

In the realm of legal scholarship, precision, and adherence to internationally accepted standards are not merely ideals but necessities. This essay critically examines the work of Dr. Jaime Ruben Sapolinski contained in his article on "nationality," published in the *Revista de Derecho Constitucional*, entitled *Nación, Nacionalidad y Estado en el Marco Institucional Uruguayo*. Dr. Sapolinski notably fails to engage with the crucial historical and human rights dimensions inherent to the concept of nationality. Instead of offering a rigorous legal analysis, his approach veers towards outdated, philosophical, and parochial perspectives that fall short of the demands of modern international law and human rights principles. He also fails to apply accepted methods of Uruguayan constitutional interpretative methodology to Article 81 of the Constitution.

This critique underscores the imperative need for legal scholarship, especially in a legal system like Uruguay's, which lacks definitive judicial interpretations, to align with globally recognized definitions and human rights principles. Legal scholarship must transcend subjective interpretations and local views to embrace a historically informed and rights-conscious methodology. In challenging Dr. Sapolinski's various definitions of "nation" and "nationality," this reply advocates for a more legally robust and inclusive interpretation of these terms, consistent with international norms and respectful of the rights of all citizens, including immigrants.

This response to Dr. Sapolinski is not merely a critique of a fellow scholar's work but a call for academic rigor and a commitment to uphold the integrity of international legal standards in interpreting constitutional provisions related to nationality in Uruguay. It is a pursuit to honor the legacy of esteemed jurists like Alberto Pérez Pérez, advocating for a legal scholarship that bridges the gap between national interpretations and international obligations, thereby ensuring that our understanding of nationality remains firmly rooted in the broader context of human rights and global legal consensus.

## **I. Critique of Dr. Sapolinski's Interpretive Approach and Its Deviation from the Intended Focus**

In his article, Dr. Sapolinski, a distinguished professor of Constitutional Law at the University of the Republic, regrettably overlooks both the historical evolution and the significant human rights implications of a narrowly construed definition of “nationality” — a stance often adopted by a segment of Uruguayan legal scholars. Dr. Sapolinski’s article did not need its included analysis of various eighteenth and nineteenth-century philosophers, but it would have benefitted from an incorporation of international legal norms.

The essence of law is its capacity to define terminology and concepts with precision, facilitating their practical application within a society governed by laws. The paramount duty of legal scholars, particularly in a system such as Uruguay's, bereft of definitive judicial interpretations, is to furnish interpretations of laws and constitutional provisions that best reflect their true intent and scope. Exceptional legal scholarship cannot afford to be marred by philosophical diversions, arguing that meanings are malleable and influenced by individual experiences, educational backgrounds, ideologies, beliefs, or vested interests.

This principle of careful and internationally-accepted scholarship gains even greater significance when the scholarly endeavor involves deciphering the international usage of terms and phrases found in customary international law — the law universally acknowledged and applicable — as well as in treaty-based commitments. International legal terminologies possess defined meanings. When Uruguay ratifies a treaty, exerting its sovereign rights as sanctioned by its Constitution, it implicitly endorses the international meanings of terms employed in the treaty. Should Uruguay dissent from these internationally accepted interpretations, it retains the prerogative to either abstain from ratifying the treaty or express its reservations explicitly.

In his article, Dr. Sapolinski does articulate a general framework for constitutional interpretation in Uruguay. He posits that such interpretation should initially hinge on the

text's literal meaning. Where this literal interpretation proves inadequate, one must then turn to the explicit intent of the legislation or its historical context for clarity. The natural and apparent meaning of words is preferred, barring instances where the legislation assigns a different definition, in cases involving technical jargon superseding the apparent interpretation, or when a term is distinctly defined for legislative purposes.

Yet, the article notably falls short of specifying which constitutional articles Dr. Sapolinski purports to interpret. It fails to address the central theme of the Taller Seminar, the workshop, in which the paper was first presented. That workshop was organized to analyze legal citizenship through the lens of rights. Instead, Dr. Sapolinski's paper deviates into an exploration of the linguistic nuances and historical contexts of terms like "nation" and "nationality," thus straying from its intended focus.

## **II. Examining Dr. Sapolinski's Multiple Definitions of "Nation" and Their Implications**

Setting aside the paper's omission of a discussion on the rights of legal citizens in Uruguay, and despite the fact that was the topic of the workshop in which it was delivered, an analysis of what Dr. Sapolinski's work purports to achieve is warranted.

Dr. Sapolinski's discourse begins by outlining four potential linguistic interpretations of the term "nation." The first definition is based on ethnicity. It is somewhat surprising that Dr. Sapolinski includes an ethnicity-based definition among his definitions. This perspective, which attributes nationhood to unique structural elements like physical traits, biological characteristics, cultural features, or even clothing, seems anachronistic for a twenty-first-century legal analysis. Historically, such a definition found favor in certain European circles during the nineteenth and early twentieth centuries, but it has since been widely discredited as a viable concept of nationhood.

Further complicating matters, Dr. Sapolinski's narrative swiftly diverges from a discussion of the rights of legal citizens to a conflation of “nationality” with the ideological doctrine of “nationalism.” This conflation becomes evident through his reliance on a 2018 publication by Iván Romero on the history of nationalism. Intriguingly, Dr. Sapolinski does not outright reject this ethnic-centric view of a nation. Romero explains that ethnic-based nationalism draws support from the controversial work of Joseph Arthur, Comte de Gobineau, author of *Essay on the Inequality of the Human Races* (1853-1855). Instead of rejecting or just omitting such a justification, Dr. Sapolinski presents it as a theoretical possibility for defining “nation,” using it as a steppingstone to discuss Uruguay's conception of “nation.”

Dr. Sapolinski argues that Uruguay rejects ethnic nationality, citing its “inclusive” approach to what is the “nation” because Uruguay incorporates into the nation the “offspring” (at least those born in Uruguay) of diverse ethnic groups. Second generation Uruguayans include, for example, Armenians, Afro-Descendants, and Spanish or Italian immigrants. He calls such “offspring” Orientals. However, this explanation quickly shifts focus and loses persuasiveness, simply introducing a new ethnic category, termed “Oriental,” thus bypassing the core issue, and obviously forecloses the opportunity for legal citizens to be Oriental.

The second definition provided by Dr. Sapolinski labels “nation” as an anthropological concept. He suggests that nationhood is formed through shared cultural elements like language, historical traditions, customs, symbols, and mythical narratives. This perspective draws support, according to Dr. Sapolinski, from the nineteenth-century thinker Ernest Renan, who has been subject to considerable critique in modern times for his deterministic views on racial characteristics and his contentious opinions on the Semitic “race.” Anthropological conceptions of nation are generally benign, but they fail to allow for multiple traditions to be incorporated into one nation.

While Dr. Sapolinski references Renan's more inclusive definition of a nation as a collective that aspires to live and achieve together, this interpretation is overshadowed by Renan's controversial legacy. Renan's work does not align neatly with contemporary understandings of nationhood in modern international law and human rights.

Dr. Sapolinski's third definition equates "nation" with "state," as the Argentine Constitution exemplifies, he tells us. However, Dr. Sapolinski neglects to acknowledge that this view aligns with the widely accepted international legal definition of "nation" and "state." He simply mentions, in an offhand way, that Argentina uses this definition. Here we find the true definition of nation, but it is provided only a few sentences in the article.

Lastly, Dr. Sapolinski proposes a definition of a nation as an entity or concept embodying sovereignty, as reflected in Uruguay's 1830 Constitution. This definition leads to a historical digression, touching upon the French National Assembly's work in 1789 and the debate over sovereignty during Gabriel Terra's coup, which, while informative, strays from the central topic of the rights of legal citizens and the internationally recognized definition of "national."

### **III. Dr. Sapolinski's Divergence from Addressing International Legal Definitions of 'National' and the Unexplored Implications of His Four 'Nation' Definitions**

Despite the article's central theme being the rights of legal citizens in Uruguay, Dr. Sapolinski's discussion strays significantly, failing to address the international legal definition of 'national' or the rights of any citizens. Dr. Sapolinski appears to use this detour to lay the groundwork for asserting the lack of a uniform definition of "nation" in international law. However, instead of addressing this fundamental issue directly, he introduces four novel interpretations of "nation," leaving their relevance to the definition of "nationality" in international and domestic law unexplored.

Let's consider these summaries of definitions provided for "nation" by Dr. Sapolinski:

1. Dr. Sapolski suggests that we might see the state as the nation, but he describes the “state” as primarily an administrative mechanism for a nation. He suggests that states, if considered nations, might struggle to foster a sense of “cultural uniqueness” that engenders national identity. Dr. Sapolski clearly doubts that a state can sufficiently cohere to form a nation. His doubt seems misplaced. His view that “states” cannot be nations with a sense of nationalism seemingly overlooks examples like the United States, where a strong sense of national identity is evident.
2. Dr. Sapolski next revisits an ethnically based definition of “nation,” citing “common characteristics” of appearance, yet he fails to distance this concept from its controversial historical associations with eugenics and fascist ideologies.
3. In his third definition, Dr. Sapolski surprisingly uses “nationality” to define “nation,” but does so in a circular manner. He declares that nationality is “place of birth” and then uses that definition as the basis of nation. This simplistic interpretation based on place of birth lacks substantiation and fails to align with the complex realities of international norms and citizenship rights.
4. Lastly, he defines “nation” based on nationalism, a concept often intertwined with ideologies and supremacy. However, the article does not critically engage with the problematic aspects of nationalism, instead portraying it as a unifying social phenomenon. Most modern scholars do not believe that nationalism, an expression of national supremacy based on ideology or characteristics, is a positive force in the current political environment and I would expect Dr. Sapolski to agree with that consensus.

The next section of the article is rather peculiar. In a seminar allegedly concerning nationality and the rights of citizens, Dr. Sapolski opts not to explore the definition of national. Instead, Dr. Sapolski finds each occurrence of the word “nation” and places its use in context. This part of the exposition is adequate for what it attempts, but it has no bearing on the concept of who is a “national” of Uruguay. Indeed, all nationals of Uruguay are members of the “nation,” and, unless the use of the word “nation” somehow indicates who is a national, the

use of the word nation by itself is beside the point. Putting the concern about whether the use of the word “nation” in the Constitution is meaningful, we can restate Dr. Sapolinski’s conclusion. Overall, he concludes that the current Uruguayan Constitution uses the word nation to signify three separate concepts. Those three concepts for nation are, first, the holder of sovereignty, second, an organized community, and third, the state itself.

#### **IV. Dr. Sapolinski's Interpretation of the Constitution and the Questionable Assertion Regarding Article 74**

With the section meticulously tracing the use of the word “nation” in the Constitution behind us, the article finally arrives at a very short analysis of the use of the word “national” in the Constitution. Most of the text is unnecessary, because it looks at the use of the word as an adjective, as in “national treasury.” Perhaps this adjectival use is interesting, but it is irrelevant to who in Uruguay is a national.

There is a very short treatment of the use of the word national as it applies to individuals. I would call this the “heart” of the paper. If it is the core argument, it concerns an astounding claim about Article 74 of the Constitution. Dr. Sapolinski states “nationality” is found in Article 74 of the current Uruguayan Constitution:

In Article 74, when mentioning the status of Oriental father or mother as a requirement for granting natural citizenship to their children, regardless of the place of birth, conditioned upon settling in the country and registering in the Civic Registry.

Article 74 says no such thing. It has nothing to do with the concept of nationality. It does not use the word national. In fact, the only concept it mentions is natural citizenship. Here is Article 74.

Article 74. All men and women born at any place within the territory of the Republic are natural citizens. Children of Uruguayan fathers or mothers are also natural

citizens, wherever they may have been born, provided that they take up residence in the country and register themselves in the Civil Register.

Article 81 of the current Constitution does, in contrast, use the word “nationality.” Article 81 states that nationality is not lost by a natural citizen if they naturalize in another nation. Dr. Sapolinski does mention this, in passing. While Article 81, in my argument, does not mean legal citizens are not nationals, it is likely the only clause in the Constitution that should have been subject to discussion in the entire article. It is worthy of being interpreted if it is allegedly the basis for denying nationality to legal citizens. But we find nothing on the topic in the article.

#### **V. Critiquing Dr. Sapolinski's Assertions and Promoting a More Inclusive Interpretation of Nationality and Citizenship**

The final two pages of Dr. Sapolinski’s article provide us with his personal opinions on nationality and citizenship, with a citation only to the 1946 opinion of Justino Jiménez de Aréchaga. Dr. Sapolinski feels free to inject extralegal and non-textual opinions, apparently, without referencing historical meanings, because “the constitutional regulation of nationality and citizenship is confusing.” He then states, “A couple of concepts, though not clearly expressed, are expressly or implicitly enshrined in the Constitution.”

Here are the “express” or “implicit” concepts Dr. Sapolinski believes are enshrined in the Constitution:

1. The Uruguayan Constitution has a concept of who is a "national."
2. We find the bare assertion by Dr. Sapolinski that *"the natural and obvious meaning of 'national' refers to a person born in the territory."*
3. The exercise of "citizen rights," both natural and legal, is conditioned on settling in the territory and fulfilling the registration requirement in the National Civic Registry.



4. National and natural citizen are not synonyms in Uruguay but are "different situations accessed by fulfilling identical requirements."
5. Based only on Justino Jiménez de Aréchaga, Dr. Sapolinski concludes, "the quality of national depends, therefore, on a fact, birth within the territory of the State." Based on this flimsy reed, he is comfortable to state that, "The acquisition of legal citizenship does not confer Oriental nationality," even though the legal citizen participates in the exercise of sovereignty, and this exists "radically in the Nation."

My skepticism persists. Any legal scholar committed to the meticulous application of Uruguayan constitutional interpretive methods should share this skepticism. Dr. Sapolinski's arguments fall short of addressing, let alone refuting, the international definition of "nationality" and its application in treaties. When grounded solely in subjective opinion, the parochial views of individual Uruguayan academicians fail to hold persuasive power in a global context.

This flawed line of reasoning leads to a nonsensical and tautological conclusion. Dr. Sapolinski, utilizing these weak arguments, appears intent on excluding legal citizens, particularly immigrants, from the concept of Uruguayan nationality. Such exclusion not only removes them from the protective embrace of the nation but also denies them a role in shaping Uruguay's collective future and participating in its civic life. He justifies this exclusion by stating it represents "the usual practice among countries," a claim that lacks substantiation and seems more an assertion of personal belief than a reflection of actual legal norms or practices.

Dr. Sapolinski puts it like this:

Nationality is considered a protective mantle for compatriots, corresponding to the state. The source of this is the usual practice among countries. As a point of connection, nationality is established as a framework for participation in the

collective destiny, thus recognizing the right to participate, as a citizen, in the civic life of one's country. On the other hand, the concept of citizenship refers to exercising civic rights and duties.

His words, “the usual practice among countries,” stand without the support of comparative legal analysis or international jurisprudence. This rhetoric, seemingly rooted in a narrow interpretation of nationality, does not engage with the broader, more inclusive definitions recognized in international law. It neglects the dynamic and evolving nature of nationality as a concept that should encompass all legal citizens, irrespective of their origin, in the shared journey of a nation's progress and cultural enrichment.

Dr. Sapolinski's approach raises serious questions about the inclusivity and fairness of his interpretative framework. It highlights a concerning tendency to lean on subjective and potentially outdated viewpoints, which risks marginalizing significant segments of Uruguay's population and contradicts the inclusive spirit of modern international legal standards. I believe it also contradicts the inclusive spirit and authentic interpretation of Uruguay's Constitutions.

Dr. Sapolinski nevertheless asserts that legal citizens, foreigners who have voluntarily sought citizenship, should be denied diplomatic protection abroad. He advocates for this exclusion by defining “national” as a status linked exclusively to international protection, thereby perpetuating a discriminatory stance without substantial support.

This interpretation, not only lacking in evidential backing but also devoid of authoritative citations, seems to be rooted in a series of outdated and biased viewpoints. Dr. Sapolinski's final position is that the status of being a foreigner is an “objective fact” that remains unaltered, regardless of legal citizenship. This assertion starkly contrasts with the broader international legal community's views, where such a notion is far from considered “obvious.”

International law often takes a contrary stance, emphasizing respect for human rights and inclusivity in defining nationality.

## **VI. International Law and Its Definitions of State, Nation, and National**

Let us examine what international law provides concerning state, nation, and national. We can do so with citations. In international law, a state, also called a nation, comprises four essential elements: a defined territory, a permanent population, a government, and a capacity to conduct international relations.<sup>1</sup> A sovereign state can freely administer its population in its territory and set its foreign policy. In an eighteenth-century text, Emer de Vattel defined nations or states as "political bodies, societies of men who have united together and combined their forces, to procure their mutual welfare and society." He added, "Every nation which governs itself, under whatever form, and which does not depend on any other nation, is a sovereign state."<sup>2</sup>

The Uruguayan state, of which legal citizens are a part of the sovereignty, is considered, in international law and treaties, to be the nation of Uruguay. Internal, domestic, or municipal definitions are irrelevant for state-to-state obligations, such as those in statelessness treaties.

Nationality has a plain meaning in international law that cuts through all of the elaborate explanations in Dr. Sapolinski's article. "Nationality defines the legal relationship or 'legal bond' between the citizen/national and her state." Further, "this relationship is based on social facts of attachment and gives rise to rights and duties on the part of both sides of that relationship."<sup>3</sup> The International Court of Justice (ICJ) in the *Nottebohm* case indicated that "Nationality is a legal bond having as its basis a social fact of attachment, a genuine

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<sup>1</sup> See the Convention on Rights and Duties of States, art. 1, 49 Stat. W. Janis 3097, T.S. No. 881, 3 Bevans 145, 165 L.N.T.S. 19 (done at Montevideo December 26, 1933; entered into force December 26, 1934).

<sup>2</sup> E. de Vattel, *The Law of Nations* 3-4, 11 (1758 ed. Fenwick trans. 1919).

<sup>3</sup> Edwards, A. (2014). The meaning of nationality in international law in an era of human rights. In A. Edwards & L. van Waas (Eds.), *Nationality and Statelessness under International Law*. Cambridge University Press.

connection of existence, interest, and sentiments, together with the existence of reciprocal rights and duties."<sup>4</sup> From this, it is evident that nationality is determined by one's social ties to a nation, also called a state. When established, those ties give rise to rights and duties on the part of the state, as well as on the part of the national, who is also, in international law, called a citizen.

We find no mention of birth in these international materials. Outdated ethnic definitions have been cast aside. What is considered "obvious" to Dr. Sapolski does not even merit mention in modern international decisions and texts.

Further contradicting Dr. Sapolski's claim is the esteemed Uruguayan jurist Alberto Pérez Pérez, whose contributions to legal scholarship and human rights advocacy present a more enlightened and humane perspective. Pérez Pérez, a respected lawyer, human rights activist, and former Dean of the Faculty of Law at the University of the Republic, served as a judge on the Inter-American Court of Human Rights. His views and legal interpretations starkly contrast to the more limited opinions of Dr. Sapolski.

Dr. Pérez Pérez elaborated on his belief that the Constitution of Uruguay did not indicate legal citizens were foreigners in 1995. The title of his article, in fact, is *Legal Citizens are not Foreigners*. Here is an excerpt:

As stated at the beginning, in my opinion, the concepts of nationality and citizenship are identical (or fully coincide), at least in a democratic State such as the Eastern Republic of Uruguay. Consequently, all citizens (i.e., both legal and natural) form, as a whole, a category that is opposed to that of foreigners.<sup>5</sup>

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<sup>4</sup> Nottebohm Case (Liechtenstein v. Guatemala); Second Phase, International Court of Justice (ICJ), 6 April 1955, ICJ Reports 1955, p. 4; General List, No. 18.

<sup>5</sup> Pérez Pérez, Alberto. "Los ciudadanos legales no son extranjeros." LJU Tomo 111, 297. Cita Online: UY/DOC/765/2009.

For a comprehensive examination of the Uruguayan Constitution, its provisions concerning nationality, and Uruguay's historical practices and communications that challenge Dr. Sapolinski's viewpoints, I refer readers to my recent publication, *“The Constitutional Interpretation of Uruguayan Nationality According to the Uruguayan Constitutional Methodology,”* published in the 29th volume of the ILSA Journal of International and Comparative Law, page 443, in 2023. That article includes many alternative views allowing for reasonable interpretations of the Constitution.

In conclusion, I firmly advocate for an approach grounded in academic rigor rather than subjective opinion. I align myself with the exemplary standards set by Alberto Pérez Pérez, whose scholarship represents the pinnacle of legal inquiry into nationality and citizenship in Uruguay. I stand with the straightforward international definitions of nation and national. This approach rejects simplistic assertions about what is “obvious” and “objective,” favoring a thorough and nuanced analysis based on law and history.