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Who Are the Citizens of South Africa and Transkei [comments]

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CASES AND COMMENTS

WHO ARE THE CITIZENS OF SOUTH AFRICA AND TRANSKEI?

A little-known fact of South African law is that all South African whites, coloureds and Indians have ceased to be South African citizens and are now citizens of Transkei. As a result, the only people who are now South African citizens are those South African blacks who have not become citizens of Transkei.

These revelations may be surprising, yet they are dictated by the plain language of the Status of Transkei Act 100 of 1976. This Act was the first to grant independence to one of the South African homelands. Among its provisions was a detailed statement, contained in Schedule B, of the bases on which individuals would be reviewed henceforth as Transkeian citizens and deprived of their South African citizenship by virtue of the Act.

For our purposes, the most relevant provisions specifying Transkeian citizenship are those contained in paras (f) and (g) of Schedule B. (Section 6(1) of the Act directs that '[e]very person falling in any of the categories of persons defined in Schedule B shall be a citizen of the Transkei and shall cease to be a South African citizen'.¹) Paragraph (f) addresses the citizenship of 'every South African citizen who is not a citizen of a territory within the Republic of South Africa, [and] is not a citizen of Transkei' on one of the grounds enumerated earlier in the Schedule. Plainly this group includes all or almost all South African whites, coloureds and Indians — assuming that these people did not in fact have Transkeian citizenship by virtue of one of the earlier subsections of the Schedule (providing for citizenship on a variety of other grounds). After all, South African whites, coloureds and Indians were highly unlikely to be citizens of one of the territories, that is to say the black territories, within the Republic of South Africa, or of Transkei itself.

Moreover, and quite obviously, the whites, coloureds and Indians fall in the category of 'South African citizens'. We cannot take Parliament to

¹ Other sections of the Act address the continued application of preexisting rules of law (s2), treaties, conventions and agreements binding on the Republic and capable of being applied to Transkei (s4), and treaties, conventions and agreements between the Republic and Transkei (s5). Conceivably there are provisions in such sources of law that might delineate Transkeian and South African citizenship in a way different from that outlined in this article. If any such conflicts exist, however, surely the express and clear language of s6 and Schedule B should be taken to be controlling.

have meant to refer only to black citizens of South Africa, for the Act nowhere states that it deals only with blacks. By contrast, in the National States Citizenship Act 26 of 1970, Parliament specified that persons whose citizenship it was allocating to the various territorial authority areas were 'every black person' not otherwise covered (ss 2(2) and 3). The omission of any mention of race in the Status of Transkei Act no doubt reflects Parliament's justifiable concern that legislation establishing a new nation on racial lines would be viewed with disfavour by the international community. Since the decision to excise any reference to race can hardly have been inadvertent, it obviously should be given effect by the courts.

The people covered by para (f) become citizens of Transkei and lose their South African citizenship if they '[speak] a language used by the Xhosa or Sotho-speaking section of the population of the Transkei, including any dialect of any such languages'. Now we may assume that relatively few whites, coloureds, or Indians otherwise falling within para (f) speak Xhosa or Sotho — though obviously any who do have been rendered Transkeian as a result. But the statute does not refer only to speakers of Xhosa or Sotho. Had Parliament wished to affect only those people who spoke Xhosa or Sotho, it could easily have said exactly that. Instead, this provision refers to all those South African citizens who are neither citizens of a territory nor already citizens of Transkei, and who speak any language 'used' by Xhosa or Sotho-speaking persons in Transkei. Those who speak Xhosa or Sotho undoubtedly 'use' a range of other languages as well.

Among these other languages will be a variety of other black (bantu) languages. But it is clear that Parliament meant to include not only black languages but also languages of European origin. Again, Parliament could easily have specified that only black languages fell within the ambit of this statute. Yet it did not. Manifestly this omission is significant, for in the National States Citizenship Act 26 of 1970, Parliament demonstrated that it knew very well how to specify black languages if it wished to. Section 3(c) of the National States Citizenship Act in fact conferred territorial authority area citizenship on black persons who '[speak] any black language used by the black population' in the area in question. No doubt Parliament chose to avoid so racialist a definition of the language basis for citizenship in the Status Act out of the same concerns for international impact cited earlier. Both statutory language and context thus confirm that the languages in question in this paragraph of Schedule B must include all languages, whatever their origin, 'used by the Xhosa or Sotho-speaking section of the population of the Transkei'.

It seems safe to say that both English and Afrikaans are widely used by Xhosa and Sotho-speaking black citizens of Transkei. As a result, we need not investigate the interesting question of whether there are any whites, coloureds, or Indians who form part of the 'Xhosa or Sotho-speaking section of the population of the Transkei'. Obviously the discovery of any such people who were also speakers of English or Afrikaans would provide an independent — but quite redundant — basis for concluding that this

Act meant to confer Transkeian citizenship on speakers of English and Afrikaans. Since virtually the entire white, coloured, and Indian population of South Africa at the time that the Status of Transkei Act came into effect also spoke English or Afrikaans, it follows that all of these people lost their South African citizenship on the independence of Transkei and became Transkeians.

Actually, many of these people probably gained Transkeian citizenship, and lost their South African nationality, on other grounds as well. Paragraph (g) of Schedule B, like para (f), applies to 'every South African citizen who is not a citizen of a territory within the Republic of South Africa and is not a citizen of Transkei' on grounds enumerated earlier in the Schedule — and so includes more or less all South African whites, coloureds, and Indians, if these people had somehow not become Transkeians under para (f). If they weren't Transkeianized under para (f), in any case, they probably were under para (g).

This paragraph provides, first, that any person within its general ambit becomes a Transkeian if he or she 'is related to any member of the population contemplated in para (f)'. It seems quite inconceivable that any white, coloured, or Indian person in South Africa is not related to one of the white, coloured, or Indian persons whom para (f) rendered Transkeian. (As a result, we need not scrutinize such intriguing questions as the extent to which whites, say, are related to coloureds who are related to blacks.)

If so unrelated a person could be found, he might still become a Transkeian if he 'has identified himself with any part of such population or is culturally or otherwise associated with any member or part of such population'. These provisions are broad enough, surely, to encompass anyone who empathizes with any of the whites, coloureds, and Indians who are deprived of South African nationality; who employs and thus associates with any such person; or who associates with such persons by serving as their attorney or advocate. No doubt ingenious minds will suggest other implications of this broad language as well.

Need I add that the fact that most of the whites, coloureds, and Indians on whom Transkeian citizenship was conferred did not reside in the Transkei was no barrier at all to their receiving this benefit? That point, after all, is apparent from the Act's treatment of *black* Transkeians. Indeed, s6(3) of the Act is specifically addressed to the situation of those citizens of Transkei who are 'resident in the Republic at the commencement of this Act'.

I trust I have now satisfactorily demonstrated that all South African whites, coloureds, and Indians ceased some years ago to be South Africans and became Transkeians. It would seem that these non-black Transkeians should be taking steps to secure representation of their interests in Transkeian political processes. This would appear to be their only course for obtaining self-government. The alternative of trying to amend the Status of Transkei Act to recapture the South African citizenship which they lost by virtue of that Act is, of course, not open to these denationalized

persons for the simple reason that they are no longer South African citizens and accordingly cannot amend any South African legislation anymore.

Conversely, it would appear that the South African blacks who did not become Transkeians are the only people who remain South African citizens. Although some of these people were later seemingly deprived of their South African citizenship when Venda, Bophuthatswana and Ciskei were granted independence, the legislators who purported to vote for the independence of these three countries were themselves Transkeians and not South Africans, and so obviously had no authority to deprive anyone of South African citizenship.

No doubt the now all-black citizenry of South Africa will also wish to take appropriate action to implement their right of self-government. One initial step on these lines might be to apprise international bodies of the true composition of the South African and Transkeian polities.

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CONSTITUTIONAL INTERPRETATION AS A MEANS OF HONOURING HUMAN RIGHTS COMMITMENTS:

Segale v Government of Bophuthatswana

1987 (3) SA 237 (B)

For some time now, the feasibility of a bill of rights for South Africa has been debated. Part of the debate has focused on the suitability of the various mechanisms through which such an instrument might be enforced. Precious little detailed attention has been directed to how the judiciary is likely to or ought to construe a document entrenching fundamental rights. This may in part be a result of the fact that South Africa has had little exposure to the interpretation of human rights documents.

It is in this context that the decision of the Supreme Court of Bophuthatswana in *Segale v Government of Bophuthatswana* 1987 (3) SA 237 (B) is especially welcome, for it signals a positive prognosis for a bill of rights and for human rights in South Africa. This assumes, of course, that *Segale* constitutes the beginning of a new trend in the interpretation of the Bophuthatswana Constitution.

Segale's case concerned the interpretation of ss 15 and 16 of the Bophuthatswana Constitution. These provisions enshrine the freedom of expression, and the freedoms of peaceful assembly and of association, respectively. Both provide for derogation from the freedoms in the interest of national security, the public order and other similar considerations.

The applicant, *Segale*, was the chairman of the opposition political party, the National Seoposengwe Party (NSP), which applied for permission to hold a political meeting, as was required in terms of