

## THE CHINESE NATIONALITY LAW, 1909

The Chinese nationality law recently passed<sup>1</sup> is of considerable interest as illustrating the tendency of China to fall in line with modern countries in respect to law-making, and her attempt to remedy by her independent legislation a phase of the anomalous situation growing out of her seventy years' intercourse with the outer world. The law aims at two points, (1) to define the status of nationality and (2) to minimize the abuse of the lax naturalization laws of some foreign countries as applied in their colonies near China.

With regard to the first point, the law supplies a long-felt want. Before China came in contact with European countries, Chinese nationality was based upon the principles of indissoluble natural allegiance and of disability of emigration. A Chinese "was not free to go beyond the border of the seas" and when he succeeded in leaving the country he still remained a Chinese in the eyes of the law, though he had been duly naturalized in a foreign land; wherefore, if he returned to China, the authorities might or might not punish him for violating the prohibition, but in neither case was he clothed with the character of an alien so as to entitle him to the protection of his adopted country. This doctrine of perpetual allegiance, tolerable as it might have been at a time when nations were sufficient unto themselves, was incompatible with the adventurous and commercial spirit of the nineteenth century. Shortly after the Opium War, the people of the two southern provinces of China, Kwangtung and Fukien, began to emigrate in large numbers to foreign lands in quest of wealth, and not a few were naturalized there. China realized that changed conditions, coupled with her military weakness, did not warrant the pushing forward of her claims to their allegiance, and, moreover, she soon discovered the benefit derived from the emigration of her subjects; but she would not formally sanction the right of

<sup>1</sup> See Supplement, p. 160.

emigration, much less the right of alienage, for that would amount to the abandonment of her traditional view of perpetual allegiance, so essential to the Chinese version of the "Divine Right" theory. The Chinese Government considered the principles of allegiance as too sacred to be subject to change. All they would do was to slacken the rigidity of its operation and give provincial authorities discretion to dispose of cases in such a way as circumstances might demand. In other words, China, instead of remodelling her nationality system to meet the changed conditions of the time, simply allowed matters to drift. The result of such a state of things was that for nearly a century the Chinese nationality system was an anachronism, accompanied by serious difficulties to the government and the people. Taking advantage of the vagueness of the system, not a few unscrupulous provincial officials decided nationality cases at their own caprice and for their own benefit. In many instances they refused to recognize the acquired nationality, thus involving the country in international controversies; and in others, they considered the mere fact of emigration to be evidence of denationalization, regardless of the hardship to which individuals were thereby subjected. Where the question of inheritance was involved, a shrewd party would also not be slow to call into play all old theories of nationality that would oust the rightful owners from possession. Now, with the passage of this law all these grievances and abuses are bound to become things of the past. The law fixes the criterion of Chinese nationality in precise and definite language so that individuals can at all times know to what country they belong.

Concerning the second point, namely the mitigation of abuses of the lax naturalization laws of some foreign countries, the law takes a long step toward securing the object in view. For many decades the authorities of the European colonies near China and especially the Portuguese authorities at Macao have, partly for political and partly for pecuniary reasons, granted naturalization certificates to Chinese who have not been out of China and who simply have to allege that they were born in one of those colonies. Having secured this naturalization they continue to reside in China without disclosing their change of allegiance. They enjoy all civil and political

rights as native subjects of China, and in some cases they even hold official positions of honor and trust. It is only when they are involved in law suits, which generally arise through their own fault, or when they desire to enjoy such privileges as are secured to foreigners by treaties, that they declare their foreign citizenship. What is worse, the moment their declaration is made, they — thanks to the institution of consular jurisdiction in China — are out of reach of the Chinese court in respect both to what they have done before and to what they may hereafter do. The last fifty years are full of instances of cases abruptly dismissed, or transferred to the consular courts, simply because a consul declared that the defendants were naturalized subjects of his country. Respecting the control of these men, China has experienced great difficulty, but in spite of her efforts has failed to effect an understanding with foreign governments. It was not until the passage of this law, that an adequate means was found to grapple with this ever irritating evil. The law is purely remedial. Supplemental Provisions 1, 2, 3, 4 and 5 of the law require all persons who have in one way or another lost Chinese nationality to report the fact to the proper authorities, otherwise they will be deemed to have remained Chinese to all intents and purposes. Articles XI and XII provide certain essential conditions for the complete denationalization of subjects and refuses to recognize that of those who have not obtained authorization. Under the operation of these rules, nationality can no longer be treated as a matter of convenience, to be taken on and thrown off to meet changing circumstances, nor can it be resorted to as a dexterous means wherewith to evade obligations. Thus it is apparent that the law strikes an effective and proper blow at an abuse which has caused great annoyance to China and by whose removal, as can not be too strongly emphasized, the amity of China with the outer world will be greatly strengthened.

But important as the above reasons are, they were not the immediate causes of the enactment of the law. Nor did it owe its birth to the argument that in view of the constitutional movement it was necessary to define the status of nationality in order to determine who were the qualified voters. The immediate occasion for

the law came from without. Toward the end of 1907 the Dutch government attempted to force naturalization upon Chinese residents in Java. The Chinese Government knew that, as forced naturalization is, in the language of Oppenheim, an international delinquency, it might rely on diplomacy to prevent the execution of the Dutch scheme, but it also knew that the immediate promulgation of a nationality law was a necessity in that it would forestall the oft-repeated argument that "China has not a proper nationality code wherewith to justify her claim to the allegiance of her subjects abroad." In the beginning of 1908, consequently, the Ministry of Foreign Affairs was commanded to prepare the necessary legislation, and the present law was the outcome.

We shall now attempt to offer a few words of explanation on the more important features of the law. At the outset it may be pointed out that the law is based upon the principle of parentage pure and simple. A child takes the nationality of the father; but should this not be clearly determined, it follows that of the mother. It is only when the nationality of both parents is unascertainable that the principle of the place of birth is resorted to. Such a position is a natural one for China to take. On the one hand, she has a population which, though not so large as the present estimates indicate, is nevertheless too large to admit new additions from without, and on the other, she begins to realize as she never did before that her children born abroad will be a source of strength to her, if properly fostered and utilized. Hence, when the law was being prepared, the framers, as the Ministry of Foreign Affairs pointed out in their memorial to the Throne, had two objects in view, namely, (1) to "set up high qualifications for naturalization so that only desirable aliens should be admitted to Chinese nationality, and (2) to keep natural-born Chinese from falling under foreign dominion."

One of the most interesting features of the law is that it imposes more limitations on the political rights of naturalized subjects than the similar laws of any other country. Article VIII provides that a naturalized subject is incapable of being enrolled in the army or holding any of the higher executive or legislative positions for twenty years after naturalization; and even then only by Imperial permission. The explanation of this seemingly harsh rule is found in

China's fear of having her army and politics controlled by outsiders. She remembers bitterly the disasters she has suffered in the past at the hands of spies and consequently she is very nervous about any step that might bring her toward the same path of danger. It should also be noted that with the existence in China of consular jurisdiction, which exempts foreigners from her courts and thereby makes them a privileged class, very few persons who would become good citizens find it profitable to take Chinese nationality. Whatever liberal grant of political rights she may accord to naturalized aliens, she will not succeed in inducing many respectable persons into her nationality, but, instead, she simply opens a way to evildoers to carry out their machinations. With all this in mind, we can easily see that Article VIII is but a step of necessary precaution under existing circumstances.

That part of the law that deals with expatriation perhaps needs special explanation. Article XI says: "Any Chinese intending to acquire an alien character must first obtain a discharge;" and Article XVIII declares in unmistakable language that all persons who have become naturalized as aliens without permission from the Chinese authorities shall be deemed Chinese, regardless of circumstances. As for those persons who, prior to the operation of the law, had become naturalized, the law requires them duly to inform the local authorities of their change of character within one year after the law goes into effect, failing which they are to be deemed Chinese, if found residing in the interior or holding official positions. These several provisions taken together, are fraught with great consequences. Apart from the fact that they amount to a direct denial of the so-called inherent right of expatriation, they are inconsistent with the generally accepted principle that the acquisition of a new nationality *ipso facto* extinguishes a previous existing one; they necessarily give rise to double nationality. For instance, if a Chinese is naturalized in a country which does not trouble itself to inquire whether he has obtained dismissal from the Chinese Government, both countries will claim him as a subject, the one by reason of his naturalization and the other on the ground that he has not observed the rules of expatriation. At the present time when the troubles resulting from double nationality have been fully brought home to

the lawmakers, it is strange that the Chinese Government should create more of them by embodying in her law the state-consent clause in addition to the *jus sanguinis*, which as opposed to the *jus soli* alone affords ample material for conflicts between states. This could hardly have been due to hastiness or incomplete consideration. The law was the result of a long preparation. It was first drafted by the Ministry of Foreign Affairs conjointly with the Special Commissioner for the Codification of Laws, then revised by the Constitutional Investigation Board and finally submitted to the Grand Council for approval. Moreover, the task of drafting and revising was put into the hands of law students who were familiar with similar laws of other countries. Such being the case, how shall we then account for this state-consent clause which is now-a-days never so strongly emphasized in the law of any other country and which, as must have been foreseen, would become a source of conflicts with other nations?

The answer to this question is not far to seek. As already explained, one of the two objects of the law is to minimize the abuses of the lax naturalization laws of some foreign countries as applied to their colonies. That China has in the past suffered very greatly from these evils and must at once put a stop to them is self-evident. It only remains to be decided what steps she should take for their suppression. As she has, in spite of her repeated efforts, failed to induce the foreign governments concerned to modify their laws, it is but natural that she should turn to any means, such as the consent-clause, that may, notwithstanding all its disadvantages, give some measure of relief. To be sure, the consent-clause is too arbitrary and results in exceptional cases of hardship, but here China will plead that it is the only course open to her.

Thus we see that China is confronted with two alternatives, neither of which is wholly desirable but one of which must be taken. The alternatives are: on one hand the unchecked abuses of lax foreign naturalization laws, and on the other, the consent-clause which will necessarily give rise to double nationality. The former is a menace to the security of the country, nay, the sapping of her vitality. The latter is productive of international controversies which, however, are rare. Therefore, as a lesser evil the consent-clause is taken.

Nor need we push the interpretation of the state-consent clause too far. China does not seek to forbid the denationalization of her subjects. All that she demands is that she should be informed beforehand of the design of one of her subjects to expatriate himself and to examine whether by reason of crime, debts, or unfulfilled duties to the state, it is necessary to retain him longer. This point is fully set forth in Article XII, which says: Permission of discharge shall be granted if the petitioner is not (1) involved in any pending civil or criminal case, (2) bound to military duties, (3) in arrears with any state or communal tax, or (4) holding any governmental position or vested with official rank.

Another point that should be explained in order to avoid misunderstanding, is the attitude which the law takes towards the settlements in the treaty ports. The supplemental provisions of the law forbid under penalty of expulsion the residence in the "Interior" of all persons who have lost Chinese character. Foreign settlements in the treaty ports are not mentioned in this connection, but by a reasonable interpretation of these provisions it may be safely concluded that the Chinese Government tacitly permits such persons to reside and hold property in those places. Such a discriminating attitude is rendered necessary by the peculiar conditions existing in the treaty ports. It must not be inferred, however, that China has ceased to exercise her sovereign jurisdiction over these places, and, as a corollary, that foreign governments can naturalize her nationals in such ports as Shanghai, Canton and Tientsin. One of the established principles of international law is that a state can confer citizenship upon aliens only in virtue of its territorial sovereignty. In the case of foreign settlements in China, the sovereign jurisdiction of the Chinese Government is maintained in treaties and upheld by legal decisions. Therefore, whatever concessions China may grant to foreign settlements can in no wise destroy her sovereignty. At the most, they only serve to cast a sidelight on the limitations of China's actual jurisdiction over these places.

Enough has been said to demonstrate the importance of the law. It has been in operation for almost a year and the consensus of opinion is that it has so far worked smoothly. While an examination in detail brings out many flaws in its construction, it is nevertheless

an ingenious fabric and will remain a most important landmark in the history of Chinese law-making. It is a remarkable example of the dexterous handling which the present Chinese legislators attempt to apply to their remedial measures. If the foreign consuls in China continue to respect the law both in spirit and in letter, it will surely prove beneficial to the relations between China and the outer world.

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