NATIONALITY: *JUS SOLI* OR *JUS SANGUINIS*

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There is no topic of present interest, involving as it does the status of men, women and children of various countries, and even of birth in the same country, as that of nationality. It bristles with difficulties! To begin with, various terms are used, apparently meant to mean one and the same thing, although unless they are carefully defined, they may refer to different aspects of the subject. For example, "national" is used as a synonym for "subject" or "citizen," yet one may be a national of a country, and subject to its jurisdiction, without, however, being a citizen—as in the case of the Filipinos, who are, indeed, subject to the Government of the United States and entitled to its protection abroad, although they are not citizens either in the sense of international, or of national law. Then there is a difference of opinion as to the branch of law to which the matter belongs—the English-speaking peoples regarding it as forming part of the public law of nations, whereas others consider it as more properly falling within the domain of private international law, to which, in turn, the English world gives the not inappropriate designation of conflict of laws.

But whether the topic belongs to international law, public or private, about which the learned differ, there is no doubt that there is a conflict of laws in well nigh every phase of the subject, which we may only hope to remedy, not by uniform laws of the different countries, but by an international compact, or convention, to which the nations at large would be contracting parties. The confusion is so great, so universal, and so embarrassing, not to say exasperating, that in the First Conference for the Codification of International Law, which is to meet at The Hague in the course of the coming year, "nationality" is the first of the three subjects, (the others being the "responsibility of states" and their "maritime jurisdiction") which the nations of the civilized world have, in their wisdom, singled out for an international agreement, in the first of their official conferences for codification.

The trouble is that there seems to be no single principle which the nations appear willing to accept as a test of their laws on the matter of nationality, some preferring the *jus sanguinis* (blood relationship), others the *jus soli* (birth within a particular country), or a combination of both, in differing degrees. There are at present seventeen countries in Europe in which *jus sanguinis* is the sole test of nationality, but there is no American country

which accepts that principle as the sole test of nationality. There is one American country whose laws are based on *jus soli* and *jus sanguinis;* on the other hand, there are five American Republics whose laws are based principally on *jus sanguinis*, but which also contain provisions based on *jus soli:* Cuba, the Dominican Republic, Haiti, Mexico and San Salvador, at least that was the case on the 1st day of January, 1929. There are twenty-seven countries whose laws are principally based on *jus soli*, but which contain provisions based on *jus sanguinis*, if those already mentioned and the self-governing colonies of Great Britain are to be included in the enumeration. Among these are the American Republics of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, the United States of America, and Uruguay.

Is there not, however, a principle which can be stated, and which, if universally and equally applied, would rid us of double or triple nationality, or even of statelessness? Is there not reason to believe that the nations would be willing to accept it in law, and in all its implications, if such a principle could be found, possessing the healing virtues which would have to be claimed in its behalf? It is suggested that the principle is that of birth within a country, which would confer the same nationality upon all persons born within its jurisdiction, and which, when those in being at its adoption had passed away, would have invested all human beings born within the country, with but a single nationality, by a single but universal law acting equally and effectively upon all persons.

For example, if the Government of the United States should adopt as the exclusive test of nationality, birth within its territory, then all persons born within and subject to its jurisdiction, after the promulgation of the law to that effect, would be deemed its nationals. In like manner, all persons born in France, or in Germany, would be French, or German nationals.

If the right of expatriation were accepted by the nations at large, and if a uniform law of naturalization were adopted, all persons wishing to change their nationality of birth could do so in accordance with its provisions, and thus gain a single nationality to replace the single nationality which they had renounced. The principle of birth within a country conferring its nationality is a natural principle, because resulting from birth, itself a natural process, and applying alike to all persons born in the country, without reference to the nationality of their parents. It is an objective principle; it is relentless, and without a remnant of consent upon the part of the person born. It is universal, as law should be, making the test one of fact; that of birth within the country in question.

If we could suppose that there was but one state in the world, it would be a matter of indifference, as far as we are concerned, whether nationality were made to depend upon *jus sanguinis*, or upon birth within the jurisdiction of the state. If we were permitted to contemplate a period when there were

but two states, either principle would be acceptable, provided each of the two states lived in solitary isolation. If, however, subjects of each visited and settled within the territory of the other, the question of nationality would begin to present itself in various forms. Could the foreigners become nationals of the state in which they resided and, if so, upon what terms? An increase in the number of states would be an increase of the difficulties, until we should find ourselves in the uncertainty, confusion and perplexity of the present day.

Without discussing supposititious situations, it is permissible to say that in primitive states the family, instead of the individual, seems to have been the unit, and that the aggregation of such units formed the group or society which we may, for present purposes, call the state; and that the family, as well as the groups of families forming the society, status, or state, was one of blood relationship. Later it appears that the state, conscious of its existence as a state, caused individuals beyond the blood relationship to enter into the family, and to possess the rights that members of the blood had alone previously enjoyed. The law permitted adoption, and the family was enlarged until it was no longer a matter of blood. The citizen was a creation of the state; all inhabitants were admitted to citizenship, and each and every citizen could say with pride: *civis romanus sum*, because of birth in the state, and without reference to blood relationship of the family.

There is another matter that should be mentioned, but not dwelt upon, the introduction of Christianity. Little by little, Europe became Christian, with the head of the Church in Rome. For us, the importance of the extension of Christianity lies in the fact that Europe became, as it were, a larger family than that of the state, larger, indeed, than the world had ever known, and whose members were, without respect to nationality, members of a community transcending the frontiers of every Christian state. Blood counted for nothing in the community of the faithful. Their allegiance was independent of descent from common ancestors; the relationship was that of association, entered into voluntarily, by an acceptance of the doctrine and practices of the Church, and through their acceptance of a spiritual superior. Every person became a member and, as it were, a citizen of the Christian community.

In the temporal world, a not dissimilar transformation occurred. States had become feudal. A feud or estate was given for life, and later made inheritable, in return for which the tenant of the feudal estate swore allegiance and military service, and the feudal superior promised protection. Here, again, this feudal relationship had nothing to do with common blood or descent from common ancestors. The relationship was, on the one hand, one of contract and, on the other, one of *jus soli*, in Europe and in Asia, at the beginning of the nineteenth century. The reasons for the political compact and for citizenship by birth within a given country were admirably stated at the beginning of the nineteenth century, in two passages, one by

an able Chief Justice of the United States, the other by the Dictator of Europe.

The Williams Case (Wharton's State Trials, 652), decided in 1799 by Chief Justice Ellsworth, in the Circuit Court of the United States, was one of citizenship. In the course of his opinion, the Chief Justice said:

> The present question is to be decided by two great principles; one is, that all the members of civil community are bound to each other by compact. The other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community will protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in its defence.

The second passage is from no less a person than Bonaparte. His opinion on nationality, and his preference for nationality by birth is thus stated in a work of authority, whose author, it should be said, was an uncompromising advocate of *jus sanguinis*. The First Consul (for that was then his position) "sought to justify by the presumed attachment of a child for his native land the application of *jus soli* to the determination of his nationality of origin; it could not but be to the advantage of the state," he said in the course of the debates in the Council of State, "to extend the empire of French laws to the sons of foreigners who are established in France and have the French spirit and French habits; they have the attachment which anyone naturally feels for the country where he was born."

The law at the time of Ellsworth's decision, and of Bonaparte's statement, was that of *jus soli* in Europe, as well as in the rest of the world. It is admirably stated by the Frenchman, Pothier: "Citizens, true and native born citizens are those who are born within the extent of the dominion of France," and, he continues, "mere birth within the realm gives the rights of a native born citizen, independently of the origin of the father and the mother and of their domicile."

Why did not this state of affairs continue? The answer is that the French Revolution had created a spirit of nationality and fraternity for Frenchmen, as such, which spirit passed to the peoples of Europe. Everywhere across the Atlantic it became so strong and so determined that the First Consul yielded to it at home, and the French Empire was ultimately crushed by the patriotism which this spirit of nationality had created abroad.

At the time of the French Revolution, there was only one independent country in America—the United States—which our Latin American friends not inappropriately term "El Mundo de Colón." The independent Republics of America are now twenty-one in number. They were settled by emigration from Europe, with considerable numbers of negroes brought as slaves to America, who are now free, and nationals of the various American Republics. The immigrants came overwhelmingly from countries in which, because of the French Revolution, nationality by blood prevailed. If the

doctrine of *jus sanguinis* and that of the impossibility of expatriation without the consent of the mother country had prevailed, it would have been difficult, if not impossible, for the American Republics to have had nationals and citizens of their own, who would have owed them exclusive allegiance.

Nationality by blood can be without limitation as to time, although its advocates apparently feel that it should not be extended to their nationals born in a foreign country beyond two or three generations, a limitation which seems to question the feasibility of a doctrine which is not susceptible of limitless application. It therefore seems advisable, in this place, to observe how the Western World has created its nationality and made of foreigners patriotic citizens. At the same time, it will be necessary to say a word in passing about the matter of expatriation, because if it had not been permitted in fact, although denied in law, the emigrants coming across the Atlantic in increasing numbers could not have been naturalized by the independent American Republics, or, if naturalized under their laws, their naturalized citizens could have been claimed by the countries of their origin, and their naturalization frustrated or endangered.

I refer again to the Williams Case, from which a few phrases have been taken. Chief Justice Ellsworth was doubtless illogical in allowing the Europeans to expatriate themselves, while denying to American citizens the right to do so. He was, however, an outspoken man, who stated the problem and policy of the New World in two short, but pithy sentences: "In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration. But our policy is different; for our country is but sparsely settled, and we have no inhabitants to spare."

Before him, however, the whole question had been treated in a large and humanitarian way by him whose hand had penned the Declaration of Independence of the United States. As Governor of Virginia, Jefferson was responsible for the Act of the Legislature of his State, of 1779, "declaring who shall be deemed citizens of this commonwealth."[1] Foreigners were to be admitted as citizens through the process of naturalization, as stated in the act; and as Jefferson was a logician, he saw that the right of a foreigner to become a citizen of the State of Virginia involved the right of that foreigner to divest himself of his original nationality. Therefore, he put the ax to the tree, and in a statute of less than two printed pages, stated sound law and enlightened practice. The act in question determines:

I. *Who are to be considered citizens of Virginia?*

> . . . all white persons born within the territory of this commonwealth, and all who have resided therein two years next before the passing of this act; and all who shall hereafter migrate into the same, other than

[1] The Statutes at Large; being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the year 1619. By William Waller Hening, Vol. X (1822), Ch. LV, p. 129.

alien enemies, and shall before any court of record, give satisfactory proof by their own oath or affirmation that they intend to reside therein; and moreover shall give assurance of fidelity to the commonwealth. . . . The clerk of the court shall enter such oath of record, and give the person taking the same, a certificate thereof, for which he shall receive the fee of one dollar.

II. *Who are to be deemed aliens?* " . . . all others not being citizens of any the United States of America shall be deemed aliens."

III. *What is expatriation?*

. . . that natural right which all men have of relinquishing the country in which birth or other accident may have thrown them, and seeking subsistence and happiness wheresoever they may be able, or may hope to find them.

IV. *How is the right of expatriation to be exercised?*

. . . whensoever any citizen of this commonwealth, shall by word of mouth in the presence of the court of the county wherein he resides, or of the general court, or by deed in writing under his hand and seal, executed in the presence of three witnesses, and by them proved in either of the said courts, openly declare to the same court that he relinquishes the character of a citizen and shall depart the commonwealth, such person shall be considered as having exercised his natural right of expatriating himself, and shall be deemed no citizen of this commonwealth from the time of his departure.

It was only in 1868 that the American Congress enacted the theory of Jefferson into a law of the United States, declaring the right of expatriation to be " a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness."

Although the policy of the United States may have been, for the reasons advanced by Ellsworth, opposed to the expatriation of its own citizens, its policy as to the right of foreigners to expatriate themselves, and to become citizens of the United States by naturalization, was clear and beyond question. The policy of the American Republics in the matter of naturalization of foreigners has been to the same effect. As a result of long and acrimonious controversy, the principle of expatriation of their own nationals was recognized by European States in the so-called Bancroft Treaties, negotiated in 1868, the year of the Congressional Act recognizing expatriation.

In 1783, when the independence of the United States was recognized by Great Britain, there were only some three million inhabitants in the vast domains of the American Republic; therefore, desirable foreigners were invited to settle within its territory. Because of this policy, millions and millions of people have come to American shores. Under the laws of the United States they have been naturalized and, eventually, their naturalization has been recognized by their home countries. Their children have been born in the United States and, by virtue of the *jus soli*, that is to say, birth

within the territory subject to the jurisdiction of the United States, they have been born American citizens. The acceptance of the place of birth as the principle of nationality and of citizenship, and the rejection of the doctrine that persons coming from Europe should remain nationals of the country from which they departed, and that their children, born in the United States should continue the citizenship of their parents, has enabled us to develop a single nationality and a uniform citizenship in the United States, which otherwise would have been impossible.

In like manner, the various Latin American Republics have insisted upon the principle of nationality of birth within their respective jurisdictions, and each has thus created an American nationality and a citizenship of its own.

The *jus soli* has made the fortune of the Western World.

Thus it is evident that the rôle of blood relationship in primitive society has given place to a relationship created by law, and that for various reasons, and through different processes, there seems to have been a general agreement on the application of the *jus soli* prior to the French Revolution. Because of that cataclysm the conception of nationality based upon blood took possession of the European mind, and has been incorporated in the policy and practice of many of the European States and, indeed, in a lesser degree, in those of non-European communities. The advantages, however, of the principle of *jus soli*, shaken to its foundations by the French Revolution, reappear in the New World, which has built the nationality and citizenship of each of its republics upon birth within the country and subjection to its jurisdiction.

The question is unavoidable: Why should not the waters of revolution subside, and the principle of nationality, generally if not universally obtaining before the convulsion in France, be restored, especially as the old doctrine has enabled the American Republics to create a uniform nationality, a uniform citizenship within their respective jurisdictions, and an American patriotism at least equaling that of Europe?