Nationality under colonial rule and the transition to independence

As in other areas of law, the legal systems of the colonisers established the initial framework for nationality in African states after independence, though many states have since amended their laws.\textsuperscript{74} At the same time, the practical effect of colonisation was to create new territorial units that were mostly not rooted in any pre-existing state structures, and indeed often cut through territorial boundaries, splitting populations speaking the same language and sharing the same political institutions. The colonisers also facilitated—either coercively or as a side effect of the pattern of economic development produced by membership of an empire—migration both within Africa (such as that of mineworkers to South Africa or farm labour to Côte d’Ivoire) and from other continents to Africa (including not only white Europeans but, for example, also the south Asians brought to the eastern and southern regions of Africa by the British).

The territories of the British empire in Africa belonged to one of three categories. First established were the “colonies”, largely the coastal trading enclaves, including Lagos, the Gold Coast, Gambia and Freetown, and also a large part of inland Kenya, as well as South Africa and Southern Rhodesia; of these, South Africa later became a self-governing “dominion”. The remaining territories, including all those added in the late 19th century “Scramble for Africa” were designated “protectorates”, into which the early colonies were later mostly merged. Colonies and dominions were part of the “crown’s dominion”, while “protectorates”, including most other British-controlled territories in Africa, were nominally foreign territory managed by African government structures established under British protection.\textsuperscript{75} Until 1948, when the first major reform of nationality law in Britain was adopted, the single status of “British subject” was applied to all those born within the British crown’s dominion (including the United Kingdom). However, birth in a protectorate did not, in general, confer British subject status. The British Nationality Act of 1948 established the new status of “citizen of the United Kingdom and colonies” (a status abolished in 1981), the national citizenship of the United Kingdom and those places which were at that time British colonies or dominions. The status of “British protected person” was codified by the new law and applied to persons born in a protectorate, as well


\textsuperscript{75} Other categories of territory within the empire included protected states (where Britain only controlled defence and external relations), League of Nations mandates and (later) United Nations trust territories.
being used for former German territories mandated to British control after the First World War by the League of Nations. A British protected person had some rights both in the protectorate concerned and in the UK, but it was a lesser status than British subject or citizen of the United Kingdom and colonies.\textsuperscript{76} British protected persons were, in general, governed by the customary law of the territory concerned, as modified by statute and interpreted by the colonial courts; British subjects/citizens of the UK and colonies were governed by the common law also as modified by statute.

At independence, most Commonwealth countries whose constitutions were drafted according to the standard “Lancaster House”\textsuperscript{77} template adopted rules that created three ways of becoming a citizen of the new state: some became citizens automatically; some became entitled to citizenship and could register as of right; while others who were potential citizens could apply to naturalise. Those who became citizens automatically were: firstly, persons born in the country before the date of independence who were at that time citizens of the United Kingdom and colonies or British protected persons and who had at least one parent (or in some cases, grandparent) also born in the territory; and secondly, persons born outside the country whose fathers became citizens in accordance with the previous provision. Those persons born in the country whose parents were both born outside the country were entitled to citizenship by way of registration, a non-discretionary process, as were other British protected persons or citizens of the UK and colonies ordinarily resident in the country. Others could be naturalised if they fulfilled the more stringent conditions set. Provisions relating to married women usually made them dependent on their husband’s status.\textsuperscript{78}

For those born after independence, the initial rule in all the British territories was for \textit{jus soli} attribution of citizenship based only on birth in the territory, though many of these laws were quickly changed to reduce or remove the rights based on location of birth.\textsuperscript{79}

France divided nationals of its colonial territories into two main categories: French citizens (\textit{citoyens français}), who were of European stock or mixed race; and French subjects (\textit{sujets français}), including black Africans, Muslim Algerians, and other natives (\textit{indigènes}) of Madagascar, the Antilles, Melanesia and other non-European territories. A much smaller number of people were designated either French-administered persons (\textit{administrés français}) from Togo and Cameroon, placed under French control by League of Nations mandate following the First World War; or French protected persons (\textit{protégés français}) in the protectorates of Tunisia and Morocco.

\textsuperscript{76} The term “British protected person” still exists, and confers some rights in the United Kingdom, but has a different legal meaning today.
\textsuperscript{77} Lancaster House was the building in London where many of the constitutions were negotiated and finalised.
\textsuperscript{78} See Laurie Fransman, \textit{Fransman’s British Nationality Law, Third Edition}, Bloomsbury Professional, 2011, Chapter 3 and catalogue entries on Commonwealth countries for this history.
The Code de l’indigénat, a collection of legal provisions added to the Penal Code, provided for a range of offences specific to indigènes, applied and interpreted by colonial administrators or executive-dominated colonial tribunals; French citizens in the overseas territories were governed by the French civil code in the civil courts. The Code de l’indigénat initially applied only to Algeria, but from 1881 extended across the empire, and remained legally in force until 1946 (though its practical effect lasted longer). Although the French imperial system did not employ the British concept of indirect rule under customary law, and the indigénat regime did not rely on the fiction of custom, there was a very similar distinction between French subjects governed by local personal law and the indigénat, and French citizens of French civil status, the vast majority of European descent.\footnote{Christian Bruschi, “La nationalité dans le droit colonial”, Proces: Cahiers d’analyse politique et juridique, 1987–1988, special issue on “Le droit colonial”, pp. 29–83; Gregory Mann, “What Was the Indigénat? The ‘Empire of Law’ in French West Africa”, Journal of African History, Vol. 50, No. 3, 2009, pp. 331–353; Pierre Lampué, « L’étendue d’application du statut personnel des autochtones dans les territoires français d’outre-mer », Vol. 7, No. 1, 1957, pp. 1–15.} Even though Algeria itself was declared an integral part of France in 1834, and indigenous Algerian Muslims thus became French, they did not enjoy French civil rights unless they also “naturalised” as citizens through a process that involved giving up their Muslim personal status.\footnote{Patrick Weil, Le statut des musulmans en Algérie coloniale: Une nationalité française dénaturée, EUI Working Paper, HEC No. 2003/3, European University Institute, 2003.} There were few exceptions to these rules, but among them was the higher status given to the inhabitants (black African as well as white) of the “four communes” in Senegal (Dakar, Saint Louis, Gorée and Rufisque) who had enjoyed special privileges since the 1830s.

Unlike the British territories, there was no systematic effort to regulate the question of nationality in the French territories on succession of states at independence. In some cases there was a long gap between the end of colonial rule and the adoption of a new nationality law—five years in the case of Dahomey (future Benin)—with a consequent lack of clarity on the status of those born or resident during this period and on the possible conflict of laws with the French nationality code. Explicit transitional provisions were usually limited to giving the formal right to opt for nationality of the host country to those who had come to the newly independent state from elsewhere in the French African territories, an option that had to be exercised within a limited time and was directed primarily at the educated elite who had served in the civil service across the French territories.\footnote{Stanislas Melone, « La nationalité des personnes physiques », Encyclopédie juridique de l’Afrique: Vol VI, Droits des personnes et de la famille, Dakar: Nouvelles éditions africaines, 1982; Alexandre Zatzepine, Le droit de la nationalité des républiques francophones d’Afrique et de Madagascar, Paris: Pichon et Durand-Auzias, 1963, pp. 10–31.} Retention of French nationality was based on the criterion of domicile, a requirement based on residence (though with more particular definition in French law). Thus, French
nationals domiciled in the newly independent states lost French nationality on
date of transfer of sovereignty, with only a few exceptions.83

For those born after independence, the new nationality codes mostly followed
the general outline and adopted variants of the substantive and procedural
provisions of French law applicable at the time, the 1945 nationality code. All
countries provided for nationality by descent from a father who was a national,
with most (though not all) distinguishing between children born in and out of
wedlock, with rights for the child of a national mother and foreign father only
if born out of wedlock and not recognised by the father, or only if the father was
unknown or stateless. A majority also adopted variants on double jus soli, applying
equally to those born before or after independence, while some also provided
for the automatic attribution of nationality to those born in the country and still
resident there at majority and others the right to opt for nationality at that time.84
Specific family codes or laws on civil registration also had a greater importance
than in the Commonwealth countries for the establishment of the facts on the
basis of which nationality would be recognised.

The five colonies of Portugal—Angola, Cape Verde, Guinea Bissau,
Mozambique, and São Tomé and Príncipe—were subject to repeated changes in
political status and metropolitan policies, against a rather stable background of
exploitative practices on the ground.85 During the eighteenth century, Portuguese
overseas territories were named colônias (colonies); they were rebranded as
províncias (overseas provinces) in the 1820 Portuguese constitution. They were
once again renamed colônias in the 1911 constitution, a status they kept until
1951, when they were again called províncias. Two categories of citizenship were
introduced in 1899, the indígena (native) and the não-indígena (non-native). The
não-indígenas, European-born Portuguese and white-skinned foreigners, were
full Portuguese citizens subject to metropolitan laws, whereas the indígenas were
administered by African law; that is, the “customary” laws of each territory. The
indigenato code, applied in all Portuguese colonies except Cape Verde and São
Tomé and Príncipe, was applied administratively, without possible appeal to any
court of law.86 Gradually, a third category emerged, that of assimilado, that is, a
person (initially usually Asian or Afro-Portuguese but including some Africans)

83 Particular rules applied to Algeria, and Algerians even without French civil status could remain French
provided they moved to France and made a declaration. In order to avoid the loss of French nationality by those
of metropolitan origin, a law of 28 July 1960 modified the 1945 nationality code to permit French nationals born
in metropolitan France and their descendants to keep their French nationality even if they were domiciled in the
new state (including those of African origin, but mainly providing for the métis). Loi No. 60-752 du 28 juillet 1960
portant modifications de certaines dispositions du Code de la nationalité. Brunchi, « La nationalité dans le droit
colonial », text with note 213 ; Donner, Regulation of Nationality, Chapter V, “Nationality and State Succession”,
section 3.2.2.
84 Roger Decottignies and Marc de Bléville, Les nationalités africaines, Paris: Collection du Centre de
Cape Verde and São Tomé and Príncipe were subjected, at least formally, to slightly different policies from
Portuguese Guinea (today’s Guinea-Bissau), Angola and Mozambique. See also, Paul Nugent, Africa Since
86 Peter Karibe Mendy, “Portugal’s Civilizing Mission in Colonial Guinea-Bissau: Rhetoric and Reality”, The
who claimed the status of *não-indígena* on the basis of his or her education, knowledge of Portuguese language and culture, profession, and income.\(^\text{87}\) Formal legal equality in the colonies was established by the Portuguese only in 1961, in the midst of liberation wars in Africa, when any African could formally choose to become a Portuguese citizen and the worst kinds of forced labour were abolished.

At independence, national constitutions were drafted, and political regimes were given a socialist content. However, all Portuguese-speaking (lusophone) countries kept Portugal’s civil law system, maintaining much of Portuguese colonial legislation, including the framework of the provisions on nationality that had been applied in the metropolitan territories. Some countries also voted for rules favouring the grant of nationality to those who had taken part in the liberation struggle and penalising those who had collaborated with the colonial regime.

Similar rules applied in Spanish, Belgian, German and Italian colonies while they were operational. Though the systems differed, in all colonial territories those with subject status (natives, *indigènes*, *indígenas*) were not only subject to different legal regimes but were also usually obliged to work, to pay specific taxes (in kind, but also in labour), and to obtain a pass to travel within or to leave the country, while (for the most part European) citizens could leave the country freely, were exempt from labour legislation and paid taxes at different rates.

The clearest example of later problems being generated by a failure to create a comprehensive and clear solution at independence itself is probably that of the Democratic Republic of Congo. In Congo, the rapidity and unplanned nature of the Belgian departure meant that there was no proper clarification of the legal status of those tens, possibly hundreds, of thousands of people of Rwandan or Burundian origin imported to the country by the colonial state as labour on the plantations established for export crops. There was no detailed agreement on nationality and only a hastily adopted law on who could vote in the independence elections. The nationality status of the Banyarwanda brought to Congo by the Belgians was complicated by the fact that Ruanda-Urundi had been mandated to Belgian administration by the League of Nations, and thus Belgium was expressly disallowed from imposing its nationality on the inhabitants of those territories (who, when brought to Congo, were therefore given distinctive identity cards). Yet their children could also be argued to obtain nationality automatically on a *jus soli* basis under an expansive 1892 law aimed at bringing as many as possible within Belgian jurisdiction. The uncertainty surrounding their status during the panicky simultaneous withdrawal of Belgium from Congo, Rwanda and Burundi, amid an outbreak of violence in Rwanda that drove refugees into Congo at the critical moment of independence, has left the issue open as a running sore in DRC until today.\(^\text{88}\)

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\(^{87}\) These formal requisites could be waived and the *assimilado* status granted “to any African who had proved he had exercised a public charge, that he was employed in the colonial administration corps, that he had a secondary school education, that he was a licensed merchant, a partner in a business firm, or the proprietor of an industrial establishment”. Bruno da Ponte, *The Last to Leave, Portuguese Colonialism in Africa*, International Defence and Aid Fund, 1974, p. 40.