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SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART III

IS IT TIME TO RETIRE *NOTTEBOHM*?

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> [N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual … is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[1]

Scholars of migration and citizenship will recognize the famous passage from the judgment of the ICJ in *Nottebohm* and perhaps be able to recite it from memory. But *Nottebohm* is nearing sixty-five, and so the inevitable question arises: is it time to retire the case? One impetus for the project of global migration law is the recognition of "current structures as historically contingent artifacts of a sovereignty-based global system in need of reform." No artifact does more work in sustaining the current configuration than the use of citizenship (or nationality) as the technology for regulating transnational movement.[2] Sooner or later, a conversation about the emergence of global migration law must grapple with international law's position on nationality, which brings us back to *Nottebohm*.

One of the curious features of the *Nottebohm* decision is that its afterlife has been marked by a sharp disciplinary cleavage. Among legal scholars who take *Nottebohm* seriously as jurisprudence, there is strong consensus that *Nottebohm* was wrong then, and may be even more wrong now. The incisive critiques of the dissenting judges remain unrefuted and robust in the face of subsequent developments. Commentators and decision-makers have variously distinguished, confined, or ignored the judgment.[3] In a 1992 European Court of Justice case, for example, the Advocate General consigned *Nottebohm* to a "romantic period" of international relations and diplomatic protection.

Among other legal scholars, the quotation from *Nottebohm* matters less as a dictum of international law than as a pithy yet attractive substantive account of nationality. The phrases "social fact of attachment," and "genuine connection" seem to capture something descriptively accurate about the lived experience of membership in a society. Indeed, the dictum is recruited in support of a normative argument for extending citizenship to long-term foreign residents—regular or irregular.[4] As an aspiration for what nationality ought to mean to citizens, or perhaps as a mission statement to guide legislators in setting standards for naturalization, the dictum is prescriptive.

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[1] Nottebohm Case (Liech. v. Guat.) (Second Phase), 1955 ICJ Rep. 4, 23 (Apr. 6).

[2] For purposes of this essay, I use the terms citizenship and nationality interchangeably, recognizing that the distinction may be relevant in other contexts. I address only nationality of natural persons and not legal persons or nonhuman entities.

[3] Case C-369/90, Micheletti, Opinion of Advocate General Tesauro 4355-56, ECLI:EU:C:1992:47. *See also* John Dugard (Special Rapporteur on Diplomatic Protection), First Report on Diplomatic Protection para. 117, UN Doc. A/CN.4/506 and Add. 1.

[4] *See, e.g.*, Ayelet Shachar, The Birthright Lottery 166-67 (2009), who invokes *Nottebohm* in support of her *jus nexi* proposal. Diane F. Orentlicher, *Citizenship and National Identity*, *in* International Law and Ethnic Conflict 299, 306, 308, 320 (David Wippman ed., 1998);

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I locate myself in the former camp, joining the (generally) critical chorus. *Nottebohm*'s international legal standard for nationality has only grown more dysfunctional over time. Confining the reach of the "genuine connection" theory of nationality to diplomatic protection is an untenable gambit. But neither can the majority's reasoning be redeployed in the service of extending citizenship to long-term residents in accordance with their "social fact of attachment" as contemporary *Nottebohm* fans seek to do. Regrettably, a faithful reading of *Nottebohm* as legal text reveals that the judgment impedes rather than advances that salutary objective.

Counting Nottebohm's *Flaws*

Nottebohm was controversial from its inception. Frederich Nottebohm was a German citizen who moved to Guatemala in 1905 at age twenty-four to join a family business, but never acquired Guatemalan citizenship. It is not clear whether he had a legal option of naturalizing. A month into WWII, he travelled to Liechtenstein for a couple of weeks, where he lawfully qualified for Liechtenstein citizenship with unusual celerity thanks to the discretionary dispensation of the residency requirement and monetary payment. Under German law, he automatically relinquished German citizenship upon acquiring another citizenship. He returned to Guatemala, was recorded on reentry as a Liechtenstein national, and resumed residence there. In 1941, Guatemala declared war on Germany, and in early 1943 Nottebohm was rendered to the United States and interned until the end of the war. After his release in 1946, Guatemala refused him reentry, and Nottebohm went to Liechtenstein, where he remained until his death in the early 1960s. Meanwhile, his Guatemalan assets were expropriated without compensation in 1949 as enemy alien property, and Liechtenstein commenced proceedings before the ICJ in respect of that property.

The ICJ in *Nottebohm* rejects Liechtenstein's entitlement to assert diplomatic protection in respect of Nottebohm by demoting formal citizenship from a sufficient condition for espousal of diplomatic protection to a necessary but insufficient condition. It introduces the "genuine link" test as a supplementary and mandatory prerequisite to recognition of nationality at international law. The Court draws inspiration from the tie-breaker rule of "real and effective nationality" used by arbitrators and national courts where circumstances required them to choose between two valid nationalities for purposes of private litigation.

In *Nottebohm*, this tie-breaker rule was converted into a determinant of the validity of a single nationality. On this standard, Nottebohm's links to Liechtenstein in 1939 were weak. Apart from a brother who lived there, Nottebohm had little connection to Liechtenstein prior to naturalization, though by the time Guatemala expropriated his property in 1949, he had been living in Liechtenstein for three years. When his case was heard by the ICJ he had resided in Liechtenstein nine years.

The political subtext to the case is patent: The ICJ suspected that Liechtenstein "sold" its neutral citizenship to Nottebohm so that he could avoid the commercial and personal consequences of German nationality, while maintaining a covert allegiance to the Nazi regime. Contemporary critics of Malta's cash-for-citizenship scheme might sympathize with the Court's unwillingness to accede to Liechtenstein's exercise of autonomy to determine who is and is not a citizen. Selectively refusing to recognize a state's otherwise lawful conferral of citizenship manages to avoid a confrontation between international law and a traditional domain of state sovereignty, while simultaneously disciplining states for putatively opportunistic exploitation of the nationality regime. Whatever the political appeal of this gambit, it is legally unpersuasive.

In their dissenting opinions, Judges Klaested, Read, and (ad hoc) Guggenheim methodically identify the defects in the majority approach. First, existing international law did not supply any basis for limiting states' authority to

Peter J. Spiro, *A New International Law of Citizenship*, 105 AJIL 694, 722-23 (2013) (noting that level of "genuine links" required to establish right to citizenship would be higher than that required for state to exercise diplomatic protection).

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determine their own rules of nationality, apart from fraud and abuse of right, neither of which were determinable at this preliminary stage of proceedings. Nottebohm's own alleged motives for naturalization—also untested—are not relevant to the legality of the naturalization.

Second, nothing intrinsic to the "genuine link" test made it only applicable to citizenship acquired by naturalization. As various colonial empires were entering their twilight, the implications of the "genuine link" test for millions of *jus sanguinis* "ex–pats" who had never resided in their country of nationality would destabilize the diplomatic protection regime.

Third, the rise of dual citizenship, even by 1955, collided with a definition of nationality that required a closer connection "with the population of the State conferring nationality than with that of any other State" to validate it.[5] The logical implication of this stipulation is that a person could only ever possess a "genuine link" to a single country. A relative weighting of nationality made sense in instances of dual nationality where a tie-breaker rule was necessary, but not otherwise.

Fourth, empowering state officials to assess the "genuine links" of individuals to that state on a case-by-case basis for purposes of invalidating nationality invited arbitrariness, abuse of discretion, and uncertainty in the application of law. Indeed, this critique is even more potent in the contemporary context. The current climate of escalating xenophobia and nativism gives little reason for confidence in the generous exercise of discretion by state officials in favor of casting the aegis of membership over noncitizens.

Finally, applying to mononationals a rationale intended to resolve disputes involving dual nationals left Nottebohm with no state eligible to challenge the expropriation by way of diplomatic protection. Judge Guggenheim gestures at the nascent status of the individual as legal subject under international law when he reframes the impact of denying Liechtenstein standing. He recognizes both that fundamental human rights are at stake (and not merely diplomatic protection's fiction of state-to-state injury), and also that citizenship is crucial to their vindication.

For purposes of diplomatic protection, the Court renders Nottebohm stateless.

For all that the Judgment deprecates Nottebohm's connection to Liechtenstein as inferior, what remains obscure is the referent—inferior in comparison to where? The Court implies that Nottebohm's Liechtenstein citizenship fails against a superior social and economic link to Guatemala, his state of domicile. But of course, the factual basis of his property seizure is the proposition that his "genuine link" was to Germany, even though he no longer possessed German citizenship. Guatemala's opposition to Liechtenstein's standing to espouse diplomatic protection is predicated on Guatemala's insistence that Nottebohm was "really" German and thus an enemy national rather than a citizen of a neutral state.[6] Only if the ICJ is willing to impute German nationality to Nottebohm for purposes of the laws of war would it make sense to insist that he is not a national of Liechtenstein for purposes of diplomatic protection. But the Court never addresses whether, why, or according to what test, Nottebohm remained a German national after he lost German citizenship in 1939.

What does emerge clearly from the judgment is that the "genuine link" requirement exerts only negative force. The acknowledgement of his "long standing and close connection" with Guatemala does not entitle Nottebohm to Guatemalan nationality; it only works to defeat Liechtenstein's claim on him as a national. Because international law leaves it to each state to decide its rules on nationality, the presence of a "genuine link" can never confer

[5] Nottebohm Case (Liech. v. Guat.) (Second Phase), 1955 ICJ Rep. 4, 42-43 (Apr. 4).

[6] Discussion of the rights and duties of states in relation to property held by neutrals and by enemy aliens during war time lies beyond the scope of this contribution, and the law. The law is also unclear. In particular, it is not apparent that even had Nottebohm been properly regarded as an enemy alien, Guatemala could lawfully retain his property without compensation after the war. *See* Rex M. Potterf, *Treatment of Alien Enemy Property in War Time and After by the United States*, 2 IND. L.J. 453 (1927). The United States settled its claims with Nottebohm after the war.

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nationality, yet its absence can negate it. The outcome of this asymmetry is that formal citizenship and a "genuine link" each become a necessary but insufficient condition for recognition of nationality.

Nottebohm*'s End*

Developments over the sixty years since the Nottebohm judgment only add weight to the dissent's critiques. Efforts to eradicate statelessness have gained momentum, plural nationality is widely practiced and accepted,[7] and heightened mobility and technology have multiplied connections to varied jurisdictions over time and space. EU citizenship further complicates the landscape. Those who wish to recuperate *Nottebohm*'s "genuine link" requirement may adopt one of two strategies: go small (by confining it to diplomatic protection) or go big (by transmuting it into a sufficient condition for nationality attribution).[8] Neither works.

Narrowing the "genuine link"

One defense of the Court's "genuine link" test is that it is confined to diplomatic protection. This move seems motivated not by logic or principle, but by the desire to manage the constraints of stare decisis by narrowing the judgment's compass. But the legal ramifications of citizenship spill over the border between domestic and international law.

One of nationality's chief functions is to rationalize exclusion of noncitizens from state territory, and to provide a return address for deportation of previously admitted noncitizens. To make this system work, the corollary of a state's right to deport noncitizens must be the duty of the state of nationality to receive and admit its nationals. The assumption that states will receive their deported nationals underwrites the willingness of states to admit foreign nationals in the first place.

To bring this back to *Nottebohm*, imagine that Frederich Nottebohm had a brother, Hans, who also obtained citizenship in Liechtenstein in 1939. Hans was interned in Guatemala during WWII while Frederich was detained in the United States. After the war, Guatemala expropriates both Frederich and Hans' properties. Frederich is denied reentry to Guatemala and so goes to Liechtenstein, which espouses diplomatic protection on his behalf before the ICJ. Meanwhile, Guatemala seeks to expel Hans before he can litigate the expropriation in the Guatemalan courts. In this scenario, Guatemala would have to insist that Frederich *is not* a Liechtenstein national for purposes of diplomatic protection while also insisting that Hans *is* a Liechtenstein national for purposes of deportation, because Liechtenstein is the only state that is legally obliged to receive him. A cheeky litigator would accuse Guatemala of trying to suck and blow at the same time. The attempt to narrow the majority judgment to diplomatic protection cannot survive close scrutiny.

Pivoting slightly in this same scenario, the duty of states to protect their citizens operates as an organizing principle of the international legal order's partition of the globe into territorial sovereign states. In principle, the state protects its citizens through its laws, institutions, and officials, whose jurisdiction is primarily territorial. State protection is most effectively delivered on the territory where the state exercises jurisdiction, and a citizen's right to enter and remain in the state of citizenship is the optimal route to accessing that protection. Diplomatic protection operates as a second-best option for the state to assert protection over a national not within state territory. To the extent that diplomatic protection and citizens' right to enter and remain derive from a common and foundational

[7] Peter J. Spiro, At Home in Two Countries: The Past and Future of Dual Citizenship (2016).

[8] Robert Sloane offers a novel third approach, arguing that the majority's reasoning masks the "true" basis for its decision, namely abuse of right. *See* Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 Harv. Int'l L. Rev. 1, 1 (2009).

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state duty to protect its nationals, a principled basis for making the "genuine link" a bespoke test for diplomatic protection grows more implausible. The same logic that animates a state's duty to admit its citizen also underwrites diplomatic protection; if one is a national for purposes of admission to a state, one should be a national for purposes of diplomatic protection by that state.

Expanding the "genuine link"

Perhaps the best evidence of *Nottebohm*'s deficiency lies in two relatively recent Communications issued by the UN Human Rights Committee (HRC), *Nystrom v. Australia* and *Warsame v. Canada*. Each concerned the deportation of long-term permanent residents who arrived as children, and who faced expulsion because they committed serious crimes as adults. Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) guarantees that "no one shall be arbitrarily denied the right to enter his own country." The language of one's "own country" as opposed to one's "country of nationality" raises the question of whether the phrase encompasses relationships beyond formal citizenship. In both cases, the HRC broke with precedent and found in favor of the petitioners. Here is how the HRC explained why Canada was Warsame's "own country":

> Canada was his own country … in the light of the strong ties connecting him to Canada, the presence of his family in Canada, the language he speaks, the duration of his stay in the country and the lack of any other ties than at best formal nationality with Somalia.[9]

This passage, and the more detailed recitation of facts that precede it sound very much like a sociological account of membership. Yet not once in either the *Warsame* or *Nystrom* decisions do *Nottebohm*'s "genuine link" or "social fact of attachment" appear. It is unlikely that the members of the HRC—mostly international jurists—are unfamiliar with *Nottebohm*. I hope the preceding analysis explains why the HRC did not invoke *Nottebohm* in support of a broad interpretation of Article 12(4) ICCPR. There is a strong normative argument to be made in favour of disaggregating the rights associated with citizenship—especially the right to enter and remain—and extending it to noncitizens who exhibit the "sociological fact of attachment" to their country of residence. The claim is especially compelling for those noncitizens who arrived as children and grew up in the country of residence. But you can't get there via a doctrine that deems a person a national for some purposes of international law but not for others.

Nottebohm operates within a paradigm where interstate rights flow from the status of the individual. *Warsame* and *Nystrom* operate within a paradigm of human rights, where individual rights flow not from status, but from personhood. Within the parameters of legal argument—even allowing generous space for reasoning by analogy—one cannot simply toggle between an interstate/status paradigm and a human rights/personhood paradigm. That is not to deny the rhetorical utility of doing so for nonlegal arguments, but it may explain why no member of the HRC has invoked *Nottebohm* (yet) in addressing cases of the deportation of long-term residents.

Conclusion: Confronting the Status of Status

The various flaws in the *Nottebohm* judgment do not commend an approach that regards a mono-citizen as a national under international law for some purposes and not others, depending on the presence of a "genuine link." The domestic and transnational dimensions of citizenship are too intertwined to sustain the boundary that *Nottebohm* seeks to draw. Nor does *Nottebohm* supply a legal foundation on which to establish a noncitizen's right to citizenship. If the goal is to vindicate a human right, the HRC's interpretation of the Article 12(4)

[9] Human Rights Committee, Warsame v. Can., Communication No. 1959/2010 para. 8.5, UN Doc. CCPR/C/102/D/1959/2010 (Sept. 1, 2011).

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ICCPR right to enter and remain in one's own country offers a divergent but more promising path to securing the most practically important incident of citizenship, namely nondeportability.

Admittedly, retiring *Nottebohm* leaves unresolved the frustration of those who resented Liechtenstein in the past or resent Malta in the present for gaming the citizenship regime for monetary gain. My answer is that states and supranational institutions possess other mechanisms for bringing pressure to bear on states that adopt policies regarded as damaging to other states' or to global interests. Indeed, if *Nottebohm* and Malta's citizenship regime demonstrate why it should no longer be "for each State to determine under its own laws who are its nationals," then the community of states should consider devising a coherent and human rights-compliant set of binding international norms governing attribution, conferral, and withdrawal of nationality. This is, of course, not a new idea.

The international law of nationality has employed *Nottebohm* as the point of departure for over six decades. As we enter the field of global migration law, maybe it is time to retire *Nottebohm* and turn our gaze toward the future.

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