2 | Empire to independence: the evolution of citizenship law in Africa

The norms that governed membership of the previous African polities were largely wiped out by the sudden expansion in the late nineteenth century of the European powers' coastal trading enclaves to become full-blown imperial territories. Though these systems survived and continued to have immense influence on the daily lives of Africans, for the colonizers their legal effect was for the most part at sub-national scale only. The colonial powers might pay attention to an interpretation of 'customary' rules when their courts came to be used to settle disputes among their African subjects, but they had little relevance to the determination of an individual's membership of the colonial state, which was determined by the European power with control of the territory.

During the age of empire the grant of nationality was (as it is still for the most part) regarded under international law as being within the discretion of the state concerned; though it was generally assumed that if you were born in a territory you had the nationality of that state. At the same time, nationality in itself did not necessarily give the individual concerned full rights within the state, since it was accepted that only a limited few could participate fully in its government. Women in particular were in most places excluded from full citizenship rights in the countries of which they were nationals until at least the early twentieth century. In the colonial states of Africa and elsewhere, all those not of European descent were similarly disadvantaged. Citizenship law and practice ensured that all but a tiny number of Africans were subordinate in status to the white-skinned citizens of the colonial states.[1]

A rhetoric of service, of carrying the 'white man's burden',

of bringing civilization and Christianity to the 'dark continent', thus could not disguise – at least not to those at the sharp end of the process – the essential exploitation of colonial rule and the crudeness of the efforts to make the African colonies pay for themselves with their resources. To be a 'native' (*indigène*) was to be an inferior being whose culture was denigrated, who had no right to influence the decision-making processes that governed daily life, whose property was regularly forfeited, and who had only limited civil liberties protections. Only a tiny minority of Africans ever achieved the right to be treated on the same legal basis as whites; a status known in the French colonies as *évolué* or in the Portuguese as *assimilado*.

Africans born in most of the British territories in Africa were officially known as 'British protected persons', a status that provided some rights but was a lesser status than that of 'British subject', applied to those born in the British Isles and their descendants. A British protected person was governed by what was applied as customary law, rules largely not written down but interpreted by the colonial courts on the basis of 'native' interlocutors with an override for those customs believed to contravene British conceptions of 'moral repugnancy'. A British subject – known as a 'citizen of the United Kingdom and colonies' after the first great reform of British nationality law in 1948 – was governed by the common law and statute, with the same civil and political rights as those born and living in Great Britain.

In the colonies of the civil-law countries the same basic division existed, though differently encoded. In the French colonies of north and sub-Saharan Africa, those with full French citizenship (*citoyens français à part entière*) were those who had moved to Africa from France itself and their descendants, including those of mixed race, plus a small number of Africans resident in particular privileged towns. The vast majority of residents of French colonial territories were French subjects (*sujets français*). French subjects were governed by the *code de l'indigénat*, a set of laws first established in Algeria in 1887 and in force until about the end of the Second World War, which

established the inferior legal status of *indigènes* and provided for the application of local customary law to them, as interpreted by colonial courts. The five Portuguese colonies similarly had two categories of citizenship, encoded from 1899: the *indígena* (native) and the *não-indígena* (non-native). The *não-indígenas*, European-born Portuguese and white-skinned foreigners, were full Portuguese citizens subjected to metropolitan laws, whereas the *indígenas* were administered by the 'customary' laws of each territory. Belgium and Spain had similar rules. Only in the very last days of empire did France and Portugal offer full citizenship to a much larger number of colonial subjects, at their option.

Conditions varied among the various territories, but in all the natives or 'indigenes' were obliged to pay specific taxes in kind or in cash, often forced to work, and required to obtain a pass to leave the country or to travel internally. The non-natives, meanwhile, could leave the country freely, were exempt from labour legislation and paid taxes in their home countries. In addition, different residents of the colonial territories were subject to very different rights in relation to land ownership. For example, Africans in the British colonies deemed suitable for European settlement – South Africa, Rhodesia and Kenya in particular – were confined to 'native reserves' where they could hold land under customary law; whereas only Europeans could have freehold title in the fertile lands designated for their settlement. Africans were brought in as labourers but denied the right to own land themselves. The apogee of such distinctions was reached in South Africa, where the self-governing and subsequently fully independent country built from the mid-twentieth century a legal framework of extraordinarily complex race- and ethnicity-based citizenship distinctions. A majority of black South Africans had even their nominal nationality taken away, told that instead they belonged to one of ten supposedly independent ethnically designated 'homelands'.

This history meant that at independence there was particular resentment of the population groups that had arrived as a result of imperial conquest: not only of the whites themselves, but also

of groups that had arrived in their wake, including even those whose origins were in other parts of Africa. Thus, the rules governing the transition to independence were particularly sensitive in the context of citizenship law. Many of the cases described in this book deal with the status of those who were recognized as colonial subjects but whose presence is challenged today; or with the determination of where someone belongs whose parents came from different parts of a common colonial territory.

The basic rule in international law relating to citizenship in the context of such 'state successions' is that those who were living in the territory concerned automatically acquire the nationality of the new state and lose their former nationality; though the new state still has the right to decide in detail whom it will regard as its nationals. International law does not compel states to *grant* their nationality except in very limited cases (for example, to children who would otherwise be stateless). The international human rights treaties adopted since the establishment of the United Nations (many of them during the same period in which African countries were gaining independence) do, however, limit the previously assumed absolute state discretion over citizenship, by requiring states to work to reduce statelessness, and by prohibiting discrimination in granting citizenship and arbitrary deprivation of citizenship.

Accordingly, at independence citizenship of most of the new states was in principle granted on an equal footing to individuals of different racial and ethnic groups. The new states' citizenship laws were to a large extent based on models from the power that had colonized them; of course, using the versions that had applied to their own full citizens rather than to the 'natives' in their colonies.[2]

In the former colonies of Britain, where nationality law had not been codified at all until 1948, the constitutions of the new states of what was now called the Commonwealth were drafted according to a standard template, known as the 'Lancaster House' model after the building in London where they were negotiated. According to these constitutions people born in the former

protectorate who had been citizens of the United Kingdom and colonies or British protected persons automatically became citizens of the new state, unless neither of their parents nor any of their grandparents were born there. Those born in the country whose parents and grandparents were born outside became entitled to the status of citizen by birth and could register to be accorded it as of right; while others who were potential citizens could apply to naturalize.

In both francophone and lusophone countries the civil code was adopted, based on their respective models. From 1889, the French 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. Just as the anglophone countries' citizenship laws followed a common pattern, the *codes de la nationalité* adopted by the francophone countries of west Africa mostly still resemble this model both in their content and in the format they follow. In the lusophone countries also, which obtained independence only in 1975 with the end of dictatorship in Portugal, content and form tend towards a similar pattern.

Both the common-law and the civil-law models of citizenship that came to be applied in Africa generally combine the two basic concepts known as *jus soli* (literally, law or right of the soil), whereby an individual obtains citizenship because he or she was born in a particular country, and *jus sanguinis* (law/right of blood), where citizenship is based on descent from parents who themselves are citizens. In general, a law based on *jus sanguinis* will tend to exclude from citizenship those who are descended from individuals who have migrated from one place to another. An exclusive *jus soli* rule, on the other hand, would prevent individuals from claiming the citizenship of their parents if they had moved away from their 'historical' home, but is more inclusive of the actual residents of a particular territory.

A handful of African countries today give automatic citizenship on a *jus soli* basis to any child born on their soil, though more than twenty give citizenship to children born in their territory

of non-citizen parents who were also born there; or give them the right to claim citizenship if they are born in the country and still resident there at majority. Several other countries provide for a right to nationality or give citizenship to children who would otherwise be stateless. Nevertheless, most countries require that at least one parent of a child born on their territory must be a citizen for the child also to be a citizen.

The European models for the laws adopted by independent African states for the most part contained no explicit racial or ethnic component as applied in their metropolitan (as opposed to colonial) territories, and this race and ethnic neutrality is also the majority position in African laws today. Nevertheless, the European-inspired concept of the 'nation-state' – of a state where all the citizens are notionally tied together by a common culture, language and genetic heritage – had a strong influence on new rulers in African countries that for the most part had none of these characteristics. Moreover, the detailed discrimination on the basis of skin colour and ethnicity applied in colonial Africa had been much more widely experienced in practice than the more equal rights that existed in the European states themselves. Especially in those countries most affected by migration during the colonial period, it was tempting to amend the law to exclude those who could not claim to be the authentic owners of the land from time immemorial. Moreover, faced with the challenge of establishing authority over geographical territories of vast cultural diversity that had been created without any regard to pre-existing polities, many African governments treated marginal populations with suspicion, regarding their loyalty as especially suspect when their kith and kin were dominant in a neighbouring state.

According to the particular history of the state in question, laws were thus in many places amended or adapted in practice to exclude those whose ethnic identification with the new state – and in particular with the particular elite who found themselves in power – could be questioned. Thus, for example, the citizenship of white Zimbabweans, Asian Ugandans and Kenyans and Lebanese Sierra Leoneans and others has been explicitly denied, restricted

or challenged since independence. A more subtle discrimination against recent arrivals is found in those countries that have citizenship requirements based on the concept of 'indigenous origin'. Even today, the Ugandan and Congolese constitutions provide explicitly that citizenship by birth is restricted to those with a parent from a community indigenous to the country, provisions that still have important effects for the descendants of long-term immigrant populations who have in each generation thus never acquired citizenship by birth. Even where the laws in place are not necessarily problematic, the successive accretions of reform and amendment have in many cases simply made the rules impenetrable even to expert lawyers.

Liberia and Sierra Leone, both founded by freed slaves, have created an emphasis in their citizenship law on authenticity of race rather than indigenous origin: a reverse racial or ethnic discrimination is explicitly written into the law. In Sierra Leone only those 'of negro descent' may be citizens by birth; in the case of Liberia, 'non-negroes' are prohibited from becoming citizens even by naturalization, 'in order to preserve, foster, and maintain the positive Liberian culture, values, and character'. Many other African countries have diluted elements of the same racial preference: in Malawi, citizenship by birth is restricted to those who have at least one parent who is not only a citizen of Malawi but is also 'a person of African race'. Several other countries have a positive spin on the same distinction, giving preferential treatment in terms of naturalization to those who are from another African country (in practice defined in terms of race rather than citizenship). Mali grants citizenship by origin to any child born in Mali of a mother or father 'of African origin' who was himself or herself also born there (but not if neither parent is 'of African origin'). Ghana has recently extended this principle to members of the wider African diaspora, allowing them to settle and ultimately become citizens on easier terms than applied to those not of African descent.

The nervousness over the possible divided loyalties of those with a foot in two countries was reflected in the decision of many

African countries at independence that dual citizenship should not be allowed. Increasingly, however, a post-independence and voluntary African diaspora, in addition to the earlier involuntary diaspora of slavery, has grown to match the European and Asian migrations. These 'hyphenated' Africans with roots both in an African country and a European or American one have brought political pressure to bear on their 'home' governments to change the rules on dual citizenship and concede that someone with two identities need not necessarily be disloyal to either state. In addition, there are increasing numbers of Africans with connections to two African countries – and not only from among ethnic groups found on the borders between two states. A Nigerian-Ghanaian person is as likely a combination as a Nigerian-American or Ghanaian-British. Though a less organized and powerful lobby group, these people too claim an acknowledgement of their multiple identities.

Many African states have thus changed their rules to allow dual citizenship, or are in the process of considering such changes; around half now allow their citizens to hold another passport (though they often retain restrictions on binationals holding senior public office). Angola, Botswana, Burundi, Gabon, Gambia, Ghana, Mozambique, Rwanda, São Tomé and Príncipe, Sierra Leone, South Africa and Uganda have all amended their laws in the last decade or so to allow dual citizenship. Some African countries – notably Ethiopia and Ghana – have created an intermediate status for members of their diasporas, instead of or in addition to creating a right to dual nationality.

As in the European countries that the newly independent countries' citizenship laws were modelled upon, the new laws of many countries in Africa discriminated on the basis of gender. Female citizens were not able to pass on their citizenship to their children if the father was not also a citizen; nor could they pass citizenship to their foreign spouses. (Despite the many indigenous African traditions of belonging and ethnic identity based on matrilineal descent, citizenship discrimination on the continent today is invariably in favour of men.) Thus, in Madagascar, for example,

perhaps 5 per cent of the long-established 2-million-strong Muslim community finds itself effectively stateless because complex citizenship rules restrict citizenship by origin to those born of a Malagasy father. There are similar problems in Sierra Leone, Libya, Swaziland and elsewhere.

Since the 1960s, however, the international struggle for women's equality has made strides in Africa as elsewhere, and citizenship law has been among the areas reformed. Today only a few countries still prevent a citizen mother from passing on citizenship to her child if the father is not a citizen. The right of women to pass citizenship to their husbands has proved more of a struggle, though there too the women's movement is making steady gains.

A key moment in this move towards gender equality was the 1993 *Unity Dow* case in Botswana. According to the law in force before the case was brought, Unity Dow, a citizen of Botswana married to an American, was prevented from passing on her Botswanan nationality to her husband and children. The Court of Appeal upheld Dow's victory in the High Court, stating that 'the time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was deliberately framed to permit discrimination on the ground of sex'. The Citizenship Act was amended to conform with the judgment in 1995, and now allows naturalization of foreign spouses for both men and women, and the acquisition of citizenship by descent if either the father or the mother was a citizen of Botswana at the time of birth.

Since then, perhaps twenty countries have enacted reforms providing for greater (if not in all cases total) gender equality in the right to citizenship, and a majority now do not discriminate on a gender basis in citizenship rights. Yet almost a third of them still discriminate on the grounds of gender in granting citizenship rights to children either when born in their country or born overseas, including Burundi, Guinea, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Senegal, Somalia, Sudan, Swazi-

land, Togo, Tunisia and Zimbabwe. And some relatively recent nationality laws have introduced new discriminatory measures: Swaziland's determinedly backward-looking 2005 law provides that those born after the new law came into force are citizens only if their fathers were citizens.

In addition, more than twenty countries today still do not allow women to pass their citizenship to their non-citizen spouses or apply discriminatory residence qualifications to foreign men married to citizen women who wish to obtain citizenship. The continued resistance to the rights of married women and suspicion of what their spouses may do is reflected in a 2003 African treaty on women's rights. Its provisions do not require states to allow women to pass nationality to their husbands and say only that women and men should have equal rights with respect to the nationality of their children *unless* 'this is contrary to a provision in national legislation or is contrary to national security interests'.[3]

The case of Ethiopia, moreover, illustrates how even when the most important provisions of the law do not apparently discriminate on the face of it, gender discrimination persists in practice. The 1995 Ethiopian constitution is gender neutral in its provision on nationality, and even provides for every child to have the right to a nationality. The 2003 Proclamation on Ethiopian Nationality is also gender neutral, stating that: 'Any person born in Ethiopia or abroad, whose father or mother is Ethiopian, is an Ethiopian subject.' However, the 1930 Ethiopian Nationality Law contained a provision stating that 'Every child born in a lawful mixed marriage follows the nationality of its father.' This is the meaning that is still applied today in practice: the tens if not hundreds of thousands of people who are children of Ethiopian women and foreign men (including Eritreans) are not regarded as Ethiopian in popular understanding and administrative practice even if they were born and have lived all their lives in Ethiopia.

Gender discrimination is particularly problematic in those countries – around half of those in Africa – that make no default provision for children born in the country who would otherwise

be stateless to have a right to a nationality, or that provide the 'fall-back' right to a nationality only for children born on the territory with unknown parents (an extremely rare circumstance). This group of people is spread throughout the continent, a vast population of disenfranchised people, excluded from full membership of the country where they live.