

MOBILITY AND BELONGING IN A GLOBALIZED WORLD

INTRODUCTORY NOTE

Yuko Nishitani*

In the era of globalization, cross-border movement of people becomes frequent and continues to expand. The influx of migrants, refugees, and other foreigners makes society multinational and multicultural. The presence of minority groups within society challenges the conventional values, customs, traditions, and legal rules including the human rights norms of the receiving State. At the same time, it becomes a crucial issue how to live up to the cultural and religious backgrounds of immigrants and accommodate their divergent values and religious precepts. Clear political, social, and economic policies are required. The receiving State ought to attentively protect human rights of foreigners, such that the scope and extent of the protection afforded to them may differ depending on the category of human rights, *i.e.*, rights to freedom, non-discrimination, and entry and residence (“freedom from the State”), rights to education, social welfare, and benefits (“freedom by the State”), and possibly the right to political participation (“freedom to the State”).¹ The increasing number of foreigners solely residing temporarily, seeking asylum or legal resident status, engaging in short-term work, or transitioning to their final destination, may challenge conventional immigration policy and legal settings of the receiving State.²

This contemporary phenomenon of cross-border movement of people sheds new light on the individuals’ belonging to the State. Nationality as membership of the State certainly remains the most important basis for granting rights and privileges and imposing obligations. Nationality, however, unduly makes a clear distinction between nationals and non-nationals, while the relevant State has the exclusive competence of defining the acquisition, continuity, and deprivation of its

* Professor at Kyoto University Graduate School of Law, Japan. All the websites cited in this paper have been accessed on October 17, 2023.

¹ See Koji Teraya, “The Impact of the International Covenants on Human Rights on the Rights of Foreigners in Japan”, *Japanese Yearbook of International Law*, Vol. 59 (2016), pp. 165–173.

² For discussions in private international law, see Sabine Corneloup, “Migrants in Transit or Under Temporary Protection — How Can Private International Law Deal with Provisional Presence?”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 87 (2023), pp. 46–75; Peter Mankowski, “Die Reaktion des Internationalen Privatrechts auf neue Erscheinungsformen der Migration”, *IPRax*, Vol. 2017/1, pp. 40–49.

nationality,³ which is often driven by political or economic interests. We also ought to consider refugees, stateless persons, and persons of ambiguous nationality, who cannot enjoy protection from their States of origin.

For the sake of social inclusion and cohesion, recent authors advocate relativizing nationality and shifting the focus from “nationality” to “citizenship” to break free from the fetters of the nation States.⁴ The notion of citizenship can better expound and account for why foreign nationals residing in the receiving State should effectively participate in social, economic, and political life and enjoy their deserved fundamental rights. Transposing the same idea to the supranational level, the European Union has introduced “EU citizenship” as a post-State belonging of persons, with a view to building civil society and enhancing solidarity in pursuit of effective regional economic integration.⁵

The qualified belonging of individuals can be further extended to minority groups, religious communities, and other collectivities within the receiving State. With the emergence of cultural enclaves, immigrants may feel stronger ties to their minority community or maintain a close connection with their States of origin. Multiple belongings and identity of individuals, which may develop and change in a dynamic way, arguably characterize today’s globalized world.⁶

Against this backdrop, the underlying special issue of this volume discusses various contemporary problems surrounding migration, social inclusion, and the mobility of individuals. This special issue contains six contributions. The authors are academics specializing in various fields of law, including legal philosophy, legal sociology, constitutional law, administrative law, and public and private international law respectively.

The first contribution, by Nami Thea Ohnishi, examines the meaning and evolution of the notion of “nationality” and advocates a shift to “citizenship”, considering the intricate historical experience and ideological context in Germany and developments in the EU. Considering the relativization of nationality as the nexus

³ Hidebumi Egawa, Ryoichi Yamada and Yoshiro Hayata, *Kokusekibo* [Law of Nationality] (3rd ed., 1997), pp. 9–21.

⁴ Christian Joppke, *Karui Citizenship. Shimin, Gaikokujin, Liberalism no Yukue* (2013; Japanese translation of *Citizenship and Immigration* (2010) by Ken Endo *et al.*), pp. 203–239. For a critical view that the focus on citizenship does not suffice and the capacity to mobility needs to be considered, see Rieko Karatani, *Ido to Seizon — Kokkyo o koeru Hitobito no Seijigaku* [Mobility and Citizenship: In Search of Security] (2004), pp. 18–26.

⁵ Christoph Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht* (2005), pp. 508–521.

⁶ Yuko Nishitani, “Global Citizens and Family Relations”, *Erasmus Law Review*, Vol. 7, No. 3 (2014), pp. 135–140; *idem*, “Identité culturelle en droit international privé de la famille”, *Recueil des cours de l’Académie de droit international de La Haye*, Vol. 401 (2019), pp. 235–316.

of rights and obligations, she advocates for protecting the human rights of foreigners.⁷ The second paper, by Hirohide Takikawa, expounds on the importance and prevalence of cross-border mobility of persons over nationality as an inert and abstract notion of membership of the State. He holds that both the negative movement (movement from the State) and positive movement (movement to the State) of individuals deserve respect, which will render the territorial state multinational, relativize the role of nationality, and modify individual identity.⁸ The third study, by Kiyoshi Hasegawa, considers the legal settings and the practices of authorizing immigrants and refugees in Japan, in which the administration exercises wide discretion in rendering decisions without proper restrictions. He critically analyzes the deficiencies in Japan's current immigration and refugee control policy from the viewpoint of human rights protection and asserts the need of enhancing social inclusion.⁹ These first three contributions are primarily based on their respective Japanese papers included in a book edited by Seigo Hirowatari and Nami Thea Ohnishi published in 2022.¹⁰

The fourth study, by Atsushi Kondo, considers the limitations of human rights protection for foreigners in Japan, referring to, *inter alia*, labor market mobility, resident status, family reunification, social welfare, and education. He also critically examines the existing rules on the acquisition, selection, and renunciation of Japanese nationality pursuant to international human rights standards.¹¹ The fifth paper, by Kaoru Obata, reassesses the human rights of foreigners, indicating the limitations of previous academic discussions focusing on the rights of Korean nationals permanently resident in Japan. He suggests transcending the conventional binary paradigm of nationals versus foreigners, with a view to further encompassing refugees, stateless persons, persons of ambiguous nationality, foreigners seeking legal resident status, and short-term workers.¹² The sixth paper, written by Yuko Nishitani, examines the evolution of and the state of discussion surrounding the criteria for determining the personal law on family relationships in private

⁷ Nami Thea Ohnishi, "Nationality and Citizenship in Relation to the Migration Phenomenon" (in this volume).

⁸ Hirohide Takikawa, "Free Movement and Nationality" (in this volume).

⁹ Kiyoshi Hasegawa, "Inclusion and Exclusion of Immigrants and Refugees in Japan: A Preliminary Study" (in this volume).

¹⁰ Seigo Hirowatari and Nami Thea Ohnishi eds., *Ido to Kizoku no Horiron — Hen-yo suru Identity* [Legal Theories on Movement and Belongings — Changing Identity] (2022).

¹¹ Atsushi Kondo, "Human Rights of Non-Citizens and Nationality — The Peculiarities of Japan's Nationality Legislation from a Comparative Legal Perspective —" (in this volume).

¹² Kaoru Obata, "Beyond the Concept of "Human Rights of Permanently Domiciled Foreigners" in Japanese Public Law Theory — Taking Seriously of Ambiguity in Nationality in the Age of International Migration —" (in this volume).

international law and its interplay with the so-called “principle of recognition” in the EU against the backdrop of the viability and effectiveness of nationality and citizenship.¹³

The idea of this special issue derives from recent developments in immigration control and foreign labor force trends in Japan. Notably, Japan has become an aging society with a low birthrate and unrivalled longevity, suffering from a labor shortage, particularly in the care, service, and transport sectors. Since 2018, the government has invited more foreign workers or trainees to fill the gaps in the labor market while carefully avoiding any settlement or permanent residence arrangement for them in Japan.¹⁴ However, due to insufficient policy considerations and the lack of a long-term strategy, pertinent government measures that rely on the technical internship training program have been flawed and not attracted as much and qualified human resources from abroad as expected.¹⁵ Nor has the issue of the enhancing the social integration of immigrants been properly addressed.¹⁶ The strict control and deportation policy for irregular migrants and refugee applicants has been controversial¹⁷ and may remain so even after the 2023 amendment

¹³ Yuko Nishitani, “Personal Law in Contemporary Private International Law — The Changing Role of Nationality, Citizenship, and Habitual Residence —” (in this volume).

¹⁴ Cabinet Decision of June 15, 2018: “Basic Policy on Economic and Fiscal Management and Reform 2018” < https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/honebuto/2018/2018_basicpolicies_en.pdf >; see Akihiro Koido *et al.*, in the special issue “The Revised Immigration Control Law of 2018 and Its Ongoing Institutionalization: Analysis from Multiple Perspectives”, *Migration Policy Review*, Vol. 12 (2020) < <http://www.iminseisaku.org/top/journal.html> >; also Justin McCurry, “The Changing Face of Japan: Labour Shortage Opens Doors to Immigrant Workers”, *The Guardian* of November 8, 2018 < <https://www.theguardian.com/world/2018/nov/09/the-changing-face-of-japan-labour-shortage-opens-doors-to-immigrant-workers> >.

¹⁵ Eugene Lang, “How Japan risks losing its shine for foreign workers”, *Nikkei Asia* of August 22, 2021 < <https://asia.nikkei.com/Spotlight/Japan-immigration/How-Japan-risks-losing-its-shine-for-foreign-workers> >; Maximilien Xavier Rehm, “What Will Japan’s Great Reopening Mean for Immigration Policy?”, *The Diplomat* of November 11, 2022 < <https://thediplomat.com/2022/11/what-will-japans-great-reopening-mean-for-immigration-policy/> >.

¹⁶ See Akihiro Koido *et al.*, in the special issue “Immigrant Social Integration: An Urgent Policy Agenda for Japan”, *Migration Policy Review*, Vol. 14 (2022) < <http://www.iminseisaku.org/top/journal.html> > (available online from May 2024).

¹⁷ See Nando Sigona, Jotaro Kato and Irina Kuznetsova, “Migration infrastructures and the production of migrants’ irregularity in Japan and the United Kingdom”, *Comparative Migration Studies*, Vol. 9, Article 31 (2021), pp. 1-9 < <https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-021-00242-4> >; Nicholas Yong, “Wishma Sandamali: The siblings suing Japan over their sister’s death”, *BBC News* of July 18, 2023 < <https://www.bbc.co.uk/news/world-asia-65692546> >.

to the Immigration Control and Refugee Recognition Act.¹⁸ Against this background, it is expedient to critically assess the shortcomings of Japan's current immigration policy and suggest reforms as to the authorization of the entry and stay of foreigners, acceptance of refugees and asylum seekers, human rights protection for foreigners, and implementation of the rule of law. It is hoped that the underlying contributions of this special issue will duly expound on the status quo, analyze Japan's immigration policy and legal settings, and enhance further discussions and developments in the future.

¹⁸ Act amending the Immigration Control and Refugee Recognition Act of June 16, 2023 (Act No. 56). See "Editorial: Japan's revised immigration law undermines human rights protection principle", *The Mainichi* of June 10, 2023 < <https://mainichi.jp/english/articles/20230610/p2a/00m/0op/009000c> >.