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Nottebohm and ‘Genuine Link’: Anatomy of a Jurisprudential Illusion

Peter J. Spiro

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***Nottebohm* and ‘Genuine Link’: Anatomy of a
Jurisprudential Illusion**

Peter J. Spiro*

ABSTRACT: Abstract: The ICJ’s 1955 decision in the *Nottebohm* Case famously set forth an aspirational conception of nationality requiring a “genuine link” between an individual and a state for purposes of international law. The formulation was controversial from its inception as a departure from the prevailing rule that states enjoy sovereign discretion over nationality practices. At no time has “genuine link” represented a general rule of international law. The putative doctrine has a poor track record in subsequent international proceedings (including before the European Court of Justice), effectively limited to supplying secondary support for the “dominant nationality” approach in the narrow context of international claims involving dual nationals. “Genuine link” is even less appropriately applied in the wake of globalisation, in which states have increasingly enabled the conferment of nationality to individuals with tenuous connections to the state, for example, through ancestral descent. Although some political theorists have deployed the “genuine link” label to advance a liberal nationalist agenda, *Nottebohm* has been rejected by a growing consensus of legal scholars.

KEYWORDS: nationality, citizenship, international law, *Nottebohm*, naturalization, dual nationality

* Charles R. Weiner Professor of Law, Temple Law School.

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1. Introduction

Nationality practices have generally fallen outside the ambit of international law. No other major element of governance has been so untouched by international constraints. This is surprising given the place of nationality (now conceived as citizenship) in the determination of rights, but perhaps it is not so surprising. Nationality is supremely important to the state project, insofar as it is the boundary delimitation – more so even than territory – which constitutes the state. Nationality is the starting point for self-determination. In that respect it allows for minimal external imposition. In the wake of the human rights revolution, international law has made some limited inroads into what was largely within the state's sole discretion.² But these inroads have been targeted almost exclusively at the denial or revocation of nationality. International law may be looking to put citizenship attribution to work as part of a broad agenda to expand human rights.

However, there are no such international law trends with respect to the consensual attribution of citizenship. If anything, international law has come to regard citizenship attribution as an unmitigated good, assuming a willing recipient. This destination is the product of the historically entrenched discretion afforded states over nationality practices now buttressed by the rights agenda. Both point to the grant of citizenship as one which should not be subject to external assessment or interference.

Among the very few derogations from this overarching rule of non-interference – real or attempted – looms the International Court of Justice's 1955 decision in the *Nottebohm Case*.³ It looms large in part because there have been so few broadly expressed rulings relating to the attribution of nationality. It looms large because its facts, stylised as they are, could have been written for a law school test paper. And, finally, the case looms large because the Court's opinion is broadly framed, exploring the elusive nature of the citizen–state relationship.

² See Peter J. Spiro, A New International Law of Citizenship, 105 American Journal of International Law 694 (2013).

³ *Nottebohm (Liech. v. Guat.)*, 1955 ICJ Rep. 4 (Apr. 6).

But none of the elements engendering *Nottebohm*'s notoriety add weight to its decisional authority; perhaps the contrary. The case is most famous for articulating a supposed requirement that an individual must have a 'genuine link' to a state asserting the individual's interest at the international plane. The putative 'genuine link' requirement for the allocation of citizenship is loosely bandied about in some legal and policymaking circles as if it were a hard-and-fast rule of international law. In fact, the 'genuine link' test has been vigorously contested since its first articulation in *Nottebohm*. To the extent that 'genuine link' commanded any compliance pull at all, it has been in narrow application with no salience to CBI programs. 'Genuine link' makes even less sense in the wake of globalisation than it did in the world of the mid-twentieth century. As individuals become more highly mobile and are enabled to maintain multiple citizenships, the prospect of sorting supposedly authentic citizenship from instrumental citizenship is a fool's errand. A chorus of academic commentary has declared 'genuine link' a dead letter. International law is not now about to start constraining states in their allocation of citizenship among willing recipients.

In short, 'genuine link' is not and never was a requirement for international recognition of the attribution of nationality.

2. The historical backdrop

'Genuine link' must first of all be situated against a pre-existing legal backdrop in which international law imposes almost no limitation on state sovereign discretion with respect to nationality practice. States could – and did – set the terms of birthright citizenship, naturalisation and expatriation as they saw fit. States could be restrictive in their grants of nationality, as was the case among some continental states such as Germany, or liberal, as was true of the United States and its nearly absolute territorial birthright citizenship rule. At the other end of the spectrum, states could strip individuals or whole communities of their nationality. Totalitarian expatriations were a moral abomination but they did not run afoul of any rule of international law.

As stated in the opening article of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 'It is for each State to determine under its own law who are its

nationals’, provided that such determinations were ‘recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality’. The Polish jurist Szymon Rundstein declared in 1926 that ‘[t]here can be no doubt that nationality questions must be regarded as problems which are exclusively subject to the internal legislation of individual States [...] It is, indeed, the sphere in which the principles of sovereignty find their most definite application’.⁴

States could, of course, and sometimes did consent to constrain nationality practices in bilateral or multilateral agreement with other states. The Hague Convention itself supplied one such example, along with the Bancroft treaties that the United States entered into with various European states during the late nineteenth century. These comprised conventional international law limitations, undertaken by states voluntarily. But these conventional international constraints were flimsy through the mid twentieth century. This is notable given the serious frictions among states which resulted from conflict of nationality laws, especially where the conflicts gave rise to conflicting claims to individuals (in other words, gave rise to dual nationals). These frictions sometimes resulted in armed conflict, including the War of 1812.⁵ Notwithstanding these serious consequences, states failed to harmonise nationality laws on their own or through other, general international law constraints. In other words, even though there was very good cause to put international law to work in the area, there was little progress towards that end.⁶ Some difficulties were resolved through discretionary state policies. For example, many states came to terminate their nationality upon a national’s naturalisation in another state, thus eliminating a major source

⁴ See League of Nations Committee of Experts for the Progressive Codification of International Law, Nationality, 20 American Journal of International Law 21, 23 (Special Supp. 1926) (‘There is no rule of international law, whether customary or written, which might be regarded as constituting any restriction of, or exception to’ the exclusive jurisdiction of individual states); see also, e.g., Paul Weis, Nationality and Statelessness in International Law 101 (2d ed. 1979) (‘The power of a state to confer its nationality is derived from its sovereignty. It is an attribute of territorial supremacy’).

⁵ For myriad examples of the sort of disputes generated by nationality-based conflicts, see volume 6 of James Bassett Moore’s *A Digest of International Law* (1906) as well as Edwin Borchard’s *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915).

⁶ It was not for lack of trying. Nationality law was one of only three subjects on the table at the 1930 Hague Codification Conference. In the run-up to that negotiation, John D. Rockefeller, Jr., commissioned a blue-ribbon initiative to study the issue and make recommendations for rationalising nationality practice. Research in International Law of the Harvard Law School, The Law of Nationality, 23 American Journal of International Law 1, 21 (Special Supp. 1929). Nationality laws had been a major target for the newly emerged networks of legal policymakers in the late nineteenth century, who repeatedly lamented the failure to reach international agreement on the subject. See e.g., James Brown Scott, Observations on Nationality 6 (1931) (framed as a ‘plea’ for states to harmonise their nationality practices to avoid dual nationality).

of dual nationals.⁷ That was permissive for states – there was no rule of international law which required the practice. Multilateral efforts such as the Hague Convention fell well short of correcting the source of the conflicts, both in terms of substance and in terms of the low number of accessions.

But for purposes of custom and generally recognised principles – those rules which apply to states even when their consent is merely notional – states were subject only to one clear constraint: they could not naturalise an individual without his consent. This norm was established through a series of nineteenth and twentieth century cases in which Latin American states purported to naturalise nationals of the United States and European states automatically by operation of law after a certain period of residence. The laws were aimed not just at naturalising the individuals but also at depriving them of their home-state nationality and attendant diplomatic protection. These efforts were vigorously protested by the United States, in the face of which the Latin American countries backed down. The norm precluding non-consensual naturalisation was recognised by a consensus of nationality experts, whose opinions in that era were understood to stand as authoritative sources of international law itself. As the mid-century nationality scholar Paul Weis observed, ‘the acquisition of a new nationality must contain an element of voluntariness on the part of the individual acquiring it, that it must not be conferred against the will of the individual’.⁸

Otherwise, it was understood that customary international law – the form of binding international law established through state practice – had no place in constraining state discretion over the allocation of nationality. Decisions of international tribunals were in concurrence, as were commentators. Speaking of ‘matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law’, the Permanent Court of International Justice declared in the *Nationality Decrees in Tunis and Morocco*, ‘questions of nationality are, in the opinion of this Court, in principle within this reserved domain’. In this reserved domain, ‘each State is sole judge’.⁹

⁷ See e.g., Richard W. Flournoy, *Naturalization and Expatriation*, 31 *Yale Law Journal* 702 (1922).

⁸ Weis, *supra*, at 110; see also H.F. van Panhuys, *The Role of Nationality in International Law: An Outline* 156 (1959) ([...] it would be hard to defend that the conferment of nationality on a person who has no connection whatsoever with the State in question may ever produce nationality within the meaning of international law). See also Peter J. Spiro, *Citizenship Overreach*, 38 *Michigan Journal of International Law* 167 (2017).

⁹ *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) no. 4, at 24 (Feb. 7)

To the extent that there were other limitations placed on the recognition of nationality, it was entirely in the context of dual nationality, the source of serious friction in state-to-state relations as each of two sovereigns laid claim to individuals representing military and economic manpower. The flashpoint was invariably the exercise of diplomatic protection, where one state would intervene on behalf of its nationals with another state which also claimed the individual as its own. The decision to exercise diplomatic protection was itself a matter of sovereign discretion. Disputes arose where one state refused to accept the legitimacy of the other's intervention. These disputes mostly occurred outside the context of formal processes and claims resolution, as when European-born naturalised US citizens returned to visit their homelands, only to find themselves facing military conscription or penalties for its evasion.¹⁰

However, disputes relating to dual nationals also arose in the context of the many arbitration settlement processes established by the mutual consent of states to resolve a number of nineteenth-century bilateral conflicts involving economic loss to private individuals. In some of these processes, arbitral bodies rejected the possibility that an individual holding the nationality of both establishing states could bring a claim against either, in the face of the dictum (rooted in sovereign equality) that international law could not hear an individual's claim against his own state of nationality. This rule was reflected in the 1930 Hague Convention, which provided that 'A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses'. (Some states, notably the United Kingdom, adopted it as an operating principle in most contexts, beyond the espousal of claims.)

But other tribunals developed a doctrine of 'dominant' and/or 'effective' nationality to in effect designate a sole nationality to individuals holding the nationality of both states involved in a claims process. In other words, individuals could bring claims against one state they held nationality of once their 'dominant' nationality was shown to be of the other.¹¹ This approach considered the individual's relative connections to each of the two states. Although the test was in theory multi-

¹⁰ See Peter J. Spiro, *At home in Two Countries: The Past and Future of Dual Citizenship* ch. 2 (2016).

¹¹ For citations to the many arbitral tribunals adopting the dominant nationality approach, see Report of the International Commission: Draft Articles on Diplomatic Protection with Commentaries, UN Doc A/61/10 (2006), at 34 n. 79.

factored, typically the state of habitual residence was deemed the dominant one. The ‘dominant nationality’ test supplied a mechanism for managing the conflicts rooted in the failure to eradicate dual nationality. While the approach had the effect of disregarding one of an individual’s nationalities, the inquiry into an individual’s ties to a state of nationality was limited to the context of dual nationality only, and then only when addressing a claim by an individual holding one nationality against another state in which he also held nationality. These cases were not about second-guessing nationality determinations generally, only about enabling claims which would otherwise have been blocked by typically vestigial nationalities in former homelands. In other words, the dominant nationality test expanded the universe of potential claims in arbitration proceedings, allowing some individuals to bring claims who would otherwise have faced the categorical bar of the Hague Convention approach against nationals bringing claims against a state of nationality.

3. The *Nottebohm* case

It was against this backdrop that the International Court of Justice issued its decision in *Nottebohm*. The facts will be familiar to any international lawyer. Born in Germany in 1881, Friedrich Nottebohm moved to Guatemala in 1905, where he participated in several profitable businesses, including the country’s second largest coffee producer. He did not naturalise as a Guatemalan, notwithstanding decades of residence there, maintaining his German birth nationality. With the approach of the Second World War, in 1939 he naturalised in Liechtenstein, where his brother lived but Nottebohm himself had never resided. A three-year residency requirement was waived upon the payment of a naturalisation fee and an undertaking to pay an annual tax to Liechtenstein. Refusing to recognise the legitimacy of the naturalisation, Guatemala detained Nottebohm in 1943 as an enemy alien after declaring war on Germany, also expropriating his properties in Guatemala. (Guatemala turned Nottebohm over to the United States, where he was interned.)¹² Liechtenstein subsequently sought to exercise diplomatic protection on behalf of its national.

¹² On the complex parallel proceedings between the Nottebohm family and the United States (including the detention of his Guatemalan national nephews), see Cindy G. Buys, *Nottebohm’s Nightmare: Have We Exorcised the Ghosts of WWII Detention Programs or Do They Still Haunt Guantanamo?*, 11 *Chicago-Kent Journal of International and Comparative Law* 1 (2011). The US government eventually returned assets to the family that had been frozen during the War, with a concession that Nottebohm was a ‘non-enemy’. See Kunz, *supra*, at 554.

Liechtenstein argued that the detention and expropriation were wrongful because Nottebohm was a national of Liechtenstein, a neutral state in the war, and therefore not classifiable as an enemy alien.

The majority opinion denied Liechtenstein's capacity to bring the claim. The Court found Nottebohm's naturalisation not to have international effect for the purposes of founding the claim against Guatemala. The Court explored the nature of the Liechtenstein's naturalisation decision to consider whether Nottebohm's acquisition of Liechtenstein nationality was 'real and effective'. '[N]ationality is a legal bond having as its basis a social fact of attachment', the Court observed in a much-quoted formulation, 'a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.¹³ In the Court's view Nottebohm failed the test, 'his actual connections with Liechtenstein [being] extremely tenuous'. His naturalisation had 'the sole aim of [...] coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, [or] its way of life'. The naturalisation 'was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance'. This 'link theory' of nationality had not been proposed to the Court by Guatemala or any other party before it. Guatemala had argued that Nottebohm had obtained naturalisation in Liechtenstein through fraud.

But the Court was careful to limit its inquiry to the international effect of Nottebohm's nationality and to preserve the state's discretion over nationality determinations for the purposes of municipal law. The Court refrained from confronting the validity *vel non* of Nottebohm's naturalisation. 'It is for Liechtenstein', the Court observed, 'as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality'. Noting that 'for most people' nationality has 'its only effects within the legal system of the State conferring it', the Court affirmed 'the wider concept that nationality is within the domestic jurisdiction of the State'.¹⁴ The decision had nothing to say about Nottebohm's status in Liechtenstein, only that his nationality

¹³ Nottebohm at 23–24.

¹⁴ *Id.* at 20.

could not be deployed against another state.¹⁵ As J. Mervyn Jones noted in an early commentary on the case, ‘In the result it seems clear that [Nottebohm] did in fact become a Liechtenstein national, and the Court in its judgment did not question this fact’. In other words, the majority was not denying the legitimacy of Nottebohm’s nationality in Liechtenstein. Rather, it was purporting to distinguish among its nationals, recognising the country’s capacity to assert claims for some nationals but not for others.

The Canadian jurist John Erskine Read issued a lengthy dissenting opinion to the decision, perhaps among the most notable dissents in ICJ history. Noting the Bancroft treaties entered into by the United States with a range of states (not including Liechtenstein) governing the diplomatic protection of naturalised citizens who returned to their homelands, Judge Read argued that there would be no cause to devise such treaty arrangements if they were already supplied by customary law.¹⁶ If states wanted to limit their capacity to represent nationals in the claims context, they had the means to do so, but such limitation should not be read into generally applicable international law. He distinguished decisions of arbitral tribunals as implicating dual nationality, ‘an essentially different kind of relationship’, in particular where states refused to recognise the naturalisation of nationals before other states, on the obvious basis that no such conflicting claims to nationality were implicated in Nottebohm’s case. In any case, Read rejected the salience of Nottebohm’s motivation for naturalisation. Even if Nottebohm had naturalised to avoid the possibility of detention and expropriation, this would in his view not have affected Liechtenstein’s ability to oppose his naturalisation.

Judge Read also refused to recognise Nottebohm’s lack of residence in Liechtenstein as a decisive factor. He observed:

¹⁵ J. Mervyn Jones, *The Nottebohm Case*, 5 *International & Comparative Law Quarterly* 230, 234 (1956); *see also* Josef L. Kunz, *The Nottebohm Judgment*, 54 *American Journal of International Law* 536, 550 (1960) (‘The judgment does not adjudicate upon the validity of the acquisition of Liechtenstein nationality by Nottebohm’); Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 *Harvard International Law Journal* 1, 16 (2009) (*Nottebohm* ‘did not establish a new rule limiting the internal competence of states to confer their nationalities’).

¹⁶ *Nottebohm*, *supra*, at 41.

Most States regard non-resident citizens as a part of the body politic. In the case of many countries such as China, France, the United Kingdom and the Netherlands, the non-resident citizens form an important part of the body politic and are numbered in their hundreds of thousands or millions. Many of these non-resident citizens have never been within the confines of the home State. I can see no reason why the pattern of the body politic of Liechtenstein should or must be different from that of other States.¹⁷

‘Unable to disregard what really did happen’, Read highlighted that after the war, Nottebohm established residence in Liechtenstein. Among the more curious aspects of the *Nottebohm* decision is the fact that as of the date of the Court’s decision in 1955, Nottebohm had been resident in Liechtenstein for almost a decade.¹⁸

4. *Nottebohm’s* errors

Nottebohm is the most famous decision of an international tribunal relating to the subject of nationality, but the ruling is famous because it was and is infamous, at least among the college of international lawyers studying nationality law. The decision was discontinuous with pre-existing law. On the facts, the decision was riddled with contradictions and was chiefly directed at a problem which was not before the Court, that of dual nationality. It was only in that context that the ruling was applied thereafter, and then only sporadically. The ‘genuine link’ concept, meanwhile, has come under increasingly withering attack from respected international law scholars.

Turning to the decision’s contradictions, it is not clear what nationality the ICJ was ascribing to Nottebohm on application of its approach. The Court did not question the operation of German law, under which his German nationality terminated upon naturalisation in Liechtenstein.¹⁹ In any

¹⁷ Id. at 44.

¹⁸ See L.F.E. Goldie, *The Critical Date*, 12 *International & Comparative Law Quarterly* 1251 (1963). The Nottebohm majority suggested that his residence in Liechtenstein was explained by Guatemala’s refusal to allow his return to the country in 1946. See *Nottebohm* at 25.

¹⁹ Although there was nothing in the Court’s opinion questioning the termination of his German nationality, the Court may have been influenced by contingencies relating to German law and policy in the months leading up to the outbreak of the War. A July 1939 German Foreign Office circular urged Germans in Latin America to seek a foreign citizenship, assured of having it restored in peace. The 1913 Reich nationality law also provided for the readmission of former

case, Nottebohm's ties with Germany had been attenuated through his more than thirty years' residence in Guatemala. If the 'social fact of attachment' were the appropriate metric, Nottebohm would have been a national of Guatemala. But he had not naturalized there, and there could be no question of imputing Guatemalan nationality in the absence of his consent (and although that would have barred Nottebohm's claims in an international tribunal, it would have undercut Guatemala's basis for expropriating his property in the first place). In this sense the ICJ denominated Nottebohm as stateless, at least for the purposes of diplomatic protection. 'The judgment prevented justice from being done to Nottebohm', observed Josef Kunz, 'making him, for all practical purposes, a stateless person and depriving him of the only legal remedy he had'.²⁰

The decision cannot be framed as having treated Nottebohm in effect as a German national, against whom expropriation would have been appropriately undertaken. The opinion would have applied to any other claim that Liechtenstein attempted to bring on Nottebohm's behalf, even if it were completely unrelated to international law as it related to enemy aliens. Say, for example, that Nottebohm had been wrongfully detained by some other state on a basis having nothing to do with his German origins. The logic of the *Nottebohm* decision would have denied Liechtenstein's capacity to intervene on behalf of its national in that case. Although Nottebohm's German origins may have driven the facts in the case before the Court, this element of the case cannot support the 'genuine link' rationale for denying the admissibility of Liechtenstein's intervention.

Nottebohm's logic seemed targeted at another problem altogether, that of dual nationality. The decision purports to isolate the 'social fact of attachment' as the fulcrum of nationality. But the opinion translates this threshold for nationality as 'the juridical expression of the fact that the individual upon whom it is conferred [...] is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.²¹ Short of the ICJ claiming the power to adduce nationality – which would be entirely inconsistent with state sovereign discretion

German nationals. These background facts may have contributed to the 'bad cases make bad law' take on the judgment. Weis, *supra*, at 180.

²⁰ Kunz, *supra*, at 566; see also Clyde Eagleton, *Ferment or Revolution?*, 50 *American Journal of International Law* 916, 920 (1956) (decision 'could produce a new class of "stateless persons"'); Jack H. Glazer, *Affaire Nottebohm (Liechtenstein v. Guatemala): A Critique*, 44 *Georgetown Law Journal* 313, 323 (1956) (characterising this consequence of the decision as 'manifestly bad' and 'exceedingly harsh').

²¹ *Nottebohm*, at 23.

– the test works only where an individual has more than one nationality. *Nottebohm*'s approach was ill-suited to the facts of the case, where the question was not which of multiple nationalities to prefer for international purposes, but whether to validate his sole nationality for those purposes. As Robert Sloane notes, 'The logic and propriety of transposing, by what amounts to *ipse dixit*, the "criteria designed for cases of double nationality to an essentially different type of relationship" is questionable'.²² In this respect *Nottebohm* was squarely in the tradition of the dominant-nationality approach to claims in which an individual brought claims against one of two states of nationality.

At the same time, *Nottebohm* was by its own terms limited to the context of diplomatic protection and international claims. That had been central to controversies implicating nationality and dual citizenship. One state seeks to bring a claim against another state on behalf of an individual who is a national of both. In that case, as described above, international tribunals (before and after *Nottebohm*) have in some cases sought to determine which nationality is 'dominant', supported by an 'effective link'. Mid-century nationality scholar Paul Weis accepts *Nottebohm*'s validity on this basis only. 'The Court did not pronounce either on the general validity of the naturalization under international law', he observed. 'It merely held that *Nottebohm*'s nationality was not opposable by Liechtenstein against Guatemala in international judicial proceedings'.²³ Sloane agrees. '[T]he rationale for the rule limits its application to the classical context of diplomatic claims espousal'.²⁴

Nottebohm was controversial from its inception. Jack H. Glazer called it 'disturbing', 'a hollow triumph of form'.²⁵ Writing in the influential *American Journal of International Law*, Josef L. Kunz noted that the 1955 judgment had 'already provoked a vast literature', much of which was 'highly critical'.²⁶ On the judgment's 'genuine link' dictum, Kunz noted that the Court 'was unable to quote a single judicial precedent in favor of the genuine link theory as constituting positive international law'. Mervyn Jones characterised it as an 'entirely new theory of international claims', 'a novel principle'.²⁷

²² Sloane, *supra*, at 15

²³ Weis, *supra*, at 179.

²⁴ Sloane, *supra*, at 29.

²⁵ Glazer, *supra*, at 325.

²⁶ Kunz, *supra*, at 537–38, 553.

²⁷ Jones, *supra*, at 243, 231.

5. *Nottebohm* in practice

The *Nottebohm* judgment has not fared well in practice. There are no important decisions from international tribunals which have adopted its rationale. In a jurisprudential sense, it was dead on arrival.

In the 1958 *Flegenheimer Case* before the Italian–United States Conciliation Commission – the first major consideration of *Nottebohm* in a claims tribunal – *Nottebohm* and ‘genuine link’ was brushed aside.²⁸ The United States sought recovery of losses incurred by Flegenheimer, a US national, on account of the sale of capital stock made at depressed prices in the face of anti-Semitic Italian legislation. Flegenheimer, who was Jewish, had been born in Germany to a father who was a return migrant from the United States. He had inquired about the possibility that he was a US citizen *jure sanguinis*, but was rebuffed by various US officials in the 1930s and 1940s, even as he was stripped of his nationality under German law in 1940. Only in 1952 was his US citizenship confirmed. Italy asserted that Flegenheimer did not qualify as a US national for purposes of the claims process at relevant dates in 1943 and 1947, and ‘in view of the fact that, during half a century, the individual concerned was considered as and considered himself to be a German national by his conduct, his sentiments, his interests’. ‘[N]ationality is not effective when it confines itself to establishing a nominal link between a State and an individual’, Italy argued, citing *Nottebohm*, ‘and is not supported by a social solidity resulting from a veritable solidarity of rights and duties between the State and its national’.²⁹

The tribunal rejected the application of *Nottebohm*: ‘it is doubtful that the International Court of Justice intended to establish a rule of general international law in requiring, in the *Nottebohm Case*, that there must exist as effective link between the person and the State in order that the latter may exercise its right of diplomatic protection in behalf of the former’.³⁰ The tribunal effectively limited *Nottebohm* to its facts. The tribunal proceeded to stress that the doctrine of effective nationality

²⁸ Flegenheimer (US v. Italy), 14 R.I.A.A. 327 (Italian-US Conciliation Commission 1958).

²⁹ *Id.* at 375.

³⁰ *Id.* at 376.

was limited in application to cases in which an individual held the nationality of each of the two states party to a claims resolution process. Since there was no allegation that Flegenheimer was an Italian national, the tribunal had no basis to reject recognition of Flegenheimer's US nationality, however nominal it may have been. So long as the citizenship was 'regularly acquired' (that is, acquired in accordance with the nationality law of the state in question), the tribunal would otherwise defer to the 'unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality'.

Perhaps the only major litigation in which *Nottebohm* was accepted as a putative rule for decision was in the Iran–US claims tribunal case *A/18*.³¹ The question there was whether dual nationals could file claims before the tribunal. The claims tribunal was enabled to hear claims by nationals of the United States or Iran. The tribunal interpreted *Nottebohm* to allow an inquiry into the 'real and effective nationality based on the facts of a case, instead of an approach relying on more formalistic criteria'.³² However, the approach was deployed to soften the bar on claims by dual nationals as nationals of one state where they also held the nationality of the state against which a claim was being made.³³ The tribunal was thus putting *Nottebohm* to work not in its own context (which of course did not involve dual nationality) but rather in order to validate the 'dominant and effective' approach to claimants holding the nationalities of both states party to a claims settlement process. *A/18* only involved dual nationals, and then only in the specific context of claims processes resolving disputes between the two states of nationality. It would not have applied to a US national with no social connection to the United States if his other state of nationality were, for instance, the United Kingdom. The ruling applied only to dual Iranian–US nationals. In that respect it was applying *Nottebohm* only orthogonally, applying it to a conceptually distinct constellation of facts. In this respect, *A/18* 'repurposed' *Nottebohm* in service of the doctrine of dominant

³¹ Iran v. United States, Case No. A/18, 5 Iran-US Claims Tribunal Reporter 251 (184).

³² Id. at 263.

³³ As the tribunal noted, 'This trend toward modification of the Hague Convention rule of non-responsibility by search for the dominant and effective nationality is scarcely surprising as it is consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals'; in other words, *A/18* put *Nottebohm* to work to expand the universe of tenable claims, not restrict it. Id. at 265.

nationality, a doctrine into which (but for the fact that *Nottebohm* lacked dual nationality) the judgment much more comfortably fits.³⁴

Closer to home, the European Court of Justice demurred from applying *Nottebohm* in the *Micheletti* case. Micheletti, a national of Italy and Argentina, sought to establish a dental practice in Spain. In the case of dual nationals, Spanish law recognised the nationality of the last state of residence, in Micheletti's case, Argentina, and denied his right to establish a practice. Advocate General Tesauro asserted that the Spanish law violated Micheletti's rights as a national of a Member State, namely Italy. The Advocate General found it 'clear that possession of the nationality of a Member State is the only prerequisite which an individual must satisfy in order to be able to exercise the right'. The Advocate General rejected the application of 'effective nationality, whose origin lies in a "romantic period" of international relations and, in particular in the concept of diplomatic protection'; in other words, the concept was overblown and limited. The opinion in the same breath rejected invocation of *Nottebohm* itself, 'the well known (and, it is worth remembering, controversial)' judgment of the ICJ.³⁵ The European Court of Justice followed the Advocate General's recommendation in deeming the Spanish law inconsistent with EU commitments.

There are other contexts in which *Nottebohm* has been demoted or cast aside. Arbitration panels established under the ICSID Convention 'have disavowed the principle of the genuine link with a view to recognizing the primacy of the domestic rules on nationality'.³⁶ The panels have generally accepted nationality determinations by states except where they do not appear to conform with positive legal requirements. A panel rejected the claim of Italian nationality notwithstanding supporting official documentation where an individual had apparently not complied with a requirement to request the retention of Italian nationality upon naturalisation in another state. However, another panel accepted the attribution of nationality by descent to reject a claim even where the individual had no other connection with the state. Assessing these and other cases,

³⁴ Rayner Thwaites, *The Life and Times of the Genuine Link*, 49 *Victoria University Wellington Law Review* 645, 657 (2018).

³⁵ Opinion of AG Tesauro in Case C-369/90 *Micheletti* [1992] ECR I-4239, para. 5.

³⁶ Alice Sironi, *Nationality of Individuals in Public International Law: A Functional Approach*, in *The Changing Role of Nationality in International Law* 53, 57 (Alexandra Annoni & Serena Forlati eds, 2013).

Robert Sloane concludes that ICSID tribunals ‘have shown little inclination to search for robust substantive bonds of the sort stressed in *Nottebohm*. This casts further doubt on the descriptive accuracy of the genuine link theory as a general doctrine of international law’.³⁷

Nottebohm has also been rejected by the International Law Commission, whose work (while not qualifying as an authoritative pronouncement of the United Nations) is afforded substantial weight as the work of a collective expert body. The Draft Articles on Diplomatic Protection adopted by the ILC in 2006 provide that ‘a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State [...] not inconsistent with international law’.³⁸ The accompanying commentary explains that this provision ‘does not require an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case’. The commentary found it appropriate ‘to limit *Nottebohm* to the facts of the case in question’ and concluded that the ICJ ‘did not intend to expound a general rule’. As a general point, the ILC observed that the burden of proof should be on any state challenging a person’s nationality given that ‘the State conferring nationality must be given a “margin of appreciation” in deciding upon the conferment of nationality and that there is a presumption in favour of the validity of a State’s conferment of nationality’.³⁹

As for the dominant nationality approach to claims by dual nationals against one state of nationality itself, the doctrine continued to have traction through the mid-century. In the *Mergé* decision from the Italian–US Conciliation Commission, nearly contemporaneous to *Nottebohm*, the tribunal weighed the efforts of a US-born claimant who had assiduously taken steps to maintain her US citizenship against her habitual residence in Italy to find the latter dominant and thus preclusive of a claim against Italy.⁴⁰ As described above, the *A/18* ruling is more appropriately situated in this line of decisions than in any universalized conception of ‘genuine link’. Article 7 of the ILC Draft Articles on Diplomatic Protection accepts the dominant nationality approach as a default rule. More recently, there appears to be a retreat from even this limited context in which duly conferred nationality is disregarded, in recognition of the cumbersome nature of the dominant nationality

³⁷ See Sloane, *supra*, at 39.

³⁸ ILC Draft Articles, *supra*, article 4.

³⁹ ILC Draft Articles, *supra*, at 30.

⁴⁰ *Mergé* (US v. Italy), 14 R.I.A.A. 236 (Italian-US Conciliation Commission 1955).

determination. The UN Compensation Commission, established in the wake of Iraq's 1991 invasion of Kuwait, considered claims from dual nationals holding Iraqi citizenship, so long as the other citizenship was *bona fide*, which was interpreted as meaning that the other nationality had been acquired prior to the beginning of the military conflict in August 1991.

In a general sense, international law has made some inroads into the near-complete discretion that states previously enjoyed with respect to nationality determinations. There has been some suggestion that states cannot discriminate in their nationality practices on the basis of suspect classifications, and there is some convergence in state practice toward adopting double *jus soli*.⁴¹ But these norms are provisional – they have clearly not hardened into binding customary international law. With limited exceptions,⁴² they affect only the denial or withdrawal of nationality, not its conferment. Otherwise, the traditional rule that states have discretion over their nationality practices is largely intact. The first article of the 1997 European Convention on Nationality, for example, provides that ‘Each State shall determine under its own law who are its nationals’, and that such determinations shall be accepted by other States as far as they are consistent with treaty obligations, customary international law and ‘principles of law generally recognized with regard to nationality’. This formulation is almost identical to the lead provision of the 1930 Hague Convention. There is simply no credible argument that *Nottebohm* and ‘genuine link’ have risen to the level of customary international law or of a general principle of law relating to nationality.⁴³ On the contrary, *Nottebohm*'s star, to the extent it had ever risen, has fallen rather far.

⁴¹ See Spiro, *supra*, at 729–30. Double *jus soli* implicates the extension of nationality to the children of parents also born on state territory.

⁴² In some cases international organisations have refused to recognise the attribution of nationality where it was with the purpose of securing advantage as an employee of the organisation. See Sironi, *supra*, at 65–66. This is a minor derogation from the general rule of non-interference. Of course, the longstanding norm that states may not naturalise individuals on a non-consensual basis stands. See Open Society Justice Initiative, *Human Rights in the Context of Automatic Naturalization in Crimea* (2018), <https://www.opensocietyfoundations.org/sites/default/files/report-osji-crimea-20180601.pdf>

⁴³ See, e.g., Weis, *supra*, at 201 (*Nottebohm* approach ‘can hardly [...] be regarded as forming part of customary international law’)

6. 'Genuine link' in the face of globalisation

From a functional perspective, if *Nottebohm's* 'genuine link' analysis made little sense in the context of the mid-twentieth century, it makes even less sense today. The *Nottebohm* period reflected perhaps the height of national loyalties and identities, that 'romantic period' of nationality set as it was in the inter-state military conflict of the Second World War. *Nottebohm's* cosmopolitan identity was relatively uncommon for the period, restricted to wealthy elites who could afford the expense of frequent inter-continental travel.

Of course, there were business persons of *Nottebohm's* profile who actively maintained their homeland identity while having permanently resettled in far-flung lands. It is not a coincidence that these were the stock characters in international claims cases implicating nationality disputes. More typically, migrants transferred their citizenship along with their centre of social gravity, so that their new nationality was their 'dominant' one. Or they returned to their homeland and the former nationality reverted, as was provided for under the Bancroft treaties. Dual nationality was suppressed, although in many cases the interaction of non-harmonised nationality laws left individuals with the nationality of both the country of origin and that of resettlement. That explained why tribunals undertook the dominant nationality inquiry in some cases, even though the individual in many cases would have had 'genuine links' to both his country of origin and resettlement.

Today the 'genuine link' inquiry looks absurd in the face of proliferating multiple nationalities and the dramatically enhanced capacity for individuals to maintain social connections with multiple countries. Multiple nationality is now a fact of globalisation. The number of states accepting the status has dramatically increased. *Nottebohm* seems perhaps no more dated in this respect than in its conception of naturalisation, which the Court framed as involving the 'breaking of a bond of allegiance'.⁴⁴ Leaving aside the question of whether it is appropriate to speak of 'allegiance' in the context of the state, it is only in a distinct minority of cases today that naturalisation in a state requires termination of one's citizenship of origin.

⁴⁴ *Nottebohm*, at 24.

This has normalised the attribution of nationality on the basis of a range of social connection. In many cases, the connections and identities will be substantial, as in the case of migrants, who will typically have deep connections to both their country of origin and their country of resettlement. But in other cases, acceptance of dual citizenship enables the attribution of nationality on the basis of thin ties.

For example, many individuals claim the nationality of a grandparent or an even more distant forbearer. Nationality based on ancestry may be meaningful in a sociological sense, or it may not be. The range will be on the one extreme those who deeply identify with the nationality of their ancestors, even if it has been centuries since the territorial link was broken. Some Sephardic Jews still closely identify with their Spanish and Portuguese roots more than half a millennium after their expulsion from the Iberian Peninsula.⁴⁵ This will also often be the case with identification with the states from which a parent or grandparent emigrated. But it will also often be the case that the child or grandchild of an immigrant – never mind a more distant relation – identifies only weakly with the state of origin. An increasing number of countries are relaxing the *jus sanguinis* basis for allocating birth citizenship. None of them subjects individuals who acquire citizenship on that basis to any sort of integration test and few retain any sort of residency requirement for *jus sanguinis* citizens born abroad. They are not required to own property in their state of ancestral citizenship, maintain any other kind of vested interest, or even to have visited. States thus do not sort for sociological connections – call it ‘social fact of attachment’ – among citizens by descent.

The same holds true in some cases of those born with *jus soli* citizenship. In states such as the United States which extend citizenship to those born on national territory on a near-absolute basis, there will be many cases in which a person does not sustain a connection to the state of birth into adulthood.⁴⁶ That is true of the birth tourist, of course, but it is also true of the child born to the graduate student or business person on temporary assignment. As a result, a growing number of individuals will have formal citizenship in a state with few and often no other ties to that state.⁴⁷

⁴⁵ H.U. Jessurun d’Oliveira, *Iberian Nationality Legislation and Sephardic Jews*, 11 *European Constitutional Law Review* 13 (2015).

⁴⁶ See Spiro, *Citizenship Overreach*, *supra*.

⁴⁷ See e.g., Sloane at 18 (‘The unquestioned validity of both *jus soli* and *jus sanguinis* as bases for the ascription of nationality casts doubt on the genuine link theory, at least in the robust form expounded by the ICJ’).

The tenuous connection many individuals have with a state of birth citizenship brings *Nottebohm* into question in rather obvious ways. The critique is not original, to say the least. As noted by the ILC commentary on diplomatic protection, the genuine link theory would by its terms ‘exclude literally millions of persons from the benefit of diplomatic protection. In today’s world of economic globalisation and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have the most tenuous connection’.⁴⁸ To the extent that a ‘genuine link’ test is applied only to naturalised citizens, moreover, it tends to discriminate against them. Only the nationality of the naturalised citizen is subject to scrutiny, where the birth citizen gets a pass, even if unjustified.⁴⁹

This can be true even of those who naturalise in states imposing a residency requirement. Residency requirements do not typically imply continuous presence. In the wake of immensely intensified communications networks and the reduced cost of travel, migrants can maintain homeland ties on a near-continuous, virtual basis. The homeland connection is compounded where there are co-ethnic migrant concentrations. One can live a fully functional professional and social existence in most world capitals in one’s own language among others from one’s country of origin. Of course, many states apply other requirements to test for cultural integration. But short of minutely inspecting a person’s beliefs, friends and daily interactions, these conditions are incapable of measuring a naturalisation applicant’s actual connection to the existing community.

The *Nottebohm* majority spoke of Nottebohm’s relationship to Liechtenstein as one of not ‘becoming wedded to its traditions, its interests, [or] its way of life’. This was an almost comically nostalgic conception of nationality, if not at the time it was decided then certainly from a contemporary perspective. States no longer have unitary traditions, interests or ways of living to which citizens hew. To apply a ‘genuine link’ test of this sort to all individuals would result in a

⁴⁸ ILC Draft Articles, *supra*, at 30.

⁴⁹ Weis, *supra*, at 181. See also European Convention on Nationality article 5(2) (‘Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently’).

great many losing their citizenship; likewise with respect to the ICJ's calling *Nottebohm* out for not 'assuming the obligations – other than fiscal obligations – and exercising the rights pertaining to' nationality. Most of the millions of individuals who live outside their countries of citizenship assume no obligations relating to their nationality – not even fiscal ones. (The only country in the world which taxes non-resident citizens is the United States.) Even those who live within a country of nationality are unlikely to assume many citizenship-delimited obligations, most of which, like taxes, are imposed on the basis of residency, not citizenship.

Nor are there many rights which are exercised on a citizenship-delimited basis. Those which are – voting in national elections representing the prime example – are abjured by many citizens. No one would suggest making the recognition of citizenship contingent on the exercise of rights today.

These observations apply today, more or less, to almost every state in a globalised world. Almost every state these days will have some number of citizens who would fail the 'genuine connection' test as conceived by the *Nottebohm* judges. To the extent that states do not police the boundaries of their own citizenships, they are hardly in a position to police the boundaries set by other states, for international purposes or otherwise.

Moreover, 'genuine link' seems infinitely elastic in a world in which establishing connections of various descriptions has been dramatically facilitated by the compression of space which has come with globalisation. The threshold for demonstrating links with a state, its people and its economy are categorically lower than they have been ever been in the past. This adds additional complexity to the task of any state or other entity seeking to second-guess the attribution of nationality by another state. As Judge Read noted in his *Nottebohm* dissent, '[n]ationality, and the relation between a citizen and the State to which he owes allegiance, are of such a character that they demand certainty [...] There must be objective tests, readily established, for the existence and recognition of the status'. Any move to second guess the nationality decisions of other countries would inevitably implicate a subjective element, undermining the reliance value that millions of individuals place in their nationality to facilitate their movement through the globalised world. There are other mechanisms available to states to police any perceived abuses in the attribution of nationality, for example, by modulating visa requirements for all nationals of a particular state.

7. *Nottebohm* today: a dead letter

Nottebohm may be among the ICJ's most famous opinions, but it is also surely among its least respected. 'Among legal scholars who take *Nottebohm* seriously as jurisprudence', writes Audrey Macklin, 'there is strong consensus that it was wrong then, and may be even more wrong now'. She concludes that it is time to 'retire' *Nottebohm*.⁵⁰ Dimitry Kochenov concludes that the decision is an 'entirely arbitrary and potentially harmful rule of international law',⁵¹ the genuine link model 'incoherent and logically inexplicable'.⁵² Robert Sloane finds that the 'sociopolitical, romanticist vision of nationality articulated by the *Nottebohm* majority has [...] become increasingly anachronistic and misplaced today'.⁵³ Rayner Thwaites similarly characterises *Nottebohm* as a 'dead letter'. Thwaites dismisses *Nottebohm* as a "'one-off" [...] confined to the facts of the case'.⁵⁴ Annemarieke Vermeer-Künzli concludes that the *Nottebohm* case 'has been criticized rather strongly, and rightly so'.⁵⁵ And so on.⁵⁶

Nottebohm remains part of the discourse in two ways, neither of which live up to its mostly underserved reputation as constraining the conferment of nationality.

First is a creative application through which some advocates press states to extend citizenship to individuals with genuine links to a state, a kind of 'reverse *Nottebohm*'.⁵⁷ In other words, some are arguing that a state must grant citizenship to individuals with genuine links to it. This is to

⁵⁰ Audrey Macklin, *Is It Time to Retire Nottebohm?*, 111 *AJIL Unbound* 492 (2018).

⁵¹ Dimitry Kochenov, *Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters*, in *Globalisation, Migration, and the Future of Europe* (Leila Simona Talani ed., 2012).

⁵² Dimitry Kochenov, *Citizenship Without Respect: The EU's Troubled Equality Ideal*, Jean Monnet Paper No. 8/10 (NYU Law School, 2010).

⁵³ Sloane, *supra*, at 5.

⁵⁴ Thwaites, *supra*, at 661.

⁵⁵ Annemarieke Vermeer-Künzli, *Nationality and Diplomatic Protection: A Reappraisal*, in *The Changing Role of Nationality in International Law 77* (Alexandra Annoni & Serena Forlati eds, 2013).

⁵⁶ See also Oliver Dorr, *Nottebohm*, *Max Planck Encyclopedia of Public International Law* (*Nottebohm* 'was not successful [...] in setting up the requirement of a genuine connection for the exercise of diplomatic protection in cases of nationality conferred through naturalization. Its reasoning in this respect was unconvincing, and the consequences of the genuine link rule were seen to be disadvantageous for the position of individuals in international law'); Matjaz Tratnik, *Limitations of National Autonomy in Matters of Nationality in International and EU Law*, in *From an Individual to the European Integration Discussion on the Future of Europe 507* (S. Kraljic & J. Klojcnik eds., 2018) (*Nottebohm* 'is largely overestimated' and 'belongs in the past').

⁵⁷ See Spiro, *supra*, at 723; Macklin, *supra*, at 496.

challenge states when they deny citizenship, not grant it. There are interesting developments consistent with this argument, under which states might have a qualified obligation to extend citizenship to those with a genuine link.

But this use of *Nottebohm* is not much more than a branding exercise. The level of genuine link required to activate the norm would obviously be higher than the level of genuine link needed to satisfy the *Nottebohm* test in the context of recognising a grant of citizenship. Indeed, nothing less than habitual residence would be required to trigger an obligation to grant citizenship. In other words, it has nothing really to do with its original doctrinal meaning, nor does it validate that original doctrinal meaning in any way.

Similarly, some political theorists have latched onto the ‘genuine link’ formulation in an effort to shore up the state as a location for the redistribution of resources and the protection of rights. These liberal nationalists – Ayelet Shachar and Rainer Bauböck most prominently among them – have centred ‘genuine links’ as part of their programme to limit the citizenry to those who have a common interest in collective governance and as a counterpoint to the rise of what Shachar calls ‘nominal heirs’, those who are allocated citizenship in countries in which they have never lived.⁵⁸

However, this turn, while powerfully argued, veers heavily to a nostalgic and romanticised view of the relationship between the individual and the state. ‘Hollow citizenship’ is everywhere and irreversible. ‘Genuine links’ as deployed by the theorists does not translate into a practical standard for the allocation of nationality. As Bauböck suggests, ‘genuine links’ can serve as ‘a critical standard for assessing the strength of ties between an individual and a particular polity’. But he concedes that ‘this strength cannot be measured in a uniform way either as a subjective sense of belonging or through objective indicators such as duration of residence or family ties in the territory’.⁵⁹ In other words, it is variable in a way that cannot supply a doctrinal metric. Perhaps the most that can be said of ‘genuine link’ is that it supplies a heuristic for thinking about idealised

⁵⁸ See Ayelet Shachar, *The Birthright Lottery* 166–71 (2009).

⁵⁹ Rainer Bauböck *Democratic Inclusion: A Pluralist Theory of Citizenship*, in *Democratic Inclusion: Rainer Bauböck in Dialogue* 3, 44 (David Owen ed., 2018).

conceptions of the state,⁶⁰ and perhaps there is a reason that *Nottebohm* is popular with the political theorists at the same time that it is being abandoned by legal scholars.

8. Conclusion

Nottebohm is a remarkable decision in one respect only: there may be no other judgment of an international tribunal which has had so much purchase on the imagination at the same time as it has so little traction on the ground. Better than any other judicial pronouncement it captures the liberal nationalist ideal of the relationship between the individual and the state. Perhaps it is something to aspire to, though the prevailing trends point in other directions. Whether *Nottebohm* reflects admirable aspirations of social organisation, it does not supply a workable frame for addressing nationality and its place in the relations among states.

⁶⁰ See Sloane, *supra*, at 26 ('genuine link became a kind of mantra').

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Investment Migration Council
16 rue Maunoir
1211 Geneva
Switzerland
+41 22 533 1333
info@investmentmigration.org