

# **JUS SOLI OR JUS SANGUINIS? DIAGNOSING LETTERS OF LAW AND OFFICIAL INTERPRETATION OF TANZANIAN CITIZENSHIP BY BIRTH**

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## **Abstract**

This article examines the controversy underlying interpretation of the letters of law on what constitutes Tanzanian citizenship by birth, particularly after independence. The centre of controversy lies in the choice of the two basic modes of attainment of citizenship by birth, namely *jus soli* (right of soil or birth right citizenship without the condition of citizenship of parents) and *jus sanguinis* (right of blood or citizenship conditioned on parents' citizenship status). Some secondary sources say the letters of law are *jus soli* based while official interpretation on the ground says they are *jus sanguinis* based. So far, there is no judicial interpretation of the convoluted letters of law under the Tanzania Citizenship Act Cap 357 R.E 2002. It is argued that the letters of law under the Tanzania Citizenship Act reflect the *jus soli* mode. The article proposes for amendment of the disputed provisions to align with what is actually obtainable on ground.

**Key words:** *jus soli*, *jus sanguinis*, citizenship by birth, letters of law.

## **1. INTRODUCTION**

Tanzania had its first provisions on who would constitute citizens by birth in the Citizenship Act.<sup>1</sup> The provisions laid down on who

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would be considered a citizen by stating that if that person was born before independence and on or after independence date. These provisions have remained intact for over fifty nine years since Tanzania's independence on 9<sup>th</sup> December 1961. Even the 1995 consolidation of pieces of citizenship legislation<sup>2</sup> did not affect the provisions. Based on the common principles of determining citizenship by birth, these provisions must have been either *jus soli* or *jus sanguinis*.<sup>3</sup>To draw line between the two, one must in the first place read through letters of law themselves and, secondly, interpret them. Divergences between letters of law and actual interpretation may arise along the way.

The Tanzania Immigration Services Department is the core institution charged with matters of citizenship.<sup>4</sup> Official interpretation of what constitutes Tanzanian citizenship by birth draws its practice from this institution. Citizenship determination in this case arises when a person applies for a passport, travel document from the Immigration Department and national identity card from the National Identification Authority (NIDA).<sup>5</sup>Official interpretation of the letters of law provides that a person qualifies

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<sup>1</sup> Cap. 512 of 1961.

<sup>2</sup> In 1995 pieces of citizenship legislation namely the Citizenship Act Cap 512 of 1961, Citizenship Ordinance Cap 452 of 1961 and the Extension and Amendment of Laws No.5 Decree of 1964 were consolidated to form the Tanzania Citizenship Act Cap 357 R.E 2002.

<sup>3</sup> *Jus soli* means right of soil and *jus sanguinis* means right of blood. The two concepts are described in part 2 of this article.

<sup>4</sup> See section 12(1)(d) of the Immigration Act Cap 54 R.E 2016.

<sup>5</sup> In determining citizenship for registering as a Tanzanian, the Immigration Department must approve one's citizenship status.

as citizen of Tanzania by birth (after independence) if born in the United Republic to a parent(s) who is citizen, a typical *jus sanguinis* mode.<sup>6</sup> In fact this is the position which has been followed since the enactment of the Citizenship Act, 1961 and is considered a settled mode<sup>7</sup> because there has not yet been a judicial interpretation of the provision to the contrary.

While this is the case for all official interpretation, external secondary sources interpret the same provision differently.<sup>8</sup> They interpret the letters of law to mean a person is considered Tanzanian citizen by birth (after independence) if only born in the United Republic without need of citizenship status of parents, a typical *jus soli* mode, of course, with the exception of immunity privileges and birth by a parent who is an enemy to the United Republic. It is this second pattern of interpretation that places Tanzania amongst countries that follow the *jus soli* mode. Thus,

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<sup>6</sup> See section 5 of the Tanzania Citizenship Act read together with the Guidance on Interpreting the Tanzania Citizenship Act “Mwongozo wa Sheria ya Uraiaya Tanzania Suraya 357, Rejeo la 2002 kwa Maofisa Uhamiaji” at pp 19-20.

<sup>7</sup> Letter from the Office of the Attorney General interpreted the same provision in line with the official interpretation. See footnote 41.

<sup>8</sup> See generally Manby, B, *Citizenship Law in Africa: A Comparative Study* (3<sup>rd</sup>Edn) Johannesburg: Open Society Foundations, 2016; Manby, B, *Struggles for Citizenship in Africa*, London: Zed Books, 2009; Manby, B, *Citizenship and Statelessness in Africa: Citizenship in Africa: The Law of Belonging* (1<sup>st</sup> Edn)Oxford: Hart Publishing, 2018; UNHCR, *Statelessness and Citizenship in the East African Community*, Nairobi, September, 2018, KENNARSH@unhcr.org; African Commission on Human and Peoples’ Rights, *the Right to Nationality in Africa, A study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons*, Banjul, the Gambia, 2015; International Refugee Rights Initiative (IRRI), “I can’t be a citizen if I am still a refugee” Former Burundian Refugees Struggle to Assert their new Tanzanian citizenship, *Citizenship and Displacement in the Great Lakes Region*, Working Paper 8, March 2013; Centre for Forced Migration, International Rights Initiative and the Social Science Research Council, “Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania,” *Citizenship and Forced Migration in the Great Lakes Region*, Working Paper No.1, November, 2008.

the same letters of law have a diversity of interpretation. In effect, a person who considers himself citizen by birth using the second version of interpretation ought to be in conflict with the official interpretation.

It is pertinent therefore to diagnose as to which version of interpretation conforms to the actual letters of law. To reach a conclusion on this issue, similar illustrative letters of law from selected countries that were or are said to follow the *jus soli* mode are examined. Analysis of the diversities between letters of law in issue and actual interpretation are thought ought in this article to be having implications that should not be left unaddressed. Beforehand, the concepts *jus soli* and *jus sanguinis* are firstly described.

## **2. UNDERSTANDING THE CONCEPTS *JUS SOLI* AND *JUS SANGUINIS***

The terminologies *jus soli* and *jus sanguinis* are basic tools in ascribing citizenship by birth. Both are Latin words. Defined from their Latin origin, the word *jus soli* means right of the soil while *jus sanguinis* means right of blood. By *jus soli*, a child is said to be a citizen of a given country by a mere birth in the respective country while by *jus sanguinis*, a child's citizenship is determined by associating it with parent(s)' citizenship. In this context, birth alone in a given country does not entitle a child to be a citizen. An illustration can further elaborate this. Assuming that country W attributes citizenship by birth under *jus soli* mode: V, a child born in country W to parents who are neither citizens of country W will automatically be a citizen of country W by birth unless there are exceptions provided under the law. For example, if V is born to a

father who is an envoy. If, on the other hand, country W attributes citizenship by *jus sanguinis* mode, V's citizenship will depend on whether her parent(s) are citizens of country W although she was born in country W. If (depending on the law of country W) neither of her parents is a citizen of country W, V will not be a citizen by birth.

Historically, *jus soli* mode was dominant in the British tradition. The feudal mode of living formed a precondition of *jus soli* mode of attribution of citizenship. Persons born under a feudal lord were considered as his ownership. As such, birth alone in the land owned by a given feudal lord automatically conferred citizenship of the feudal lord on the new born. This mode of attribution of citizenship continued to grow under the British citizenship tradition. Following development of migrations outside Europe, *jus soli* mode was adopted in British colonies in Africa, United States, Canada, Ireland, and Australia. Preference of this mode was in countries of immigrants where children born in those countries automatically acquired citizenship by mere birth in their new areas of settlement.

In fact, until immediately before 1983, the British position was that of *jus soli* mode.<sup>9</sup> This position was affirmed under section 4 of the

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<sup>9</sup> This position was amended by the enactment of the British Nationality Act 1981. This Act aimed at giving all existing CUKCs a citizenship status which reflected their circumstances especially their connection with the UK. The Act received Royal Assent on 30 October, 1981 and its main provisions came into effect on 1 January, 1983. It amended the Immigration Act 1971 in order for the right of abode to reflect the new citizenships created. Under the Act citizenship of the UK and Colonies was replaced with three separate citizenships namely: British citizenship, for people closely connected with the UK, British Dependent Territories citizenship for people connected with dependencies and finally British Overseas citizenship, for CUKCs who did not acquire either of the other citizenships at commencement. See page 5 of the Home Office's Historical

British Nationality Act (BNA) of 1948. Under this section every person born on or after 1 January, 1949 within the United Kingdom and Colonies was a citizen of the United Kingdom Colonies (CUKC) by birth unless he was a child of an accredited foreign diplomat or was born to an enemy alien in territory occupied by that enemy. Under this position, citizenship by birth was that of a pure *jus soli* mode. That is, birth alone was used to determine citizenship by birth. Immigration and nationality status of parents did not even at all matter except for the exceptions mentioned.<sup>10</sup>

*Jus sanguinis* mode on the other hand predominated the French tradition. In a bid to do away with the feudal tradition where an individual was seen as a property of his feudal lord, *jus sanguinis* mode was seen as a way through. It was assumed that a person born anywhere to a father who was French would continue to be French citizen. This was seen to be an achievement against bondage of feudal lords.

In fact both modes of attribution of citizenship are not carved in stone. They get adopted by countries depending on needs and circumstances of the respective countries. For example, countries whose citizens were moving away from their countries preferred *jus sanguinis* mode in order to maintain their children's citizenship while the same shifted to *jus soli* mode when they changed to be countries of massive immigration. This is what happened to France prior and after the 19<sup>th</sup> century which in the first place was

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<sup>10</sup> See also Fransman, L., *Fransman's British Nationality Law* (3<sup>rd</sup> Edn.) Bloomsbury Professional, 2011 at p. 198.

principled to *jus sanguinis* but later also adopted elements of *jus soli*. However, *jus soli* mode is largely practised in countries that have stable border controls. Countries whose borders are not ably controlled prefer *jus sanguinis* mode.

### 3. AN ALARM OF LITERATURE STRANDS

To a reader who is informed by secondary sources on what constitutes *jus soli* letters of law, Tanzania citizenship law follows the *jus soli* mode. On the other hand, a reader who is informed by the official interpretation above named, *jus sanguinis* is rather the mode followed. There has not been consensus between the two. Available literature does not provide conclusive affirmation as to which mode amongst the two constitutes what is provided for under the Tanzania Citizenship Act. Even the recent judgment of *Robert John Penessis v. United Republic of Tanzania*<sup>11</sup> subscribed to the official interpretation of *jus sanguinis* mode in the following words:

The Court further notes that, according to the 1995 Citizenship Act, at the time of the Applicant's birth, that is 1968, ... a person could acquire Tanzanian nationality by birth if that person was born in the United Republic of Tanzania after Union Day, provided either of his parents is Tanzanian. ...

The note mentioned in the above case was not, however backed up by an analysis of the position of law in issue. It was rather given in a manner that did not contemplate the existing contradiction between letters of law and practice on the ground

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<sup>11</sup> African Court on Human and People's Rights, Application No.013/2015 judgment passed on 28 November 2019.

(official interpretation). Unfortunately, the issue of citizenship status of Robert was not a subject of interpretation in the Court of the Resident Magistrate of Bukoba,<sup>12</sup> the High Court at Bukoba<sup>13</sup> and finally the Court of Appeal at Mwanza<sup>14</sup> in which the case had been determined. In all these municipal Courts Robert was confirmed to be a foreigner who was, and had never been a citizen of Tanzania. In contemplation of this, he was neither charged with the offence of being non-citizen nor convicted of it. As such, a lack of judicial interpretation of the convoluted provisions examined under this article.

The following is a selected literature that informs the reader of the existence of this unascertained position.

Manby<sup>15</sup> basing on section 5 of the Tanzania Citizenship Act<sup>16</sup> counts Tanzania as a country that follows birthright or *jus soli* citizenship. This position is similarly echoed in her books and article.<sup>17</sup> In the latter, the author points out that the proposed new constitution of the United Republic of Tanzania<sup>18</sup> had changed the

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<sup>12</sup> Criminal Case No.35 of 2010 at Bukoba.

<sup>13</sup> High Court Criminal Appeal No.9 of 2011.

<sup>14</sup> Criminal Appeal No.179 of 2011.

<sup>15</sup> Manby, B., *Citizenship Law in Africa: A Comparative Study* (3<sup>rd</sup>Edn), Johannesburg: Open Society Foundations, 2016.

<sup>16</sup> Cap 357 R.E 2002.

<sup>17</sup> Manby, B, *Struggles for Citizenship in Africa*, See footnote 8; *Citizenship in Africa: The Law of Belonging* See footnote 8 and her article: 'Tanzanian constitutional review proposes radical changes to citizenship law' <http://citizenshiprightsAfrica.org> (accessed 17/09/2019).

<sup>18</sup> 2014 particularly part six. This part provides under article 68 (2) that Tanzania citizenship would be of two types, namely citizenship by birth and by naturalisation. Under article 70(1), citizenship by birth is given on the basis of parentage. That is, in order for one to be considered as a citizen of Tanzania, he or she must be born in Tanzania to a mother or father who is a citizen of



*jus soli* mode of attainment of citizenship to *jus sanguinis* mode. While the author finds that Tanzania follows birthright citizenship, it remains uncertain according to its relative provisions whether the position of law regarding citizenship by birth falls under this interpretation or by *jus sanguinis* mode.

In a study by the same author<sup>19</sup> she points out that there is a conflict between the wording of section 5 of the Tanzania Citizenship Act and their interpretation on the ground. The author accords interpretation of section 5 of the Act to the commonly held position under the Commonwealth countries which follow *jus soli* mode of attribution of citizenship. Though not clearly provided however, she admits that there are minor exceptions under the Act compared to those commonly held under the *jus soli* mode of Commonwealth countries. This proposition leaves an unascertained position as to whether the letters of law under the Tanzania Citizenship Act are in consonant with the practice on the ground which accords Tanzania citizenship by birth to a *jus sanguinis* mode.<sup>20</sup>

Issa<sup>21</sup> takes into dimension both *jus soli* and *jus sanguinis* mode as applicable in Tanzania. She does not show how this is possible. As a matter of confusion, while she asserts that Tanzania follows *jus soli* mode she does not remain consistent on this. Instead she maintains in her arguments that in order for a person

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Tanzania. The proposed constitutional changes failed to proceed. This position diverged from that obtaining in the Tanzania Citizenship Act 1961 which is unclear and posited by the author as a birthright model of attribution of citizenship.

<sup>19</sup> UNHCR, *Statelessness and Citizenship in the East African Community*, Nairobi, September, 2018, KENNARSH@unhcr.org.

<sup>20</sup> See the note above in the case of Robert John Penessis.

<sup>21</sup> Issa, M.I, "The Efficacy of the National Laws in Tanzania on Citizenship by Birth," LL.M Dissertation, Mzumbe University, 2013.

to be considered as a Tanzanian citizen by birth, he must be born in Tanzania to either parent who is also a citizen of Tanzania, a typical *jus sanguinis* mode. Thus, the author adds more confusion as to which position of law Tanzania follows specifically on citizenship by birth, whether by *jus soli* or *jus sanguinis*.

Following the similar trend is the report of the Right to Nationality in Africa.<sup>22</sup> This Report elucidates eight variations in the application of *jus soli* namely; one, to all children born on their territory of birth; two, to all children born on their territory, but only if they belong to a specific ethnic group, three, to children born in the respective country to non-national parents at the age of majority following a period of residence either automatically or by application, four, to children born in the country to a parent who was also born in the country, five, to children born in the country to parents who are legal and habitual residents, six, to children born on the respective territory if they would be stateless if not granted nationality, seven, to all children born to unknown parents and eight, to all those countries that do not grant any citizenship rights based on birth in the respective territories even for foundlings or children of unknown parents. Under this classification, Tanzania is placed in the first category which implies that birth right citizenship exists in Tanzania without qualifications of parentage status under the *jus sanguinis* model. This further reveals a gap on the real position under the Tanzania citizenship law regime.

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<sup>22</sup> African Commission on Human and Peoples' Rights, the Right to Nationality in Africa, A study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, Banjul, the Gambia, 2015.

In the Working Paper by the International Refugee Rights Initiative (IRRI)<sup>23</sup> the legal challenge regarding determination of citizenship by birth is raised. This challenge goes to children of refugees born in Tanzania. Due to this uncertainty, some of the naturalised persons born in Tanzania were thought of possibly having had already acquired Tanzanian citizenship by birth. The Report further noted how it is not clear, as a matter of law, whether this group of persons acquire and become recognised as citizens of the countries where their parents originate. In this context the Paper also acknowledges the existence of the problem on determination of Tanzanian citizenship by birth without endeavouring to provide an interpretation of the law as it now stands in the statute books.

Similarly, in the Paper by the Centre for Forced Migration, International Rights Initiative and the Social Science Research Council<sup>24</sup> regarding Tanzania citizenship by birth it is also shown that section 5 of the Tanzania Citizenship Act appears to indicate that those born in the territory of Tanzania after 26<sup>th</sup> April, 1964 become automatically Tanzanian citizens by birth without due regard to citizenship of their parents (with exception however of a child born to a diplomat or to a parent who is an enemy to Tanzania and if the birth occurs in place under occupation by the enemy). The Paper asserts that this position is due to a number of secondary sources that confirm this position. On the other hand, it

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<sup>23</sup> International Refugee Rights Initiative (IRRI), "I can't be a citizen if I am still a refugee" Former Burundian Refugees Struggle to assert their new Tanzanian citizenship, Citizenship and Displacement in the Great Lakes Region. See footnote 8.

<sup>24</sup> Centre for Forced Migration, International Rights Initiative and the Social Science Research Council, "Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania," Citizenship and Forced Migration in the Great Lakes Region. See footnote 8.

provides that this is not the approach taken in practice and, as such, seeks clarifications from Tanzanian experts. It thus leaves an alarm to the existing challenge of which mode is to be followed between the two.

Shah<sup>25</sup> examines in detail the controversial 1985 amendment to Kenyan citizenship laws particularly section 2 of the original independence constitution of Kenya. The relevance of the section is that it looks similar to section 5 of the Tanzania Citizenship Act. His interpretation, (which is principled on *jus soli* mode) however needs a critical assessment and reflection given the fact that there has not been any critical interpretation of section 5 of the Tanzania Citizenship Act which is frequently interpreted by practitioners in Tanzanian citizenship law<sup>26</sup> to refer to the *jus sanguinis* mode of attribution of citizenship rather than the *jus soli* mode.

#### 4. ILLUSTRATIVE SIMILARITIES AND ANALYSIS

Reading through secondary sources attempting to interpret section 5 of the Tanzania Citizenship Act<sup>27</sup> and impliedly section 3 of the former Citizenship Act,<sup>28</sup> there are apparent discrepancies between the letters of law and the actual interpretation. The centre of this controversy lies in the mode attaching to Tanzanian citizenship. Some secondary sources as shown in Part 3 above

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<sup>25</sup> Shah, R.K.D, "Britain and Kenya's citizenship law: a conflict of laws?"6(4), *Immigration and Nationality Law and Practice*, 1992, p.120 at pp.120-125.

<sup>26</sup> Notably immigration officers under the Tanzania Immigration Services Department who undertake matters related to citizenship.

<sup>27</sup> Cap 357 R.E 2002.

<sup>28</sup> Cap 512 of 1961.

consider the letters of law of the Tanzania Citizenship Act to follow the principle of *jus soli* while the actual interpretation in practice shows that it is the principle of *jus sanguinis* which is followed under the said Act.<sup>29</sup> In other words, while the Tanzania Immigration Services Department interprets the law to mean that a Tanzanian citizen by birth must have been born in the United Republic to a parent (s) who is a citizen of Tanzania, secondary sources relying on the letters of law interpret it to mean a person born in the United Republic whether to foreign parents or not with exception only to a father who has immunity of suit or parent who is an enemy to the United Republic and the birth occurred in a place under occupation by the enemy.

This is why under the international jurisprudence on the status of national laws by countries following *jus soli* as against those following the *jus sanguinis* mode,<sup>30</sup> Tanzania is considered to be among countries that grant unrestricted *jus soli*.<sup>31</sup> The following provisions which demonstrate the *jus soli* mode are borrowed and reproduced here *in verbatim* in order to show how they resemble section 5 of the Tanzania Citizenship Act and section 3 of the

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<sup>29</sup> Amongst all respondents including immigration officers and state attorneys none interpreted section 5 of the Tanzania Citizenship Act to follow *jus soli* mode. They responded affirmatively that the law and practice are in consonant to each other. They found that the law is clear with regard to Tanzanian citizenship by birth that in order to qualify as a Tanzanian citizen by birth one must in addition of being born in the United Republic have either parent or both who is/are citizens of the United Republic, that is the *jus sanguinis* mode.

<sup>30</sup> See <http://www.law.gov> on Birthright Citizenship Around the World by November, 2018, the Law Library of Congress, Global Legal Research Directorate. (Accessed 10/02/2020).

<sup>31</sup> Other countries are Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chad, Chile, Costa Rica, Dominica, Ecuador, El Salvador, Fiji, Grenada, Guatemala, Guyana, Honduras, Jamaica, Lesotho, Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Tuvalu and United States.

repealed Citizenship Act.<sup>32</sup>The provisions are reproduced for the sole purpose of illustrating how similar letters of law in the selected commonwealth countries (which are/were considered to be *jus soli* based) are in consonant with those under section 5 of the Tanzania Citizenship Act.

#### **4.1 Antigua and Barbuda**

The Constitution of Antigua and Barbuda of 1981 states that:

Section 113. The following persons shall become citizens at the date of their birth on or after 1<sup>st</sup> November 1981-a. every person born in Antigua and Barbuda: Provided that a person shall not become a citizen by virtue of this paragraph if at the time of his birth-i. neither of his parents is a citizen and either of them possess such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Antigua and Barbuda; or ii. Either of his parents is a citizen of a country with which Her Majesty is at war and the birth occurs in a place then under occupation by that country.<sup>33</sup>

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<sup>32</sup> Cap 512 of 1961.

<sup>33</sup> See section 113 of the Constitution of Antigua and Barbuda of 1981. Chapter VIII on Citizenship is entitled: Persons who automatically become citizens after commencement of this Constitution.

## 4.2 Barbados

The Constitution of Barbados of 1966 states that:

Section 4. Persons born in Barbados after 29<sup>th</sup> November 1966 shall become a citizen of Barbados at the date of his birth: Provided that a person shall not become a citizen of Barbados by virtue of this section if at the time of his birth, his father possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign state accredited to Her Majesty in right of Her Government in Barbados and neither of his parents is a citizen of Barbados; or b. his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.<sup>34</sup>

## 4.3 Belize

The Constitution of Belize states that:

Section 24. Every person born in Belize on or after Independence Day shall become a citizen of Belize at the date of his birth: Provided that a person shall not become a citizen of Belize by virtue of this section if at the time of his birth- his father or mother is a citizen of a country with which Belize is at war and the birth occurs in a place then under occupation by that country.<sup>35</sup>

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<sup>34</sup> See section 4 of the Constitution.

<sup>35</sup> See section 24 of the Constitution.

#### 4.4 **Dominica**

The Constitution of the Commonwealth of Dominica states that:

Section 98. Every person born in Dominica after the commencement of this Constitution shall become a citizen of Dominica at the date of his birth: Provided that a person shall not become a citizen of Dominica by virtue of this section if at the time of his birth- a) neither of his parents is a citizen of Dominica and his father possesses such immunity from suit and legal process as is accorded to the enjoyment of a foreign sovereign power accredited to Dominica; or b) his father is a citizen of a country with which Dominica is at war and the birth occurs in a place then under occupation by that country.<sup>36</sup>

#### 4.5 **Uganda**

The 1962 Constitution of Uganda states:

Section 9. Every person born in Uganda after 8<sup>th</sup> October 1962 shall become a citizen of Uganda at the date of his birth:

Provided that a person shall not become a citizen of Uganda by virtue of this section if at the time of his birth-

- (a) neither of his parents is a citizen of Uganda and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Uganda; or

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<sup>36</sup> See section 98 of the Constitution.



- (b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.

#### **4.6 Kenya**

The 1963 Constitution of Kenya provides thus:

Section 2. Every person born in Kenya after 11 December 1963 shall become a citizen of Kenya at the date of his birth:

Provided that a person shall not become a citizen of Kenya by virtue of this section if at the time of his birth-

- (a) neither of his parents is a citizen of Kenya and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Kenya; or
- (b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country.

#### **4.7 Zambia**

The 1964 Constitution of Zambia also states:

Section 9. Every person born in Zambia after 23rd October, 1964 shall become a citizen of Zambia at the date of his birth:

Provided that a person shall not become a citizen of Zambia by virtue of this section if at the time of his birth-

- (a) neither of his parents is a citizen of Zambia and his father possesses such immunity from suit

- and legal process as is accorded to the envoy of a foreign sovereign power accredited to Zambia;  
or
- (b) his father is a citizen of a country with which Zambia is at war and the birth occurs in a place then under occupation by that country.

As it can be critically read through, the contents underlying the above reproduced constitutional provisions which are interpreted as to reflect the *jus soli* mode are quite similar in principle with the Tanzania citizenship law. It is therefore this similarity that makes Tanzania to be grouped along with other countries such as Antigua and Barbuda, Barbados, Belize and Dominica in considering the *jus soli* principle.

Among the above cited countries, the following are selected cases showing how the *jus soli* provisions were applied or not. The first case is that of Dilcia Yean and Violeta Bosico v. Dominican Republic.<sup>37</sup> It must be noted that Dominican Republic is among countries listed above that follow the *jus soli* mode. Although the Constitution of Dominican Republic provides for this mode, yet Dilcia Yean was denied Dominican citizenship. Dilcia Yean was born on 15 April 1996 in the Dominican Republic to a woman of Haitian descent. Through both judicial and legislative developments, the Government made it a law to deny citizenship to persons of the category of Dilcia Yean and Violeta Bosico. The Dominican Government before the Inter American Court of Human Rights had argued that the two girls were not Dominican and could not have been regarded as stateless since they were able to

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<sup>37</sup> Inter-American Court of Human Rights (IACtHR), 23 November 2006.

acquire Haitian nationality. The Court dismissed the claims of the Dominican Government and established that because the two girls were born in the Dominican Republic, they were Dominican citizens by the principle of *jus soli* which was the guiding principle under the Dominican Constitution. The Dominican Government was further held to have failed to comply with its duty to safeguard the rights set forth in the American Convention and had committed an arbitrary deprivation of nationality to the girls leaving them stateless.

In the case of Zambia, matters related to former Presidents Dr. Kenneth Kaunda and Frederick Chiluba are worth noting. As it was noted that the Zambian Constitution followed the *jus soli* principle but for political-related reasons, it was amended in 1996 to exclude Dr. Kenneth Kaunda from contesting Presidential post on reasons that he had no citizenship roots in Zambia. The changes required that in order to contest for Presidential post one must have both of her/his parents born in Zambia, a condition that excluded Dr. Kenneth Kaunda because his parents were from former Nyasaland (later known as Malawi). While however the same argument was posed against Frederick Chiluba whose father was also said not to be Zambian by birth and thus not qualifying to re-run for Presidential post. Authorities turned away from realities and protected the position of Chiluba as being non-contentious against the Zambian Constitution. In the case of *Lewanika and Others v. Chiluba*<sup>38</sup> the Supreme Court of Zambia affirmed that citizenship must not be defined in discriminatory terms. It was further found that whichever of several proposed biographies adopted, Chiluba's ancestors came from Northern Rhodesia (later known as Zambia) and his citizenship and eligibility for the

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<sup>38</sup> 1998 ZLR 86.

Presidential post could not be questioned since citizenship was attributed at Independence to anyone born in Zambia.<sup>39</sup>The African Court on Human and Peoples' Rights on its part had among others found the changes of Constitution mainly targeted to Dr. Kenneth Kaunda as discriminatory in *Legal Resources Foundation versus Zambia*.<sup>40</sup>

These cases illustrate how the *jus soli* position was applied (though for the case of Zambia it varied on how it was applied to Kaunda and Chiluba). The *jus soli* principle in this case was used to rescue Chiluba (by the Supreme Court's proclamation) while the same could not be invoked on Dr. Kenneth Kaunda.

Under the Tanzanian judicial considerations there has not been so far a challenge against the provisions leading to a precedent or standing judicial pronouncement regarding this controversy. Research has revealed only a position held as a matter of clarification from the Attorney General's Office.<sup>41</sup> Clarifying on the correct position of section 5 of the Tanzania Citizenship Act, the Office of the Attorney General concluded, among others, that the section requires that a person needs to be born in the United Republic to a parent who is also a citizen so as to qualify to be a Tanzanian citizen by birth. Coupled with this clarification, the Immigration Services Department interprets section 5 of the Tanzania Citizenship Act to be based on *jus sanguinis* mode.

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<sup>39</sup> Man by, B, *Citizenship in Africa: The Law of Belonging*. See footnote 8.  
<sup>40</sup> 211/98.

<sup>41</sup> Letter available with the Tanzania Immigration Services Department. See also a copy of the letter as an appendix in Issa, A.M, *The Efficacy of the National Laws in Tanzania on Citizenship by Birth*, LL.M Dissertation, Mzumbe University, Tanzania, 2003 available at [www.scholar.mzumbe.ac.tz](http://www.scholar.mzumbe.ac.tz) (Accessed on 12/01/2020).

While other countries such as Uganda, Kenya and Zambia amended their provisions (that were similar to that of Tanzania) in order to depart from the *jus soli* principle, Tanzania has not amended the provisions of section 5 while still maintaining the *jus sanguinis* model of interpretation.

## 5. A CASE FOR *JUS SOLI* MODEL

The question that arises at this juncture is why does the author of this article subscribe to the *jus soli* principle in interpreting sections 3 and 5 of the Citizenship Act and the Tanzania Citizenship Act respectively? To this question there are a number of reasons.

The first reason is drawn from history. At independence, Tanganyika inherited the *jus soli* British model which was the foundation of British model as well as the foundation of British nationality law. It was a position that only came to be amended in 1983. Fransman insists that apart from the children of certain diplomats and enemy aliens, the immigration and nationality status of the parents was irrelevant under the British inherited law on nationality. It was the place of birth and nothing more that conferred nationality that is, pure *jus soli*.<sup>42</sup>

The second reason lies in the secondary interpretation of the provisions. As shown previously, every country whose provision reads in the context held under sections 3 and 5 of the Citizenship Act and the Tanzania Citizenship Act respectively is regarded to follow the *jus soli* model. This is shown in the examples of countries of Antigua and Barbuda, Barbados, Belize and Dominica. In other words, if Kenya, Uganda and Zambia, among

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<sup>42</sup> Fransman, L, *Fransman's British Nationality Law*, above at pp.198-199 in footnote no.10 above.

others, had not amended their law provisions which were similar to those under the Tanzanian citizenship Acts would similarly be grouped in the list of countries that grant citizenship by birth under *jus soli* model. It is in recognition of this controversy that prompted them to shift their positions to *jus sanguinis* model by amending the provisions in their respective laws.

The third reason is related to the second reason but lies in what actually is the interpretation of the convoluted provisions. This interpretation is advanced by Shah<sup>43</sup> and it forms the basis for *jus soli* interpretation. The word “and” in section 5(2)(a) of the Tanzania Citizenship Act is central to this challenge. If it were not for the proviso under section 3 of the Citizenship Act and that under section 5 of the Tanzania Citizenship Act, then a person born in Tanganyika and the United Republic respectively would be a citizen by birth unconditionally. It is the proviso which sets conditions on birth. Illustratively, if section 3 of the Citizenship Act were to read thus:

Every person born in Tanganyika after the eighth day of December, 1961, shall become a citizen of Tanganyika at the date of his birth” then it follows that citizenship by birth after eighth December, 1961 would be limited to birth in Tanganyika only and no more condition would have been required.

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<sup>43</sup> Shah, R.K.D, *Britain and Kenya's citizenship law: a conflict of laws?* Immigration and Nationality Law and Practice, in footnote no.25 above.

Similarly if section 5 of the Tanzania Citizenship Act would have omitted the words “subject to the provisions of subsection (2)” and “subject to the provisions of section 30” and equivalently read thus;

“Every person born in the United Republic on or after Union Day shall be deemed to have become and to have continued to be a citizen of the United Republic with effect from the date of his birth, and with effect from the commencement of this Act shall become and continue to be a citizen of the United Republic.”

Then it follows that citizenship by birth would have been unconditionally attained. It is the author’s view that the words temporarily omitted in the fore going quotation, do not make the Tanzanian provisions different from the reproduced provisions for Kenya, Uganda, Zambia and the other countries above mentioned. In this case, the Tanzanian position would still be amenable to an equal interpretation in accordance to what similar provisions from those countries have been interpreted.

As pointed out earlier, the centre of controversy lies in the use of the word “and” as follows:

neither of his parents is or was a citizen of the United Republic *and* his father possesses the immunity from suit and legal process which is accorded to an envoy of a foreign sovereign power accredited to the United Republic.<sup>44</sup>

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<sup>44</sup> The word referred to is italicized.

It is the submission of the author that the word “and” has been put to mean “in addition to” what is previously stated. That is to say, neither of his parents is or was a citizen of the United Republic “and in addition” his father possesses the immunity from suit and legal process which is accorded to an envoy of a foreign sovereign power accredited to the United Republic of Tanzania.

Under this interpretation a person would become a citizen by birth if neither of his parents is or was a citizen of the United Republic upon his birth. For example, if Amadoli was born in Tanga on 20 April 1964 (before Union) to a father and mother who were citizens of Italy, then he became a citizen of Tanganyika automatically and unconditionally. If on the other hand the same person would have been born on 27 April 1964 (after Union) to the same parents would equally be a citizen of the United Republic. If however his father would, in addition, be a diplomat, then this is where the exception comes in as to his *jus soli* position. In other words, the fact that neither of Amadoli’s parents was a citizen of Tanganyika before the Union or the United Republic after the Union does not prevent him from becoming a citizen *unless* Amadoli’s father was a person possessing immunity from suit and legal process accredited to the then Tanganyika or the United Republic.

In this regard, the position of law on what constitutes Tanzanian citizenship by birth after independence of Tanganyika is not in consonant with the commonly held interpretation which fails to accord weight to the word “and” which indeed is central to the correct interpretation. It might be a default to think that the wording of the proviso to section 5 refers to a condition that either parent



must be a citizen of the United Republic. This is due to the fact that even before independence of Tanganyika, consideration of a parent was a necessity in determining a person's citizenship. It was provided for under section 1(1) of the Citizenship Act that in order for a person to be regarded as a citizen of Tanganyika on the eighth day of December, 1961(one day before independence), he ought to have been a citizen of the United Kingdom and colonies or a British protected person and in addition either of his parents should have been born in Tanganyika. The intention that after independence a citizen by birth was supposed to have (in addition of being born in Tanganyika) a parent who was a citizen of Tanganyika, is in this case not reflected in the said provision (section 3 of the Citizenship Act). Given the fact that this position has never been amended since independence, then it follows that the practice that a person born in the United Republic needs to have either or both of his parents who is/are citizen(s) of the United Republic remain in practice in conflict with the guiding provision.

A reading through the 17-18 October 1961 Hansard on Tanganyika Citizenship-Government Paper No.4 and the 18 April 1995 Hansard on the 1995 Tanzania Citizenship Bill reveals further these discrepancies. The 17-18 October 1961 Hansard shows that it was the intention of the Parliament to allow the application of the *jus soli* principle after the independence of Tanganyika. The following were the words of the Minister of Home Affairs tabling the Bill and, necessarily, reproduced hereunder in verbatim for ease of reference:

Turning now to the specific proposals in the Government Paper, you will note: Sir, that we are having to decide not only what the national

status of various persons will be on Independence Day and shortly after, but also what will determine a person's national status in the more distant future. The proposals therefore fall naturally into two groups. The first group consists of persons whom it is proposed shall be or shall be entitled to be if they so wish, citizens of Tanganyika on Independence Day. The second group consists of persons who may at any time after Independence become or wish to become Tanganyikan citizens.

In the first group, the largest class comprises all people born in Tanganyika before Independence who are at present either British Protected Persons or Citizens of the United Kingdom and Colonies, one of whose parents was also born in Tanganyika. It is accepted international practice that a state accepts as its potential citizens any persons born within its area. Since, in the past numbers of people have come to Tanganyika from other countries for temporary purposes, and had children born to them here, and have then gone away elsewhere, it is proposed that this automatic citizenship shall only be granted to people so born in Tanganyika if at least one of their parents was also born in Tanganyika. If neither of their parents was born in Tanganyika, then they will be entitled to become registered as Tanganyika citizens if they wish, but they will not automatically be Tanganyikan citizens since their parents' connection

with Tanganyika may have been very casual or short-lived. *In the case of people born in Tanganyika after Independence Day, it is not required that one of their parents should also be born in Tanganyika.* However, it will be remembered that if such a child born in Tanganyika has another citizenship too, as will usually be the case of non- Africans, the child will have to decide within one year of reaching the age of 21 whether or not he wishes to keep his Tanganyikan citizenship.<sup>45</sup>(Emphasis added)

Reading through the above quotation, it can be noted that the principle underlined in determining citizenship was based on *jus soli*. Emphasis however was put against duality of nationality. *Jus soli* was allowed to the extent that if the child had another nationality, he would be required to renounce such other nationality upon reaching twenty one if he so wished to remain Tanganyikan. At the same time, Members of Parliament had also in mind of the other view which in fact reflected the *jus sanguinis* mode. The Chairman of the Parliamentary Constitutional and Legal Affairs Committee had this to say:

Na ni kweli wakazi au raia wa nchi yetu, wale ambao wako katika Wilaya za mipakani, unapozungumzia juu ya kuzaliwa Tanzania, kama tungeliacha tu bila kuliainisha na kwamba siyo kuzali watu, lakini pia inabidi uwe na sifa ya kuwa raia, pengine lingeweza likatupa matatizo makubwa. Lakini ukisoma ibara ya 4 ya Muswada, kuzaliwa peke yake katika mojawapo

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<sup>45</sup> Page 306 of the Hansard.

ya nchi zilizoungana kufanya Tanzania, haitoshi. Ni mpaka mmoja kati ya wazazi, au sifa nyingine ya kuwa raia nayo itimizwe.

Literally translated it means:

And it is true that inhabitants or citizens of our country found in border districts, when you speak of birth in Tanzania, if we had left it without describing it and that it is only being born in Tanzania (to qualify to be Tanzanian by birth) but also that you must have qualifications to be Tanzanian, perhaps it could cause to us a lot of problems. But if you read article 4 of the Bill, birth alone in the countries that united to form Tanzania is not enough until one of parents or other citizenship qualifications to be fulfilled.

Since there were no changes in the previous position of the law following the enactment of the 1995 Tanzania Citizenship Act, it follows that Members of Parliament discussing the 1961 Citizenship Bill had in mind the *jus soli* mode while those discussing the 1995 Tanzania Citizenship Bill had in contemplation of *jus sanguinis* mode, the latter being the mode followed in practice. These discrepancies have left negative implications on persons relying on the letters of law so as to determine their citizenship by birth while, in fact, the interpretation on the ground goes against such reliance. For example, Juma who was born in the United Republic to parents who are not citizens, by relying on the *jus soli* principle which seemingly exists in the letters of law of the Tanzania Citizenship Act may regard

himself a Tanzanian citizen while this may not be the case when his citizenship is tested by the authorities entrusted with the determination of citizenship in Tanzania.

## 6. CONCLUSION

This article has examined the controversy arising when the letters of law on what constitutes Tanzanian citizenship by birth (after independence) are interpreted. What is clear is that interpretation from the selected secondary sources is in conflict with the official interpretation by the Tanzania Immigration Services Department, the core institution charged with matters of citizenship. Due to this controversy, the question that forms the bottom line for discussion is whether Tanzanian letters of law are pegged on *jus soli* or *jus sanguinis* mode. Drawing through historical legacy of British nationality which was pegged on *jus soli* mode whose letters were adopted at independence, illustrative similar letters of law from countries considered to follow the *jus soli* mode and their synthetic analysis, it is argued that the letters of law under the Tanzania Citizenship Act reflect the *jus soli* mode. As a result, researches into what constitutes Tanzanian citizenship by birth (after independence) which are purely based on letters of law without actual consultation with the Immigration Services Department are prone to divert from what is actually interpreted on the ground. That is why Tanzania is regarded (by some secondary sources) to follow the *jus soli* mode while other sources describe it to be following the *jus sanguinis* mode. In order to avoid this controversy and, like its counterpart countries (such as, Kenya and Uganda) which amended the same provision to reflect what is actually practised, this article proposes for amendment of the convoluted provision to align it with what is being practised by the Immigration Department. This is important given the fact that so

far there has been no domestic judicial position that has entirely cleared the cloud on the interpretation of this provision. Thus, any sole reliance on the said provision, without considering the practice, as a basis for determination of one's citizenship by birth under this controversy may yield negative implications on the person so relying on the provision.