From “Traditional” to “New” Migration: Challenges to the International Legal Migration Regime

A project of the nccr – on the move
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International migration law increasingly divides into global norms and fragmented features, thereby offering an example in case for deepening the theory of multilayered governance. The project examines how Switzerland and the EU construe admission, visa, citizenship and nationality law and how these different levels of governance interact, and analyses the advantages and deficits of multilayered governance for conceptualizing international migration law and for the construction of coherence.

in a nutshell #15 is based on the author’s PhD research carried out within this project.

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The nccr – on the move is the National Center of Competence in Research (NCCR) for migration and mobility studies and aims to enhance the understanding of contemporary phenomena related to migration and mobility in Switzerland and beyond. Connecting disciplines, the NCCR brings together research from the social sciences, economics and law. Managed from the University of Neuchâtel, the network comprises fourteen research projects at ten universities in Switzerland: The Universities of Basel, Geneva, Lausanne, Lucerne, Neuchâtel, Zurich, ETH Zurich, the Graduate Institute Geneva, the University of Applied Sciences and Arts of Western Switzerland, and the University of Applied Sciences and Arts of Northwestern Switzerland.

“in a nutshell” provides answers to current questions on migration and mobility – based on research findings, which have been elaborated within the nccr – on the move. The authors assume responsibility for their analyses and arguments.

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Further Reading


The principle of jus nexi considers nationality as part of the individual’s social identity. Entitlement to Swiss citizenship should be broadened to include the application of the principle of jus nexi, providing the right to nationality on the basis of a special connection with Switzerland.

Jus soli

The right to a nationality is enshrined in the Universal Declaration of Human Rights and in numerous human rights treaties. Yet citizenship continues to be regarded as a privilege, transferred by birth and granted by naturalization at the discretion of individual states. From the human rights perspective, citizenship should rather be understood as part of a person’s social identity, to be granted according to his or her real connection to the country in question.

Article 15 of the Universal Declaration of Human Rights of 1948 states that every person has the right to a nationality. This provision has far-reaching implications, by challenging the view traditionally held that national identity was essential to the framework of international law that states are able to determine who are their citizens. So, it is scarcely surprising that Article 15 was not directly incorporated in binding UN human rights treaties. Nevertheless, the right to a nationality is today enshrined either directly or indirectly in many human rights instruments. In addition, numerous resolutions and recommendations issued by international organizations endorse the status of the right to nationality as a human right. Even the European Court of Human Rights recognizes the right to nationality, although in a rather limited case (in so far as it is included in the European Convention on Human Rights). So notwithstanding the reluctance of the community of nations to enshrine the right to nationality as an obligatory entitlement, this right is now widely recognized as a human right.

A Sense of Belonging as Part of an Individual’s Social Identity

But what does the right to nationality involve? According to Article 15, the right to nationality as granted by international law is clearly at odds with the current system of ordinary and extraordinary naturalization procedures. The fact that the right to nationality is in fact explicitly enshrined in a number of binding instruments, in particular, for stateless persons and children.

The principle of jus soli

In Switzerland the principle of jus sanguinis applies, whereby citizenship is transferred by descent to the child from its parents to the child. In some other countries the principle of jus sanguinis applies, whereby citizenship is transferred by descent from parents to the child. In some countries the principle of jus soli applies, whereby citizenship is transferred by birth. In Switzerland, for example, for foreigners born in Switzerland and young people who have attended school in Switzerland.

The situation in Switzerland is not very different from that in many other countries. Only a small number of countries recognize a right to nationality. Rather, naturalization is an administrative or personal process, tied to a varying set of prerequisites and leaving a wide margin of discretion for the officials involved in the decision making.

Jus soli and jus sanguinis differ by the fact that the former is tied to the connection between the person and the state in question. This has the advantage, in contrast to the jus sanguinis, that jus soli and jus sanguinis, of basing the issue not on an accident of birth, but the person’s real life situation. Such a nexus could conceivably be based on a range of factors – residence and stay in a country, social and family ties or personal and cultural connections, or indeed a connection through being afforded international protection as a refugee or stateless person. In any case, the basic idea underpinning the jus nexi principle is not new in the international protection of human rights. A person’s personal and social ties are also protected through the right of privacy and family life, and the right to enter his or her own country.

The principle of jus nexi

The right to nationality as granted by international law is clearly at odds with the current system of ordinary and extraordinary naturalization procedures. The principle of jus nexi applies, whereby membership in the country to which they are connected by their situation makes it easier to determine whether an action impinging on his or her right to nationality can be seen as reasonable. Thus the withdrawal of citizenship would be inadmissible not only if it was arbitrary or if the person became stateless as a result, but also if the person thereby lost nationality of the state to which he or she has a closer connection than to any other.

For Swiss citizenship, the consistent application of a right to nationality on the basis of the jus nexi principle would lead to the right to nationality genuinely being recognized as a (human) right, and to wider access to citizenship.

The principle of jus soli

What is meant by nationality and citizenship? Both these words denote the fact of a person belonging to a particular state, which is associated with certain rights and obligations. Legally the two words are generally used as synonyms, with citizenship (“Bürgerrecht”) the term which is usually preferred in Switzerland.

Stateless

The principle of statelessness refers to a person who is not considered a national by any State under the operation of law. Acquisition of citizenship

In Switzerland the principle of jus sanguinis applies, whereby citizenship is transferred by descent to the child from its parents at birth. In some other countries the jus soli principle applies, whereby a child acquires the citizenship of its place of birth. Citizenship can also be acquired subsequently by ordinary or extraordinary naturalization.

The right to a nationality is enshrined in the Universal Declaration of Human Rights and in numerous human rights treaties. Yet citizenship continues to be regarded as a privilege, transferred by birth and granted by naturalization at the discretion of individual states. From the human rights perspective, citizenship should rather be understood as part of a person’s social identity, to be granted according to his or her real connection to the country in question.