Further Reading

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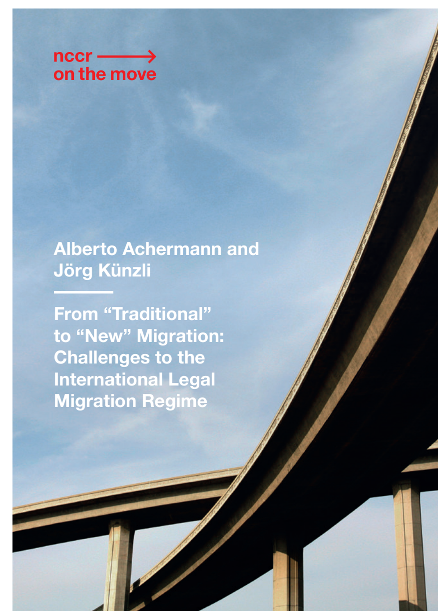

From "Traditional" to "New" Migration: Challenges to the International Legal Migration Regime

A project of the nccr – on the move
Alberto Achermann and Jörg Künzli, University of Bern

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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Nationality as a Human Right: What Implications for Swiss Citizenship?

in a nutshell #15, March 2020

FNSNF
Swiss National Science Foundation

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Messages for Decision-Makers

The concept of nationality as a human right is enshrined in international law.

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Yet this human right is not met solely by the acquisition of citizenship by descent or naturalization at the discretion of the state concerned.

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The principle of *jus nexi* considers nationality as part of the individual's social identity.

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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.

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 most frequently used in Switzerland.

… stateless
refers to a person who is not considered as a national by any State under the operation of its 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 simplified naturalization.

… the principle of *jus nexi*
states that nationality is not determined by a person's descent or place of birth, but rather by her or his social identity and specific connections to a particular country.

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 prevalent in 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, in spite of it not being 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 of the Universal Declaration of Human Rights, every person has the right to a nationality, and no one may be arbitrarily deprived of his or her nationality nor denied the right to change it.

In international law it is widely accepted that the right to nationality precludes the arbitrary revocation of citizenship, i.e. without a legal process, without the statement of reasons, without legal protection, or in an otherwise grossly unfair manner. In terms of the acquisition of citizenship, forced naturalization and mass naturalizations against the will of those affected are regarded as a breach of the right to nationality. And finally, the prohibition on discrimination enshrined in various instruments forbids unequal treatment on the basis of race, religion, origin, gender, age, disability or other prohibited grounds with regard to citizenship, that is to say in naturalization and withdrawal of citizenship processes.

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"Everyone has the right to a nationality."
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In addition to the provisions of international law, the right to nationality is further defined in the case law of the European Court of Human Rights, which in several judgments has ruled that nationality forms part of an individual's social identity. According to the Court, a person's social identity is the totality of his or her connections with other people and the world in which he or she lives. An individual's nationality and his or her life circumstances and social relationships are closely interlinked and have to be recognized as part of his or her social identity and, consequently, of his or her private life. Given that an individual's citizenship is part of a person's social identity, the right to acquire or give up a particular nationality must be protected.

"Swissmakers" – or Citizenship as a Privilege

The right to nationality as granted by international law is clearly at odds with domestic law. At the national level, citizenship is still frequently treated as a privilege, rather than a right or entitlement. In Switzerland, nationality continues to be dominated by the principle of *jus sanguinis*. Swiss citizenship is transferred by descent from parents to children. Foreigners may be naturalized, but generally speaking there is no entitlement to be granted citizenship, and the obstacles to becoming naturalized are significant, as shown in the work of Dragan Illić. The person must have lived in Switzerland for ten years and must hold a permanent residence permit, speak the language and otherwise be well integrated into Swiss society. The three-stage Swiss naturalization process is extremely complex, and leaves a wide margin of discretion for officials, as further explained by Anne Kristol. Some cantons do exceptionally accept a right to naturalization in some cases – in the Canton of Zurich, 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 most countries. Only a small number of countries recognize a right to nationality. Rather, naturalization is an administrative or political process, tied to a varying set of prerequisites and leaving a wide margin of discretion for the officials involved in the decision making.

Nationality as a Human Right or National Sovereignty?

How can a situation where a right to nationality or naturalization on the national level is not accepted by most states be reconciled with nationality as a human right? Are states not obliged by the norms of international law to introduce this right?

In the face of this conflict between the human rights dimension of nationality and national sovereignty on naturalization issues, states often argue that the right to nationality is not obligatory in law, since it is not set down in binding treaties. However, an analysis of the various sources of law shows that the right to nationality is in fact explicitly enshrined in a number of binding instruments, in particular, for stateless persons and children.

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"A person's nationality is part of his or her social identity."
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States also frequently argue that international law cannot provide the basis for access to a particular nationality in a specific case, since it is not all clear which state would be under an obligation from this right. The articles on the right to nationality are formulated in such general terms, they say, that the addressee of the right is not identified, and therefore the right supposedly cannot be implemented in practice. This argument, too, is less than convincing on closer examination. In most cases it is in fact possible to determine which state bears the responsibility of protecting or fulfilling the right. In the context of the prohibition on arbitrary withdrawal of nationality or the right to change nationality, for example, responsibility is clearly borne by the state whose nationality the person already holds, and which he or she is at risk of losing. Even for access to a particular nationality, the addressee can be identified as the state with which the person has a particularly close connection, such that this sense of belonging becomes part of the person's social identity.

A Right to a Specific Nationality on the Basis of *Jus Nexi*?

This is where the principle of *jus nexi* comes into play, whereby membership of a (national) state is tied to the real connection between the person and the state in question. This has the advantage, in contrast to the principles of *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 employment, cultural or political connections, or indeed a connection through being afforded international protection as a refugee or stateless person. This basic idea underpinning the *jus nexi* principle is not new in the international protection of human rights. A person's familial and social ties are also protected though the right of privacy and family life, and the right to enter his or her own country.

When the *jus nexi* principle is applied to the right to nationality, the addressee of a right to a particular nationality can generally be determined as follows: all persons should have the right to the nationality of the country to which they are connected by their real life situation. Accordingly, the *jus nexi* principle takes up the idea of nationality as part of the person's social identity and 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 had 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 result in a fundamental paradigm shift. It would lead to the right to nationality genuinely being recognized as a (human) right, and to wider access to citizenship.

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"Every person should have the right to nationality of the country with which he or she is most closely connected."
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But it would not mean that any foreigner in Switzerland would automatically be granted Swiss citizenship. Entitlement to the granting of citizenship would apply for those who were more closely connected with Switzerland than with any other country – e.g. second-generation foreigners, or those whose life has long been centered in Switzerland. Depending on how the *jus nexi* principle was applied in practice, it would be possible to do away with the rather mechanical checklist of prerequisites currently applied in (ordinary) naturalization procedures. The fact of being a social welfare recipient or having committed a petty criminal offence would only stand in the way of a person's naturalization in the absence of a close personal connection with Switzerland. Naturalization could however be denied if Switzerland's interest in the person not being naturalized outweighed the interests of the individual concerned – e.g. in the case of serious criminal convictions. And the current system of ordinary and simplified naturalization could continue to be used for those who are unable to demonstrate a sufficient "nexus".

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"The *jus nexi* principle offers a sustainable approach for linking a person's citizenship to his or her real life situation."
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Under a human rights-based view of citizenship, both the granting and loss of nationality would therefore no longer be understood as the privilege of states, with increased weight instead given to the individual right to citizenship. This would include not only protection against the arbitrary withdrawal of citizenship and a person becoming stateless, but also the right to access to a particular nationality. In this context, the *jus nexi* principle offers a simple and sustainable mechanism for tying citizenship to the person's real life situation. Particularly in migration societies without a *jus soli*, this approach would help to provide better protection of the human rights of immigrants in terms of their access to citizenship.