A Note on Decolonization and Nationality

By *Władysław Czapliński*

Decolonization constituted an extremly important stage in the development of international law. Because of its specific features, the International Law Commission while preparing the draft conventions concerning the succession of states decided to distinguish decolonization as a separate type of state succession, a type of special nature, with a privileged position of the succeeding state. The adoption of such a solution was influenced by the attitude of the ILC towards the politics of former colonial powers – they treated the colonies primarily as a source of raw materials for the metropolises. The privileged position of the newly independent states can easily be recognized in the regulations of state succession conventions, especially the one of 1983, which gave rise to a number of controversies concerning the basic solutions to the questions of state property and state debts.

The creation of the newly independent states was attended by some important consequences, including the necessity to decide on the attitude of the new states towards the pre-existing norms of international law and especially customary international law. Among these rules, the rule of automatic change of nationality in cases of state succession is to be considered. According to this rule, the inhabitants of the ceded or seceding territory automatically change their nationality; they lose the nationality of the predecessor state and acquire the nationality of the successor state, notwithstanding the acts of municipal law enacted by the interested states. We are to emphasize, however, that the rule of automatism does not operate directly. According to general rules of international law, nationality belongs to the domain reserved for the exclusive competence of the states concerned and cannot be regulated by general international law »excluding international agreements expressly concerning these questions«. The major part of international legal rules concerning nationality, especially the customary ones, are indirectly applicable and constitute the requirements addressed to the legislatives of the states concerned. They can constitute, however, the basis for individual claims concerning the determination of nationality.

The rule of automatic change of nationality seems to be such a requirement as well. Its binding force has often been impaired in the theory of international law, especially by scholars of German and Austrian origin. It is worth examining whether the practice of states in the cases of decolonization confirms the application and binding force of the rule of automatism. One must notice that the position of new states is special – the existence of the state is strictly connected with the existence of its nationality, the creation of the state involves therefore the creation of its nationality as well.

According to the rule of automatism, every person residing in the territory of the newly

independent state (former colony) acquires the nationality of this state. In practice, however, the solutions adopted by those states are not so uniform.

The problem of nationality in cases of decolonization is very important from the point of view of the legal systems of the former metropolis and that of the new state. It has often been resolved by international agreement between the interested states or in the act granting independence to the colony.

Traditional French colonial law distinguished the situation of inhabitants of territories incorporated into France from that of inhabitants of territories placed under French sovereignty and control in another way (protectorates: Morocco, Tunisia and Cambodia; mandates: Togo and Cameroon). The inhabitants of the former acquired the status of French subjects (sujets français)[1] – this customary rule has been established in the 2nd half of the 19th century in the court decisions concerning Vietnam and Algeria and confirmed subsequently by the decree of 24 February 1953 on the scope of application of the French Nationality Act of 1945. As to the protectorates, their inhabitants possessed their own citizenship (that of the North African states was strongly influenced by Moslem religious ideology); the regulation was complicated because the protectorates primarily constituted religious communities instead of national ones.[2] From the point of view of international law, the inhabitants of the protectorates possessed the status of French protected persons (protégés français) and under French municipal law they were »privileged aliens«. Inhabitants of mandated territories possessed the nationality of these territories and the status of French – administered persons (administrés français). The possibility of granting them French nationality has been limited by the resolution of the Council of the League of Nations of 22 April 1923.

Extensive migration of Frenchmen of metropolitan origin was an important feature of French colonization. Irrespective of their domicile, they preserved their status of »French citizens« (citoyens français) and enjoyed political rights in France; their position in the protectorates was privileged, inter alia, they enjoyed wide facilities in the acquisition of local citizenship.

The situation changed radically after the Second World War. The French Union was created on the basis of the constitution of 1946; this event was followed by the change of the status of respective territories within the Empire. According to article 80 of the constitution, all inhabitants of the Union had equal rights, in practice, however, the distinct statuses of French citizens and French subjects were maintained.[3] Further changes in the nationality system of the French Union were introduced as the consequence of the change of status of Togo (1956) and Cameroon (1957); both states were granted the right to regulate their own nationalities (diplomatic protection was, however, still exercised by France).

1 Cf. A. R. Werner: Essai sur la réglementation de la nationalité dans le droit colonial francais, Paris 1936, p. 11 ff.

2 F. Guiho: La nationalité marocaine, Rabat–Paris 1961, and L. Aguesse: Souveraineté et nationalité en Tunisie, Paris 1930, passim.

3 F. Gonidec: Note sur la nationalité et les citoyennetés dans la Communauté, AFDI 5/1959, p. 749.

Decolonization of the French Empire began on a large scale in 1958. In the same year the French Community was created on the basis of the constitution of the 5th Republic. The Community was intended to be the confederation which would preserve French influence upon former French dependent territories. Common status of the population within the Community – citizenship of the Community (citoyenneté) – was introduced according to article 77 of the constitution and subsequently confirmed by de Gaulle's decision of 9 February 1959. This concept was not clear and precise, it was not therefore universally accepted. The native Frenchmen preserved their status of French citizens and they enjoyed political rights. The states and territories constituting the parts of the Communauté were not entitled to introduce their own citizenship.

Generally nationality problems have rarely been resolved in international agreements concluded by France with her former colonies and other dependent territories (excluding the treaties with Algeria, Vietnam and Tunisia). The solution has been left to the municipal legal systems of the states concerned. All French colonies adopted the principle of automatic change of nationality of their inhabitants at the moment of becoming independent.[4] French nationality in connection with domicile, African origin or tribal status have been adopted as the criteria for defining the circle of nationals of newly independent states;[5] in several cases this solution has been replaced by the tests of ius sanguinis and/or ius solis.[6] Nationality laws of the newly independent states were in several cases enacted with certain delay and retroactive effects were excluded.[7] The facilities in acquiring new nationality by the Frenchmen residing in the former colonies were introduced by several states; such a possibility cannot be treated as an »option« because the option is an institution of international law – it would be more appropriate to use the term »simplified naturalization«. Such naturalization would be effected by the unilateral declarations of the persons concerned.

Decolonization has had an important influence upon French municipal law. Two acts intended to resolve the nationality problems were enacted by the French authorities: the law No 60–752 of 28 July 1960 and the law No 62–825 of 21 July 1962.[8] According to the first one, all French citizens residing in the former colonies were entitled to preserve or preserved French nationality. The second one was enacted in order to implement the provisions of French-Algerian agreements of Evian of 18 March 1962. Mutual right to opt for nationality was provided respectively for French citizens residing in Algeria and for moslems of Algerian origin domiciled in France. According to the French law of

4 For detailed analysis, see G. Breunig: Staatsangehörigkeit und Entkolonisierung, Berlin 1974, at p. 101 ff. The rule was expressly provided in municipal legislation of Central Africa, Gabon, Chad, Upper Volta, Mali, Cameroon etc.

5 E. g. Guinea, Ivory Coast, Senegal, Congo-Brazzaville, Niger, Dahomey.

6 Cf., G. Breunig: op. cit., p. 134 ff.; R. Decottignies, M. de Biéville: Les nationalités africaines, Paris 1963, p. 30–33.

7 Cf. the examples of Dahomey, Guinea, Mauritania and Upper Volta.

8 Option could be negative or positive. Wide facilities were introduced into the legal systems of Cameroon, Guinea, Mali and Upper Volta.

1962, all French citizens domiciled in Algeria were entitled to preserve their French nationality, irrespective of their status under Algerian law.[9] The privileged position of French inhabitants in Algeria (Algerois) was connected with the large-scale emigration of Frenchmen to Algeria, influenced by the special status of Algeria as an overseas department of France and the relatively short distance between metropolis and former colony. The laws of 1960 and 1962 broke with the rule of automatism, traditionally accepted in French practice, in order to preserve the interests of French citizens. The practice of France, however, does not eliminate the cases of dual nationality.

Important modifications were introduced also into nationality laws of the French protectorates in North Africa. As the result of events in 1955–1956 French nationals were declared to be aliens from the point of view of new legislation in Tunisia and Morocco.

Another concept has been applied in the practice of the United Kingdom. The British practice was based on the British Nationality Act of 1948 and on international agreements. According to British municipal law, three categories of nationals could be distinguished: citizens of the United Kingdom and colonies, British protected persons and British subjects without citizenship. All inhabitants of the Empire irrespective of their eventual different citizenship in dominions possessed the common status of British subjects.

The dissolution of the Empire was initiated by the independence of Burma and India in 1947. Taking into account an expected future decolonization, important measures in the field of both municipal (British Nationality Act of 1948) and international (the creation of the »new Commonwealth«) law were undertaken. From the point of view of international relations, all British nationals preserved their common status, possessing also distinct local citizenships. Legislations of Commonwealth countries often treat British subjects without local citizenship as aliens.[10] Domicile[11] combined sometimes with the origin of parents of the person concerned[12] were adopted as criteria of acquisition of nationality of the newly independent states – former British colonies. In every case, however, the person acquiring the new nationality had to be a British subject.[13]

The system of conventional options was introduced in the British practice (art. 3 of the treaty between Great Britain and Burma of 1947, Annex D of the treaty between Great Britain, Greece, Turkey and Cyprus of 1960). In certain cases the right of choice was proclaimed unilaterally by the United Kingdom (e. g. in the Kenya Independence Act of 1963) and subsequently confirmed by the municipal legislation of the respective new states. The system adopted in the practice of the British Commonwealth permitted to eliminate the cases of dual nationality and the possibility of persons becoming stateless.

9 Cf. M. M. Avakov: Pravopreemstvo osvobodiaschchikhsa gosudarstv, Moskva 1983, p. 64–66; M. Flory: Succession d'états et conditions des habitants, in: »La succession d'état en Afrique du Nord«, Paris 1968, p. 25–35.

10 Australia, New Zealand, Tanzania, Uganda, Nigeria, Great Britain etc.

11 Nigeria, Tanganyika, Uganda, Kenya, Malta, Malawi, Gambia.

12 Trinidad–Tobago, Uganda, Kenya, Malta, Zambia.

13 Cf. section 2.c of the constitution of Barbados of 1966, article 1.1 of the British Nationality (Cyprus) Order of 1960, articles 2.1 and 4 of the Constitution of Kenya.

Nationality problems in the practice of the Netherlands and her former colonies were resolved in different ways in respect of different territories. The Dutch-Indonesian convention on nationality problems[14] provided the right of Dutchmen residing in the former colony to opt for Indonesian nationality; Dutch subject of origin other than Indonesian were entitled to opt for the Dutch nationality; finally the Indonesians possessing Dutch nationality acquired automatically the nationality of the new state. Surinam became independent on the ground of the declarations by the two interested governments; the question of nationality was resolved by the agreement of 25 November 1975 which defined three categories of persons: the nationals of the new State, the persons who preserved their Dutch nationality and the persons entitled to opt for one of these nationalities.

The former Portuguese colonies: Angola and Mozambique, became independent as the result of the war against the former metropolis. Nationality problems were resolved in acts of municipal law. The law on the nationality of Angola of 10 November 1975[15] provided that the new nationality was acquired by persons born in Angola and by the children of Angolan parents born outside Angola except those who collaborated with the colonial régime. Nationality of Mozambique was granted in accordance with the provisions of the law of 20 June 1975[16] to children of the parents of Mozambique origin, to the persons domiciled in Mozambique on the day of the proclamation of independence (except those who expressly renounced the new nationality) and to all persons born in Mozambique after proclaiming independence. Portuguese legislation (law-decree 308-A of 24 June 1975, kept in force by the Portuguese nationality act of 1981[17]) preserved Portuguese nationality of the persons of Portuguese origin residing in the former colonies while the persons of foreign origin were deprived of the status of Portuguese nationals. The act of 1975 was compatible with the legal tradition in Portugal; dual nationality is generally accepted and Portuguese nationals do not lose their nationality automatically while acquiring any new nationality in a non-voluntary way.

Spanish colonies constituted integral parts of the metropolis. After the collapse of the Spanish Empire and the cession of the major part of her colonies to the United States in 1898, Spain possessed certain rights in Equatorial, Guinea Spanish West Africa (Western Sahara and Ifni) and Morocco. The situation of the population was strictly connected with the status of the territory. The inhabitants of the protectorate of Morocco possessed their own citizenship; the inhabitants of West Africa had the same right; as the inhabitants of the metropolis; finally the inhabitants of Guinea of African origin

14 UNTS 69; 272. The convention has been denounced unilaterally by Indonesia. See Ko Swan Sik: Te Netherlands and Law concerning Nationality, in: »International Law in the Netherlands«, Alphen a. d. Rijn–Dobbs Ferry 1980; p. 32–33.

15 RCDIP 1980; p. 151–152; StAZ 1981, No. 1, p. 29.

16 StAZ 1981, No. 2, p. 59.

17 StAZ 1981, No. 11, p. 331: Cf. also M. M. Ramos: Nacionalidade e descolonizaçao, »Revista de Direito e Economia« Coimbra 2 (1976), p. 1, and the note and translation of the act by the same author in RCDIP 67 (1978), No. 1, p. 179.

were Spanish subjects (subditos). Spain renounced all rights in Morocco according to the treaty with the Kingdom of Morocco of 7 April 1956, she ceded Ifni to Morocco in the treaty of Fez of 4 January 1969; the independence of Guinea was declared unilaterally by the Spanish decree of 9 October 1968.[18] Nationality problems were resolved expressly in the treaty concerning the retrocession of Ifni only: in accordance with its provisions, the persons whose personal status was governed by Spanish civil law preserved Spanish nationality and the persons born in the territory of Ifni were entitled to opt for Spanish nationality, acquiring automatically the nationality of Morocco.

Libya, former Italian colony,[19] became independent in accordance with the decision of the UN General Assembly of 21 November 1949. The resolution left the nationality problems intact; fundamental principles of acquisition of Libyan nationality were defined in the constitution of Libya of 21 November 1949. The general rule of article 8 stated that persons born and domiciled in Libya (if not possessing any other nationality) and the persons residing in Libya for a stipulated period acquired Libyan nationality. Nationals of other states residing in Libya were entitled to opt for Libyan nationality. Dual nationality is excluded under Libyan municipal law.

Finally, the Treaty of General Relations between the Republic of the Philippines and the United States of 4 July 1946 contained no provisions concerning nationality in the independent Philippines. It was not necessary because a distinct Philippine nationality already existed at the moment of proclaiming independence.

It can be concluded that the rule of automatism has been confirmed in respect of decolonization, as to the acquisition of the new nationality by the native inhabitants of former colonies. The possibility of acquisition of new nationality by Europeans, usually the nationals of the former metropolis, residing in the new states was restricted; the procedure applied may be defined as »simplified naturalization«. This category of persons usually preserved the nationality of the metropolis. The possibility of acquisition of metropolitan nationality by native inhabitants of former colonies seems to be of an exceptional character (one must mention here the British Immigration Acts of 1970, prohibiting the entry into the United Kingdom of certain groups of British subjects; the situation has been resolved finally on the ground of the British Nationality Act of 1981).

18 Cf. M. D. de Vellasco Vallejo: Algunas Cuestiones relativas a la »sucesión de Estados« en la reciente descolonización española, »Anuario Hispano Luso-Americano de Derecho Internacional« 4 (1973), p. 613.

19 Italy renounced her rights in Libya in article 23 of the treaty of peace of 1947, UNTS 49, 3.

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The accession to independence of colonies and other dependent territories has posed the problem of how the transfer of sovereignty involved affects the nationality of persons domiciled or resident in the territory subject to such change of international status. The article examines the state practice of several former colonial powers – Britain, France, Italy, Portugal, Spain, and the United States – with regard primarily to possessions in Africa. It is found that international agreements as well as municipal enactments in the process of decolonization confirm the general rule of automatic acquisition of the nationality of the newly independent state by the native inhabitants of the former colony.