

## IMMIGRATION LAW AND POLICY

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### Summary

This article addresses law and policy governing migration: why people migrate, how states regulate their borders, and how migration affects individual states and society as a whole. Most democratic countries' systems share similar underlying principles, although those principles' implementation may vary, and the article focuses on their systems, noting significant distinctions where appropriate.

### 1. Introduction

The Universal Declaration of Human Rights grants every person the right to life, liberty, and the security of person, freedom of movement, and residence within the borders of the state, freedom to change one's nationality, and freedom from forced exile. Yet, a state's power to exclude persons from its territory generally is recognized as an inherent attribute of sovereignty, necessary for the sovereign's integrity and preservation.

Accordingly, a state's migration policy should balance the individual's rights against its sovereign power to protect its territorial integrity. Democratic and pro-human rights nations generally allow their citizens to freely depart from and return to sovereign

territory. Moreover, citizenship, once acquired, is difficult to lose involuntarily, and usually can be bequeathed to one's children. All states limit the entry of non-nationals, however, in the absence of an international treaty granting free movement across borders. The state's choices as to who gets in, how one gets in, and how one stays directly reflect economic conditions, human rights norms, political exigencies, moral judgments, and social concerns.

Contemporary voluntary migration primarily results from economic need, that of the migrant herself, the sending states and the receiving states. The term "need" is used broadly in this context, not only to refer to the situation where the individual is unable to find work that provides basic sustenance, but also where the individual may acquire greater wealth or economic benefit for his skills. For example, a computer analyst probably may be gainfully employed in any country these days, but "gainful employment" may bring him/her a larger house, better education and better health and social services in another state. In contrast, the mere attraction of better wages may not entice a migrant if he/she is comfortable and dedicated to building a better life in his/her state. "Need" also broadly characterizes not only the nation that cannot afford to house, feed, clothe, and educate its citizens, but also the one that cannot attract investment to develop its economy and the state seeking to expand an economic sector for which its nationals are not trained. Moreover, a sending state may need the services of its national physicians or engineers, but without investment and infrastructure to support their services, the sending state may equally benefit from the infusion of cash from nationals working abroad.

Although certainly individuals' and nations' experiences differ, scholars have recognized four key characteristics shared by migration systems at the turn of the twenty-first century. First, most immigrants today leave nations with a limited supply of capital, limited rates of job creation, and a large labor pool. For example, in the years preceding the Second World War, over half of the immigration to the US was from Europe. In 1960, the major sending nations were Canada, Mexico and seven European countries. In 1990, the major sending nations included Mexico and six Asian nations. The Soviet Union was the only European country in the top ten, and Canada had dropped from the top of the list. The dominant sending regions today are Asia and Latin America.

Second, receiving nations tend to be experiencing lower birth rates and aging populations, producing a limited supply of workers, while technological advances and capital investment have created greater opportunities for nationals with education and skills, but higher unemployment for the unschooled or unskilled. As a result, many of these nations do not acknowledge a need for immigrants, as they might have in the past, and still others are imposing greater restrictions on migration than in the past, resulting in greater numbers of clandestine migrants.

Third, the number of refugees and asylum seekers has mushroomed, especially in the last two decades of the twentieth century. The collapse of Soviet-dominated communism and greater civil unrest on the Asian and African continents also has altered the population of refugees.

Fourth, the disparities in wealth, income, culture, power, and population growth between receiving and sending societies have never been as vast.

## 2. Nationality

Nationality is the status of a person identified with a state by some tie of allegiance. Most nationals are citizens, and non-citizen nationals generally enjoy the same rights as citizens do. Accordingly, this article uses the terms interchangeably.

Citizens of a nation that respects basic human rights enjoy the right to participate in the nation's benefits, including admission to the nation's territory at any time and the rights to vote, work, receive social services and the like. They may also expect the nation's protection when traveling abroad. Generally, nationals also have a broader privilege to petition for the immigration of non-national family members. In exchange for the benefits of citizenship, they are subjected to the state's burdens: taxation, military service and respect for its laws.

A nation possesses the exclusive competence to determine who are its nationals. It may confer citizenship at birth through the principles of *jus soli*, *jus sanguinis* or both. *Jus solis*, or the right of the land, confers citizenship upon those born within the state's territory. For example, any person born within the territorial limits of the US, unless not "subject to" the US' jurisdiction, such as a diplomat's child, automatically acquires US citizenship. The US' wholesale recognition of *jus soli* is rare; most nations require an additional tie to the country of birth, such as a parent's citizenship or a period of residence. Citizenship by right of descent, or *jus sanguinis*, is citizenship bequeathed by the parent's citizenship, regardless of the place of birth. Therefore, a child born of a French citizen outside of France may acquire French citizenship.

Most nations also have procedures for conferral of citizenship after birth, or naturalization. Naturalization generally requires a period of permanent residence within the state, and commitments to respect the laws of the state. In the US, naturalization also requires, with some exceptions, the ability to read and write English, knowledge of US history, good moral character, and the renunciation of former state allegiances. In Israel, any person of Jewish descent may automatically receive citizenship under the Law of Return.

Dual nationality is recognized or tolerated by many states. Some individuals may acquire more than one citizenship at birth, or later through naturalization. The occurrence of dual nationality has increased at the close of the twentieth century, primarily because of greater mobility, an increase in international marriages, and some nations' relaxation of the laws conferring citizenship at birth. Regardless of how the second or third citizenship is conferred, commentators differ about the value of dual citizenship. Those who oppose it believe it leads to conflict and devalues the notion of citizenship and allegiance to the sovereign itself. Others believe that such concerns are inconsequential. International norms generally guarantee that citizenship cannot be withdrawn involuntarily unless the state's borders change, such as in the case of the former Soviet Socialist Republics. Otherwise, the person must voluntarily and specifically reject the state's protection, or commit fraud in the process of acquiring

citizenship. For example, US citizenship will not be revoked unless one commits treason, seeks foreign citizenship, serves in the armed forces of or accepts employment with a foreign state government, or specifically renounces, with the intention of revoking US citizenship.

The fraud basis is best illustrated by the cases over the last 25 years where former Nazis who omitted their affiliations and conduct during the Second World War from their citizenship applications were stripped of their citizenship and often deported. The omitted information was deemed material to the application for citizenship or permanent residence, particularly in countries such as the US and Canada where membership or participation in the Nazi party, acts of persecution or acts of genocide automatically preclude a person from entering.

### **3. Voluntary Permanent Migration**

Many states permit a non-national to reside indefinitely within their territory without becoming a citizen of the state and while retaining another state's nationality. A quota may limit how many such individuals are admitted, and certain categories and/or sending nations may be given preference.

Generally, the permanent resident will enjoy rights similar to those enjoyed by the national. He will be able to work, to receive some public benefits, and to leave and re-enter freely, as long as he does not remain outside the residential state long enough to create an inference that he has abandoned residency. In many states, he may petition for the immigration of other family members, although this right generally is limited to his spouse and minor children. He will not be permitted to vote or accept certain government employment, however, and will not be subject to mandatory military service. Most significantly, perhaps, he will be subject to expulsion should he fail to comply with certain of the state's laws. The permanent resident generally acquires his/her status because of family ties within the receiving state or an ability to benefit the economic, social or cultural life of the receiving state. Some nations have treaties whereby employees may freely cross state boundaries. Also, from time to time, governments that experience huge flows of undocumented migrants have granted amnesty based upon length of stay, compliance with the state's laws, and moral character qualifications. Regardless of the initial basis for granting residence to a voluntary migrant, the receiving nation will always take into account the potential immigrant's economic value to the nation and the family ties, if any. The receiving nation also considers to various degrees, the person's moral character, health, prior criminal conduct and prior immigration, if any.

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## Bibliography

Fix M., Passel J. S., Echautegui M. E. and Zimmerman W. (1994, 1998). *Urban Institute: Immigration and Immigrants. Urban Institute: Setting the Record Straight*. [Discussions of immigration impact on labor markets and public sector in the US.]

Immigration & Nationality Act of the US (2000). *Immigration & Nationality Act of the US 8 US Code*. [Laws governing temporary and permanent immigration to the US and conferral of citizenship.]

Immigration & Nationality Service. *Recent Statistics and Statistical Yearbooks*, available online at <http://www.usdoj.ins.gov>. [Statistics concerning immigration to US.]

Legomsky S. H. (1997). *Immigration and Refugee Law and Policy*, 2nd edn. New York: Foundation Press. [History, policy and law of immigration to US.]

Massey D. S., Arango J., Hugo G., Kouaouci A., Pellegrino A. and Taylor J. E. (1998). *Worlds in Motion: Understanding International Migration at the End of the Millennium*. Oxford: Clarendon Press. [Economic theories of migration applied to various geographic regions.]

Money J. (1999). Human rights norms and immigration control. *UCLA Journal of International Law and Foreign Affairs* 3, 497. [Analyzes roles of family reunification and *nonrefoulement* in context of immigration control.]

Plender R. (1988). *International Migration Law*, 2nd revised edn. Netherlands: Martinus Nijhoff Publishers. [Comparative study of states' immigration laws and policies and international documents governing same.]

United Nations High Commissioner for Refugees. Website, <http://www.unhcr.ch>.

## Biographical Sketch

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