Citizenship under colonial rule

As in other areas of law, differences in the legal systems of the colonisers have influenced the principles that have been applied since independence, though both African and European states have since amended and modified the principles on which their nationality law was originally based. At the same time, the practical effect of colonisation was to create new territorial units that were mostly not rooted in any preexisting state structures, and indeed often cut through territorial boundaries, splitting populations speaking the same language and sharing the same political institutions. The colonisers also encouraged—either deliberately or as a side effect of the pattern of economic development produced by membership of an empire—migration both within Africa (as of mineworkers to South Africa) and from other continents to Africa (including not only white Europeans but for example, also the south Asians brought to 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 and Freetown); of these, South Africa later became a self-governing “dominion.” The remaining territories, including all those added in the late nineteenth century “scramble for Africa” were designated “protectorates,” into which the early colonies were later mostly merged. Colonies and dominions were part of the “crown dominion”; while “protectorates,” including most other British-controlled territories in Africa, were nominally foreign territory managed by local government structures established under British protection. 43 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 in the British crown 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,” also created by the new law and applied to persons born in a protectorate, provided some rights both in the protectorate concerned and in the UK but was a lesser status than citizenship of the United Kingdom and colonies. 44 British protected persons were in general governed by the customary law of

43 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.

44 The term “British protected person” still exists, and confers some rights in the United Kingdom, but has a different legal meaning today.
the territory concerned, as modified by statute and interpreted by the colonial courts; British subjects were governed by the common law also as modified by statute.45

At independence, most Commonwealth countries whose constitutions were drafted according to the standard “Lancaster House”46 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 at the date of independence who were at that time citizens of the United Kingdom and colonies or British protected persons; and secondly, persons born outside the country whose fathers became citizens in accordance with the other provisions. Those persons born in the country whose parents were both born outside the country were entitled to citizenship by way of registration, as were others who were ordinarily resident in the country. The laws were not gender neutral, and special provisions relating to married women were included, usually making them dependent on their husband’s status.

In 1881, France adopted a law which divided nationals of its territories into two categories: French citizens (citoyens français), who were of European stock or mixed race; and French subjects (sujets français), including black Africans, Muslim Algerians, and other natives (indigènes) of Madagascar, the Antilles, Melanesia, and other non-European territories. The Code de l’indigénat, which eventually extended across the empire, standardised laws already adopted in Algeria and elsewhere, and remained legally in force until 1946 (though its practical application lasted far longer). It established an inferior legal status for French subjects compared to French citizens, and provided for the application of local customary law as interpreted by colonial courts to French subjects, while French citizens were governed by the French civil code. 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 naturalised as citizens by the same arduous process.47 Whether in north or sub-Saharan Africa, there were few exceptions to these rules;48 but among them was the higher status given to the inhabitants (black Africans as well as white) of four communities in Senegal who had enjoyed special privileges since the 1830s, including the option to access the courts under the civil code and the right to elect a deputy to the French parliament from

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45 See Laurie Fransman, British Nationality Law (2nd Edn), Butterworths, 1998, for an exhaustive discussion of British nationality law.
46 Lancaster House was the building in London where many of the constitutions were negotiated and finalised.
48 French territories in sub-Saharan Africa were from the early 20th century divided between French West Africa (Afrique occidentale française, AOF), French Central Africa (Afrique équatoriale française, AEF), and Madagascar.
A final category was that of French-administered persons (administrés français) from Togo and Cameroon, placed under French control by League of Nations mandate following World War I.

Though French subjects had the theoretical right to become full citizens, no more than 16 West Africans were granted naturalisation each year between 1935 and 1949: the famed French commitment to assimilation effectively applied only in the cultural domain until the very last years before independence. Only then did France offer full citizenship and greater rights of representation within the French democratic system to a much larger number of its subjects. At independence, those who already had French nationality could keep it, if they made an application to do so to the French authorities.

When the French colonial territories became independent, citizenship law was based on the French Civil Code, as it had evolved since the Revolution and was applied in France. From 1889, the civil code provided that a child born in France of one parent also born in France became French; while a child born in France of foreign parents could claim citizenship at majority; the code also allowed for naturalisation after a residence period (reduced from 10 years to three years in 1927, and increased again to five years in 1945). Since independence, most francophone countries have maintained the framework of the civil code, while also amending their laws on the basis of national politics and changing international norms. In addition to provisions relating directly to citizenship, the laws relating to the family are also influential.

The five colonies of Portugal—Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Principe—were subject to repeated changes in political status and metropolitan policies, against a rather stable background of exploitative practices on the ground. 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

49 Dakar, Saint Louis, Gorée and Rufisque.
CITIZENSHIP UNDER COLONIAL RULE

Cape Verde and São Tomé and Príncipe, was applied administratively, without possible appeal to any court of law. Gradually, a third category emerged, that of assimilado, that is, a person (initially usually Asian or Afro-Portuguese but including some Africans) who claimed the status of não-indígena on the basis of his or her education, knowledge of Portuguese language and culture, profession, and income. 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.

55 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.