug. 11, 1986, at 2, col. 3.

145. *See, e.g.*, Haysom, *Human Rights Index*, 2 S. AFR. J. HUM. RTS. 108, 129 (1986).

> you imagine the reaction of a white South African if there were a black government here that suddenly said, "You have no political rights in South Africa because you come from France, Germany or Holland. Even if you are fourth generation, if you want to vote you must go back to Europe. . . ." I've never even been to QwaQwa.[146]

If deported or "voluntarily relocated" by government pressure from their home in South Africa to one of the "homelands,"[147] blacks often find themselves in a place where they know no one, have no house, no food and no job. The "independent" and nonindependent homelands are third world nations constructed for and by a first world country.

F. *Prospects for Effective Citizenship*

Effective citizenship for South African blacks entails some form of political rights, as suggested by the analysis of the modern meaning of the concept of citizenship in Section II above. The South African government has hinted that it accepts this abstract proposition, but its citizenship policy to date precludes the extension of political rights to residents of the independent homelands, and only holds out the possibility of drastically attenuated rights to those blacks acknowledged by South Africa as citizens.

The new constitution, adopted in 1983, continues to completely exclude blacks from political representation. The new state strategy clearly consists of co-option of a new black middle class (in the expansive sense of Indians, Coloreds, and African black urban and rural "insiders") which is expected to align with whites as a result of having a stake in the system. The claims of many blacks to political rights will continue to be denied on the grounds that they can exercise political rights in the "independent states."[148]

---

146. STUDY COMMISSION ON U.S. POLICY TOWARD SOUTHERN AFRICA, SOUTH AFRICA: TIME RUNNING OUT 281 (1981).

147. Over 3.5 million people have been removed forcibly to the homelands since 1960. Wash. Post, Sept. 22, 1986, at A1, col. 1. South Africa announced plans to discontinue this policy in February 1985, but "voluntary relocations" continue. Platzy, *Relocation in South Africa: A Review*, 1 S. AFR. J. HUM. RTS. 270 (1985); *see, e.g.*, Wash. Post, Sept. 22, 1986, at A1, col. 1 (150,000 settlers from Bloedfontein and Geweerfontein "resettled" to Bophuthatswana or Rust de Winter); N.Y. Times, Sept. 24, 1985, at A8, col. 1 (government commission proposal to "resettle" 42,000 people in connection with "consolidation" of KwaZulu).

148. Immediately after the government announced that citizenship would be restored to South African blacks, officials made clear that "citizenship did not imply political rights for those living in the homelands." N.Y. Times, Oct. 1, 1985, at A6, col. 3.

Regarding those blacks who are not eligible for restoration of South African "citizenship," the Botha Government has suggested in recent years that the problem of "power-sharing" may be approached from a long-term vantage point.[149] Yet affirmations of "separate development" ideology inevitably have accompanied such statements. Thus, after the announcement that citizenship would be restored, Botha announced his desire to replace traditional apartheid with structures for "cooperative coexistence."[150] He spoke of "units" that would be "recognized on a geographical and group basis," with each unit having "autonomy on matters affecting only that unit, while the units on the central level should manage jointly matters of mutual concern."[151] This is precisely the structure erected by the new constitution,[152] but extended to the whole country instead of merely "white" South Africa. The result would be some sort of federal structure[153] or "constellation" of states,[154] perhaps of varying degrees of legal independence or sovereignty, in which different classes of people could be easily granted different qualities of rights. To this end, President Botha has attempted to designate a "National Council" of blacks, with the stated objective of discussing legislation affecting blacks and ultimately drafting a new constitution for South Africa.[155] Most black leaders have rejected the "National Council," concluding that the proposal is a delay tactic and that the separate structures envisioned by the government merely will continue the "divide and rule" aspects of separate development.[156] Only South African citizens can be appointed to the Council. The ideology of separate development has constrained blacks' chances for effective political power, and the rejection of black enfranchisement suggests that it will continue to do so. Even if the gov-

149. N.Y. Times, Sept. 16, 1985, at A6, col. 3.

150. N.Y. Times, Oct. 1, 1985, at A6, col. 3.

151. *Id.*; *see also* N.Y. Times, Aug. 16, 1985, at A1, col. 6 (President Botha's speech envisions "goal of co-responsibility of participation," but not "one-man one-vote in a unitary system").

152. The new constitution of 1983 establishes separate chambers for Indians, Coloreds, and Whites, enabling non-whites to exercise some power over what the Executive State President designates as "own affairs," such as housing, education and health, but subject to the veto power of the white house of Parliament. *See* Republic of South Africa Constitution Act, No. 110 (S. Afr. 1983).

153. *See, e.g.*, Financial Times, Apr. 2, 1986, at 3.

154. *See, e.g.*, THE CONSTELLATION OF STATES (W. Bretenbach ed. 1980).

155. President Botha announced the plan for a National Council in January 1986. The Bill establishing the Council was published in May, asking for feedback by June 1986. *See Summary of World News Broadcasting* (British Broadcasting Corporation, May 27, 1986).

156. *See, e.g.*, Christian Science Monitor, Aug. 5, 1986, at 1.

ernment takes the large step of offering the right to vote to some blacks which it accepts as citizens, it will continue to exclude many other blacks. Such an offer would be consistent with the demands of radical right Afrikanerdom for a new state in which whites hold reinvigorated and absolute political power.

Another power-sharing plan which has been considered (and now at least tentatively rejected) is the Natal "Indaba,"[157] a proposal for provincial government in Natal. While based in part on the principle of ethnic separation — because it envisions an upper house divided into Zulus, Indians, English, Afrikaners, and generic "South Africans," to complement the lower house elected by universal suffrage — the Natal Indaba almost certainly would have resulted in a large black majority in the lower house and a black Prime Minister of Natal. Structural protections, including a bill of rights, were established to protect the rights of minorities, including whites. Nevertheless, the South African government refused to acquiesce in the dissolution of the KwaZulu homeland that would have been entailed by the Natal Indaba experiment.[158]

Negotiations with the "independent states" could yield restoration of South African "citizenship" to more blacks, but until South Africa gives that citizenship its modern meaning, the prospects for nonrevolutionary achievement of black political power in South Africa are bleak. The homelands/"independent state" structure might be difficult to dismantle, given the creation of administrations and bureaucracies with vested interests in perpetuating their positions. Nevertheless, the South African government has the actual power necessary to abolish the governments of the homelands and independent states as well as the homelands and states themselves. Such will be a necessary component of any transition to a post-apartheid society. However, with citizenship and the homelands structure, as with other areas of life long affected by apartheid legislation, social practices and patterns shaped by the law will not vanish with the simple wave of the magic wand of reform.

Accompanying the new denial of political rights is the concomitant decrease in legal protection afforded blacks who are relegated to the "independent states" or homelands. The law in the various independent states consists of South African law existing at the time of independence, which makes for much irrelevant law and confusion as to what home-

157. A Zulu word for "meeting of the people."

158. The draft Indaba proposals were rejected by Natal National Party leader Stoffel Botha in mid-December 1986. The final report was submitted to Pretoria in January 1987, and the government has delayed a "final decision" on the Indaba Proposal until after the May 6, 1987 elections. *See, e.g.*, Wall St.J., Feb. 11, 1987, at 18, col. 1.

land legislation will be given effect at a given time. It is today difficult to establish what the law in a given independent or nonindependent homeland is. Homeland legislation is often simply not available. Because the "independent states" purport to be separate new legal entities, any liberal reforms taking place in South Africa have no effect in the independent states.[159]

IV. CHALLENGING THE CITIZENSHIP POLICY

The thrust of this article so far has been to show that the modern meaning of citizenship involves political rights, rights that are being denied by South Africa's policy of restricting citizenship on dubious grounds and treating citizenship as if it were nationality. This Section discusses different approaches to challenging South Africa's citizenship policy.

Many logical and legal flaws in South Africa's citizenship policy exist, but they all relate to the nature of a racially based denial of citizenship pursuant to a plan designed to obscure existing racial discrimination. South Africa uses a cloak of international law to disguise its denial of political rights in domestic law. The fiction that states which have not been recognized by any member of the international community are "states," the fiction that these wholly dependent states are "independent," the fiction that ethno-linguistic categories are not "racial" categories, and the final fiction that citizens of an "independent state" are in some sense "equal" to South African citizens because they have rights "in their own state" all reveal that the citizenship policy amounts to a political dispensation that is neither genuine nor fair. The dispensation may be challenged on several fronts.

Specific legal flaws are discussed below in the context of possible legal theories for litigation challenging the policy; the major conceptual flaws are the attribution of citizenship based on ethnicity for blacks but not for the ethnically diverse whites of South Africa, the belief that separate development will yield harmony rather than discord in race relations, and the specious appeal to "self-determination" in justifying the policy. Of these, self-determination is the logical flaw most relevant to legal challenge.

---

159. *See, e.g.*, Whiteside & Haysom, *A Separate Development: Labour Legislation in the Homelands*, 5 INDUS. L.J. 251 (1984). This is especially true of the labor laws making up the migrant labor system.

A. *Domestic Legal Approaches*

The citizenship policy is clearly not open to challenge in the domestic courts of a nation other than South Africa because transnational law typically excludes such overtly political issues. Although South Africa's citizenship policy implicates what would be constitutional rights in other countries, the opportunities for constitutional litigation within the domestic courts of South Africa are extremely circumscribed because of the traditions of parliamentary sovereignty and only limited judicial review. Summary deportation also bypasses the courts, for example, so little room for maneuver in that area exists.[160] Even to the extent that public international law is accepted as part of South African law, which is a controversial matter,[161] the obstacles of legislatively curtailed jurisdiction and a judicial review that largely is limited to the regularity of administrative proceedings prevent courts from questioning the validity of South African legislation on international law grounds. Nevertheless, recourse to international law remains a possible option for liberal judges interpreting vague or ambiguous provisions of the independence-conferring statutes.[162]

Parliamentary sovereignty on the English model has long been the basis for the South African legal order, but the healthy English notion of Parliament as protector of popular liberty has not taken hold in South Africa. Consequently, the lack of a judicially enforceable bill of rights in South Africa has greater significance than in England. Put simply, a black whose rights of political expression, free movement, or equal protection are violated by South Africa's citizenship policy has little recourse to South Africa's courts to challenge the violation.

Statutory interpretation replaces constitutional exegesis in South Africa.[163] Statutory arguments challenging or obstructing the implementation of the government's citizenship policy are available. The Legal Re-

---

160. Admission of Persons to the Republic Regulation Act §§ 13, 16, No. 59 (S. Afr. 1972).

161. Professor John Dugard and many commentators support an "incorporation" theory and a comparative approach which locates international law norms within municipal law. Dugard, *International Law is Part of Our Law*, 88 S. AFR. L.J. 13 (1971); *see* South Atl. Islands Dev. Corp. v. Buchan, 1971 (1) S. Afr. L. Rep. 234, 238 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)). For the contrary view, see BOOYSEN, VOLKEREG (1980).

162. *See* Pitts, *Judges in an Unjust Society: The Case of South Africa*, 15 DEN. J. INT'L L. & POL'Y 49 (1986).

163. *See* Note, *Public Interest Law in South Africa*, 22 STAN. J. INT'L L. 153, 178 (1986).

sources Centre[164] in Johannesburg has long planned a test case in the citizenship area but could not bring it until the government clarified its position on urban blacks. Now that the new legislation makes clear that blacks "permanently resident" in South Africa will be eligible for restoration of citizenship, it may be time to bring such a test case.

The specific arguments involved in this case would have to be planned in careful detail, and it is best to limit public discussion, in any event, to only the broad outlines of the arguments. One approach would be to focus on the central concepts of "permanent residence" and "the Republic" in order to challenge at least part, rather than the whole, of the government's citizenship policy. The goal of this test case would be to expand the number of people eligible for South African "citizenship." The test case would not in and of itself vindicate the distinctive rights of citizenship suggested in Section II of this article. If the government actually imbued citizenship with limited political rights in the future, however, the beneficiaries of the test case would be able to profit from the expansion of rights. Moreover, recognition of these rights by a South African court would be a potent emotional and equitable reminder of the continued connection with one's birthplace which South Africa has traditionally accepted in theory as the criterion for citizenship. The resultant publicity would dramatize the issue for both domestic and international audiences, give a moral boost to the opponents of separate development, and force the South African government to deal with the millions of "aliens" who, under this analysis, would not be aliens after all.

In general, the ambiguity of the terms "permanent residence" and "the Republic" as used in the Restoration of South African Citizenship Act could be exploited in arguments that more blacks have permanent residence rights than the government expects, and that the "Republic" in which they reside is larger than the small "white" South Africa contemplated by the government. Because the Act leaves the phrase "permanent residence" undefined, blacks legitimately may argue that it includes not only the permanent residence rights granted under the exemptions in section 10(1)(a)-(c) of the Urban Areas Act, but also administrative permission granted under section 10(1)(d) of the Act.[165] Furthermore, blacks could argue that the evidentiary burden of proving permanent residence should be exceedingly light, because they often were discouraged from accumulating evidence of permanent residence by the now repealed

164. The Legal Resources Centre is the preeminent public interest law firm (on the United States model) in South Africa. *See id.* at 167.

165. *See supra* note 100 and accompanying text.

influx control laws.[166] Even squatters and temporary residence permit holders could be helped if an enlightened court were to accept this position. Thus, permanent residence should be assumed for purposes of litigation to be an expansive concept, despite the likelihood that the government intended it to be a restrictive concept.

Similarly, a technical argument can be constructed that the ambiguous and shifting use of the term "Republic" in the Restoration of Citizenship Act means that more people qualify for citizenship than expected. In interpreting the word "Republic," one has to deal with difficult problems of space and time. The unique definition of "Republic" in the Act provides that the word takes on different meanings, and the state which is the referent takes on different boundaries, depending on exactly where in the Act the word appears, and to what in the Act the word refers.

> In this Act a reference to the Republic, in relation to the birth, entry or residence of a person in or into the Republic, shall be construed as a reference to the territorial limits of the Republic as constituted at the time of such birth, entry or residence, as the case may be.[167]

The implicit assumption is that the event of independence determines the territorial boundaries of the Republic. Yet this assumption is not explicit in the language of the statute. In addition, the assumption glosses over the significant legal question of whether independence actually changed the boundaries of the Republic, in light of the fact that no other nation has recognized the "independent states." Further, this legislation itself tends to undermine the scheme of spinning off "independent states" by offering repatriation to some citizens of those "states."

The use of the word "Republic" is further flawed in that it sometimes derives its meaning not from the event of independence but from the time of "birth, entry, or residence." Section 2, which governs citizenship by birth, provides:

> Any person who in terms of an [independence-conferring statute] is a citizen of an independent state, shall be a South African citizen by birth if he — (a) was born in the Republic before the commencement of that Act and ceased to be a South African citizen in terms of that Act and — (i) immediately before the commencement of this Act was permanently

166. South African blacks subject to the Restoration of South African Citizenship Act should, in fact, be more successful with this argument than illegal aliens subject to the new U.S. Immigration Reform Act. This is because the purpose of the latter act are contradictory (providing for sanctions as well as amnesty), while the explicit purposes, at least, of the former act are ameliorative.

167. Restoration of South African Citizenship Act § 1(2), No. 73 (S. Afr. 1986).

> resident in the Republic and has been so resident since he became a citizen of that independent state; and (ii) informs the Director-General in writing that he is desirous of regaining South African citizenship. . . .[168]

According to the plain meaning of the statute the reference to the "Republic" in section 2(a) takes its meaning from birth before the event of independence, but the reference to "the Republic" in the continuation of the same sentence in 2(a)(i) is to residence after the event of independence. In reality, the borders of the Republic probably changed in the interim. The second reference to the Republic, therefore, may have a different meaning from the first reference to a variable but larger "Republic." The thrust of this interpretation is that the flexible definition of "the Republic" given in the Act is incoherent. A liberal judge either could throw out the narrow definition of "Republic" on this ground, or hold that the Act clearly contemplates a time before independence, so that the original "black *and* white" South Africa should be the reference point for eligibility for restored South African citizenship.

Both of these examples of creative approaches to statutory interpretation are vulnerable to more restrictive readings by positivistic judges, but both indicate the type of argument needed to point out the deficiencies in the new citizenship legislation. As mentioned above, the advantages of test cases challenging the citizenship policy are limited; the chances for success are not very great, and even an absolute victory would achieve only nationality for blacks, in the guise of citizenship, and in which those newly eligible for citizenship could share. Yet the arguments used in the test case also could be used at the administrative level, where blacks will be applying for residence rights, identity documents and restoration of citizenship. The chances of helping even a few people in even a small way make the effort worthwhile. At the very least, the test case would serve to publicize the issue both within and without South Africa.

B. *International Legal Approaches*

While the modern concept of citizenship has developed in conjunction with the international law on human rights, the rights of citizenship *as such* have not yet crystallized as rights enforceable under international law. The legal flaws in South Africa's citizenship policy impact human rights in general so significantly that international litigation on related but more traditional legal theories is a desirable alternative. International litigation would highlight the problematic statehood of the "independent states." Moreover, it would challenge the South African govern-

168. *Id.*, § 2(a)(i)-(ii).

ment's reliance on self-determination and international law for its policy of treating the black majority as a group of "aliens" subject to surveillance, exclusion and deportation. This litigation might add a new and legally authoritative voice, such as the International Court of Justice (ICJ), to the increasingly weak and repetitive condemnations of apartheid by the General Assembly and Security Council of the United Nations, and by individual states.[169] While international pressure through political channels remains important, rhetorical posturing alone is insufficient to challenge South African policies. The new significance of the citizenship policy requires a new strategy.

Because recognition by the international community is linked to legal existence, the states created by the citizenship policy have only a dubious and tainted statehood. Although they have the traditional prerequisites of de facto statehood,[170] the "independent" states remain dependent on South Africa both economically and politically. Doubts about their ability to effectuate the rights and duties of independent states persist.

South Africa finds self-determination attractive because it is enshrined in various international legal documents[171] and has served as the basis for third world decolonization. When opposition members of the Progressive-Reform Party attacked Nationalist plans for the independence of Transkei, for example, Nationalists responded by calling the opposition "imperialists" and "colonials."[172] On its face, the principle of self-determination might seem to apply, because independence is being granted to territories, much as it was during the decolonization movement. Simultaneously arguing for Namibian independence and nonrecognition of South Africa's "independent states" may therefore seem inconsistent.[173]

---

169. Over 100 increasingly virulent General Assembly resolutions dealing with South Africa's racial policies have been passed.

170. These prerequistes include: permanent populace, defined territory and capacity for international relations. *See* J. BRIERLY, THE LAW OF NATIONS 137 (6th ed. 1963).

171. *E.g.*, Declaration on the Granting of Independence to Colonial Countries and People, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960); U.N. Charter, ch. IX, art. 73; Declaration Regarding Non-Self-Governing Territories; International Covenant of Economics, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

172. Johannesberg Star, June 9, 1976; Rand Daily Mail, May 26, 1976.

173. Though most commentators see the colonial situation of Namibia as presenting distinct legal issues reconciliable with the arguably noncolonial context of the "independent" states, *e.g.*, Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185 (1978), other commentators have tried to argue that self-determination is achieved by the citizenship policy, at least

On the other hand, the principle of self-determination involves the right of people to determine freely their own destiny. The black majority of South Africa clearly has not done this. The citizenship policy has been condemned repeatedly as a violation of the principle of self-determination.[174] Because the territory of South Africa contains both blacks and whites, and the black majority has had no say in its political future, South Africa may not be simply analogized to other economically exploitive colonial powers. Secessionist demands made to a colonial or quasi-colonial oppressor (as in India, Canada, the United Kingdom and Israel) may be distinguished from unilaterally imposed grossly unfair land distribution and grant of "independence."

Self-determination is complicated in a multi-ethnic context, because the meaning of the principle depends in large part on the definition of the "self" which has the right to determine its future. In a multi-ethnic context, the claims of ethnic integrity often are pitted against the claims

---

with regard to the Transkei (alleged to have had a prior history of greater "independence" from South Africa). *See, e.g.*, de Kieffer & Harquist, *Transkei: A Legitimate Birth*, 13 NEW ENG. L. REV. 428, 447 (1978); Swan, *Self-Determination Pretoria Style: The Case of the Transkei*, 3 WHITTIER L. REV. 475, 491-93 (1981). *But cf.* Swan, *Comparative Constitutional Law — Communal Self-Determination in the Republic of South Africa's New Constitution: A Comparative Perspective on a Critical Experiment*, 7 WHITTIER L. REV. 349, 374 (1985) (communal self-determination of Indians and Coloreds possible only in theory under new constitution; blacks still excluded). The claim that Transkei has any particular historical claim to independence has been decisively refuted. *E.g.*, Norman, *The Transkei Revisited*, 13 NEW ENG. L. REV. 792, 794-95 (1978). The argument that the "independent" homelands manifest the principle of self-determination has even less merit in light of the lack of a choice on the part of the peoples said to have the right of self-determination, the disruption of the territorial integrity of South Africa, and the consistent condemnations of the international community precisely on this point. Thus, Dugard writes of

> the notion that the right of self-determination is now a peremptory norm of the character of *jus cogens*, the violation of which renders an act null and void. This development provides the clue to the non-recognition of South Africa's independent national states. They have come into existence in violation of a peremptory norm of contemporary international law — the right of self-determination — and this renders them nullities under international law.

Dugard, Book Review, 103 S. AFR. L.J. 316, 317 (1986) (reviewing J. Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (1985)).

174. *See, e.g.*, G.A. Res. 31/6, 31 U.N. GAOR, Supp. (No. 39) at 10, U.N. Doc. A/31/39 (1976); G.A. Res. 2775, 26 U.N. GAOR, Supp. (No. 29) at 39, U.N. Doc. A/8429 (1971); G.A. Res. 3411, 30 U.N. GAOR Supp. (No. 34) at 35, U.N. Doc. A/10034 (1975); G.A. Res. 2775, 26 U.N. GAOR, Supp. (No. 29) at 39, U.N. Doc. A/8429 (1971); Organization of African Unity: Resolution on Non-recognition of South African Bantustans, O.A.U. Doc. CM/Res. 493 (XXVII) (adopted at Port Louis, Mauritius, June 24 - July 3, 1976).

of a common view of human rights cutting across heterogeneous peoples. Because of the risks to broad respect for human rights, the Organization of African Unity has been committed to the principle that African borders are not to be restructured simply to accommodate ethnic desires. It is not a coincidence that many homeland leaders are staunch ethnic chauvinists at the same time they express opposition to racial discrimination. Although both whites and blacks may have the right to a voice in their respective futures, the denial of that voice to the black majority is one reason the world community has refused to recognize the "independent states." Application of the principle of self-determination in its true sense would condemn the original establishment of separate "states" and would allow members of the black majority to choose between homelands citizenship or South African citizenship. The alternative expounded by the South African government entrenches racially discriminatory allocation of land and application of law without any determination of the black majority "self" of South Africa.

The ICJ is a problematic forum for the citizenship issue for three reasons. First, because the ICJ is the judicial arm of the anti-South African United Nations; second, because it is set up to settle interstate disputes; and third, because it has no effective means of enforcing its judgments. Bringing an ICJ suit regarding South Africa is especially difficult, because South Africa does not accept the "compulsory" jurisdiction of the World Court.[175] Thus, contending states could not submit a case to the ICJ, and theoretical problems of defining "states" with standing and framing such a case do not arise.

Yet the ICJ is available to review South African independence-conferring legislation in a way in which domestic South African courts are not. An advisory opinion of the ICJ (requested by the General Assembly or the Security Council of the United Nations) is a possible form for such a judgment.[176] Professor John Dugard of the University of Witwatersrand

175. As defined by article 36 of the Statute of the International Court of Justice (the "optional clause"). As of 1984, only 47 states had filed declarations of acceptance of the optional clause, some with significant reservations. South Africa is, however, one of the 160 states that are parties to the Statute of the ICJ. 1983-1984 I.C.J.Y.B. 41, 57 (1984). The United States withdrew from compulsory jurisdiction effective April 1986. As of January 1986, 45 declarations of acceptance under I.C.J. Statute article 36 were still in force. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) 159 (Tent. Draft No. 7, 1985).

176. Article 96(1) of the United Nations Charter and article 65(1) of the Statute of the International Court of Justice allow the General Assembly or the Security Council to seek an advisory opinion on any question of international law, the existence of any fact which, if true, would breach an international obligation, or the nature and extent of

has advocated such an approach,[177] in which South Africa's agreement to submit a case to the ICJ is unnecessary. Advisory opinions are not binding, but are legally authoritative statements of international law. South Africa itself once requested an advisory opinion from an ICJ more sympathetic to South Africa, on the issue of its discriminatory treatment of Indians, but the government could not get the General Assembly in 1946 to support its request. Dugard has noted that this "refusal to request an advisory opinion on South Africa's racial policies was a tactical error on the part of the international community."[178] The General Assembly has been willing to request advisory opinions on the South West Africa/Namibia issue, as opposed to the domestic apartheid issue. The Security Council requested an advisory opinion on Namibia in 1970. The resulting 1971 Advisory Opinion on Namibia[179] by the ICJ undoubtedly has spurred progress toward Namibian independence. In that opinion, separate development as applied to Namibia was found contrary to United Nations Charter provisions requiring observation of human rights without regard to race.

One reason that the General Assembly refrained from acting in 1946 was its hesitance to get involved in domestic issues subject to the exclusive domestic jurisdiction of states. South Africa's claim that its citizenship policy, like apartheid generally, is a domestic issue would have to be dealt with before the ICJ could proceed. Article 2(7) of the United Nations Charter provides that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . ." Yet this provision was composed before the post-World War II revival of natural law and the increased sensitivity to violations of human rights as reflected in international law and international organizations. Developments subsequent to World War II have established that apartheid, and thus the most extreme version of apartheid represented by the citizenship policy, is a matter of international concern. Even the original rationale of

---

reparations to be made for such breaches of international obligation. Most advisory opinions are requested by the General Assembly. Professor John Dugard first suggested this route when Transkei was given independence. *See* Note, *supra* note 77, at 645.

177. Dugard, *The Denationalization of Black South Africans in Pursuance of Apartheid: A Question for the International Court of Justice?*, 33 INT'L COMM. OF JUR. REV. 49 (1984).

178. *Id.* at 50. While South Africa has refused to recognize the validity of the Court's advisory opinions on South West Africa/Namibia, those opinions have nevertheless encouraged South Africa to gradually move to conform to international expectations with regard to Namibia.

179. *See infra* note 188.

article 2(7) — state stability — has additional implications when one remembers the numerous international resolutions declaring that apartheid represents a threat to world peace.[180] Large scale violations of human rights like those occurring under South Africa's citizenship policy rightly are recognized as implicating civil rights in other countries. The legal issues arising from the citizenship policy may be framed as suitable for judicial determination. For all these reasons, South Africa should not be able to invoke article 2(7) as a "domestic issue" shield against the operation of international law. If a more subtle justification for recognizing the international issues posed by the citizenship policy is needed, the novelty and the extreme injustice of the policy provide this justification.

The political nature of legal issues involving the citizenship policy also represents an obstacle to ICJ jurisdiction, because the World Court typically refrains from deciding political issues. For this reason, analysts try to frame the political issues raised by the citizenship policy as narrow legal issues. The attempt can only be partially successful, because the distinction between law and politics in a society like South Africa is exceedingly thin. The attempt is understandable, however, because political issues usually are seen as falling within the unique competence of organizations like the General Assembly and the Security Council, as opposed to the World Court. South Africa has ignored the many resolutions of the former bodies, and South Africa would be no less skeptical of submitting the citizenship issue to the ICJ. Some commentators counsel against involving the ICJ when the desire for a particular answer is strong and manifest, as it is in this case.[181] Yet, the fact that this case is not a typical ICJ boundary dispute counsels in favor of choosing the forum of the ICJ. The desirability of a particular result does not necessarily indict the judicial character of the decision. The stakes are high, and public pressure will be brought meaningfully to bear on South Africa. International pressure spurred the development of South Africa's citizenship policy;[182] this same pressure may contribute to its demise. Disillusionment with the ICJ as a vehicle for such pressure arose largely from its pro-South African decision in *South West Africa Cases* of 1966, but the 1971 advisory opinion on Namibia should have dispelled such qualms. Although politics thus pervades the issues raised by the citizenship policy, the ICJ is most useful for considering aspects of the policy that can be challenged under narrow legal theories.

---

180. *See supra* note 169.

181. *E.g.*, M. POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS 377 (1973).

182. Note, *supra* note 77, at 645; Dugard, *supra* note 6, at 11.

Article 38 of the ICJ statute denotes applicable sources of law as including international conventions, custom, general principles and previous decisions of the ICJ.[183] Several legal theories that might indict the citizenship policy exist, some more tenable than others. A broad claim of an international right to share the collective wealth of South Africa,[184] for example, would be both dubious at law and unworkable in practice. The argument that South Africa is an illegitimate government and thus any states it purports to create are illegitimate is similarly too "political" and too broad. The argument would be difficult to sustain legally. Focusing on the citizenship policy itself is better. Although the citizenship policy probably violates the right to self-determination of black South Africans, the breadth of the concept of self-determination combined with its traditional use in struggles for independence make self-determination an unattractive theory for challenging the citizenship policy.[185]

The most viable legal theory for challenging the citizenship policy focuses on the racially discriminatory aspects of the policy, which violate international law in both conception and implementation. Racial discrimination undoubtedly is disfavored in current international law and custom, and South Africa is the only country on Earth that has institutionalized racial discrimination; the rest of the world has moved away from such discrimination. There are several international covenants against racial discrimination which have been adopted since the United Nations Charter and the Universal Declaration on Human Rights[186] condemned discrimination, but because South Africa has signed virtually none of the covenants, it is not bound by their terms.[187] There also have been statements by the ICJ and its members, notably the *1971 Namibia Opinion*,[188] condemning racial discrimination as a violation of interna-

183. Statute of the International Court of Justice, art. 38. Note that the ICJ does not follow stare decisis. *Id.*, art. 59.

184. Under article 17 of the Universal Declaration of Human Rights regarding ownership of property, for example, more recent international covenants have dropped such a reference.

185. Self-determination is nevertheless the legal violation emphasized by many commentators. *E.g.*, Richardson, *supra* note 174, at 214; Note, *supra* note 77, at 629-31.

186. G. A. Res. 217A, U.N. Doc. A/810, at 71 (1948) (adopted by the U.N. over eight abstentions, including that of South Africa).

187. *See, e.g.*, Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969).

188. Namibia Opinion, 1971 I.C.J. 16, 58; Barcelona Traction Case (Barcelona Traction, Light and Power Company, Ltd.), 1970 I.C.J. 3, 32; Southwest Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), 1966 I.C.J. Pleadings 1, 285-88 (non-discrimination on the basis of race is a principle of international law) (Tanaka, J., dissenting).

tional law.

From this general legal principle disfavoring racial discrimination, one may argue that the citizenship policy is illegal because it is racially discriminatory in its conception and its effects. Casting the citizenship rights as political rights would again suffer from the fault of being too "political." The more "neutral" and "international" concept of nationality, however, might be a more suitable ground for a claim. Denationalization on racial grounds is an increasingly questionable practice under international law. On one hand, traditional international law and its elevation of state sovereignty would allow a state to denationalize any of its inhabitants at will.[189] On the other hand, even the Hague Convention of 1930 declared that international conventions, custom and principles of law limit the nationality laws of each state.[190] A comprehensive survey has concluded that "denationalization measures based on racial, ethnic, religious, or other related grounds are impermissible under contemporary international law."[191] Contemporary writers lean toward the view that "prohibition of discriminatory denationalization may be regarded as a rule of present day international law. This certainly applies to discrimination on the grounds of race which may be considered as contravening a preemptory norm of international law."[192]

Dugard notes four particular grounds taken from state practice, multilateral treaties and judicial decisions that support the argument that customary international law prohibits racially discriminatory deprivation of nationality:[193]

1) The widespread opposition to the 1941 Nazi decree which denationalized German Jews;[194]

---

189. *E.g.*, Convention on Certain Question Relating to the Conflict of Nationality Laws, April 12, 1930, 179 L.N.T.S. 89, ch. 1, arts. 1 & 2; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 126 (2d ed. 1973); 2 D. O'CONNELL, INTERNATIONAL LAW 683-84 (2d ed. 1970); *see also* Oliver, *Statelessness and Transkeian Nationality*, 2 S. AFR. Y.B. INT'L L. 143, 154 (1976) (denationalization by South Africa was not "solely" on racial grounds); Note, Nonrecognition of the Independence of Transkei, *10* CASE W. RES. J. INT'L L. 167, 192 (1978).

190. Convention on Certain Questions relating to the Conflict of Nationality Laws, Apr. 12, 1930, art. I, 179 L.N.T.S. 89, 99.

191. MCDOUGAL, LASSWELL & CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 918 (1980); McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Areas*, 83 YALE L.J. 900, 958 (1974); *see also supra* note 46.

192. P. WEIS, *supra* note 12, at 125.

193. Dugard, *supra* note 6, at 26-27.

194. P. WEIS, *supra* note 12, at 119-21; see also *supra* note 49.

2) Article 15 of the Universal Declaration of Human Rights,[195] which declares that 'no one shall be arbitrarily deprived of his nationality';
3) Article 9 of the Convention on the Reduction of Statelessness,[196] which provides that a 'contracting state may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds';
4) Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination,[197] in which states undertake to guarantee the right of everyone, without distinction as to race, equality before the law, 'notably in enjoyment of the right to nationality'.

Because the ICJ's legitimate role includes crystallizing the current trend of international legal principles, its recognition that South African citizenship as now conceived violates international law would be within its legitimate functions. An advisory opinion by the ICJ could take note that a dispute of law may arise over the effects of the citizenship policy (such as those outlined above in Section III) as well. For example, international law guarantees aliens minimum standards of treatment, yet South Africa fails to observe these minimum standards with regard to its new "aliens." Most aliens coming to South Africa are treated well, but black citizens of the "independent states" are subject to all discriminatory laws that still exist in South Africa. Apartheid legislation does not distinguish between black South Africans and blacks generally. The citizens of the independent states face the worst of both worlds — they have lost their right to participate in their country's political system at some future date, and they have not been granted the rights that normally accrue to aliens.

An ICJ determination of the legality of South Africa's approach also could consider the consequence of statelessness that follows from the citizenship policy. The new citizens of the "independent states" are stateless to the extent that they have been deprived of South African nationality while not having been ascribed the nationality of any recognized state.[198] South Africa is a party to the Convention Relating to the Status of Stateless Persons,[199] but is not a party to the many other international conventions regarding stateless persons and refugees. South Africa's defense

195. *See supra* note 186. This Declaration is not legally binding, however.

196. Convention on the Reduction of Statelessness, Aug. 29, 1961, art. 9, U.N. Doc. A/Conf. 9/15 (1961). This Convention has not entered into force.

197. *See supra* note 187.

198. Some commentators sympathetic to the citizenship policy deny the possibility of statelessness. *E.g.*, Oliver, *supra* note 189.

199. Dugard, *The Conflict Between International Law and South African Law*, 2 S. AFR. J. HUM. RTS. 1, 15 (1986).

would be that the ascription of "independent state" nationality precludes the possibility of statelessness resulting from its citizenship policy. The practical reality of nonrecognition abroad, however, means that these new "independent state" citizens are in fact stateless.

V. CONCLUSION

Members of the black majority have not accepted separate development, of which the citizenship policy is the ultimate extension. Blacks are aware that the citizenship policy exists to deny their claims to political and civil rights in South Africa. Forced deprivation of citizenship has been a major source of bitterness in the black communty.[200] Even now, the government crushes nascent black protest in an endless cycle of violence, repression and more violence.

The South African government must accept that change is inevitable. The South African population is inextricably mixed, and the homelands are not viable either as "independent" or "nonindependent" states. A political fantasy which breaks up the territory of the country into ministates is not the solution. Dialogue leading to full citizenship, genuine democratic participation and self-determination by the whole of South Africa is the only acceptable solution. Communities must be "closed" in some sense, but they need not (and, really cannot) be *completely* homogenous. Tolerance can be, and is, a value that binds. Genuine restoration of citizenship to all South Africans could be a powerful symbolic statement of such tolerance, and an open invitation to a post-apartheid society. A grant of universal citizenship would say that the artificial isolation and separation of apartheid is over, and awareness of interdependence and sensitivity to others has begun. As citizens of the melting pot which is America are painfully aware, symbols of tolerance are often even more important in creating a sense of community than the existence or nonexistence of tolerance in everyday interpersonal relations.

Challenges to South Africa's citizenship policy through domestic and international litigation would complement existing avenues of international pressure to spur change in South Africa. While neither domestic nor international legal approaches alone will accomplish immediate fundamental change, both will weaken the legal legitimacy of South African policy and keep the issue before the international community. This litigation could result in the extension of nationality in the guise of citizenship to a greater number of people, which could prepare the way for a

200. *Opened for signature* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force *June 6, 1960).*

South Africa in which the concept of citizenship takes on greater substance. Problems exist with stopping or reversing the process of "independence"; homeland leaders will resist giving up the benefits they now enjoy as a result of the citizenship policy. The South African government, too, will undoubtedly be recalcitrant at first. The citizenship policy is more integral to South Africa than Namibian independence. As with Namibia, however, it is likely that the government will ultimately move in the direction that the international community indicates. If the government does not move of its own free will, it might have to move later of necessity.