CHAPTER 6

An Individual Right
Realizing the Right to Citizenship

Whilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person’s social identity.¹

ECtHR, Mennesson v France, 2014

The previous chapters have described the right to nationality under international human rights law and discussed both the rights it attributes to individuals and the obligations it imposes on states. It has been shown that today, the right to nationality is well-established in international law. Its scope and content can be determined based on several international treaties, from Article 15 UDHR and the subsequent universal human rights treaties to instruments at the regional level. In fact, a surprising number of specific rights and obligations under the right to nationality can be identified. However, there is a mismatch between the increasingly solid protection of the right to nationality in international law and the practice, especially at the national level. The validity of the right to nationality as an individual human right is regularly questioned. In particular, the right to nationality is interpreted as not protecting a right to the nationality of a specific state. Membership to the state where one has one’s center of life is far from being recognized as an individual entitlement that can be invoked by individuals and protected by courts and state officials. It is often argued that this is due to the absence of an addressee. Since it is not clear which state would be under an obligation to protect that right, an individual cannot invoke the right to nationality against a particular state to be granted nationality. This alleged indeterminacy of the right to citizenship leaves non-citizens in a vulnerable situation. It leads to a situation where stateless persons cannot effectively claim a right to acquire a nationality that would offer them freedom.

¹ Mennesson v France [2014] ECtHR Application No. 65192/11 para 97.
protection; where long-term resident non-citizens often remain dependent on discretionary naturalization procedures to acquire the nationality of the state in which they are at home;² and where an increasing number of persons are deprived of their nationality without a proper balancing of the interests involved.³ In practice, despite the formal recognition of the right to nationality as a human right in the international legal sphere, nationality is often still thought to be a stronghold of state sovereignty where international law imposes few limitations upon states’ discretion.

How can this tension between the right to nationality in international law and its realization in practice be released? How can the right to citizenship, as currently protected by international law, ensure the effective protection of citizenship as part of a person's social and legal identity in a world marked by global migration? Ultimately, the right to citizenship should establish that states, as Benhabib argued, "may stipulate certain criteria of membership, but they can never be of such a kind that others would be permanently barred from becoming a member of [their] polity".⁴ Access to citizenship should not be a matter of discretion but of entitlement.

It is against this background that I would like to suggest a novel interpretation of the right to nationality, to strengthen the enforceability of the right for individuals and secure an actual claim to membership in a specific state. This is not a call for the introduction of a new human right, but a proposal for a more rights-based interpretation of the right to citizenship — as I shall refer to it in the following in order to illustrate its broader, rights-based focus.⁵ I argue that the principle of *jus nexi* can serve as the theoretical foundation for such an interpretation. The principle of *jus nexi* proposes to base citizenship acquisition on a genuine connection between the person concerned and the society in question.⁶ Linking citizenship to a person's ties to society allows

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⁵ See for the terminology used in this book Chapter 2, 1.

nationality to be recognized as a mixed question of fact and law. Moreover, as will be shown, it accommodates the fact that citizenship is not necessarily a stable, lifelong status that is passed on from generation to generation without any change of external factors.

In the following, I shall first motivate my claim by discussing four arguments based on the limitations upon the current citizenship system, the exclusionary effect of citizenship laws, the risk of a democratic deficit and the implications of framing citizenship as an individual right. Each of these motivates why I believe the right to citizenship should be strengthened (1.). I then discuss the principle of *jus nexi*, its theoretical foundations and parallels to established concepts in human rights law, the elements it entails and its flexibility to account for individual biographies to illustrate how it could help in mitigating the indeterminacy of the right to citizenship (11.). A third section links the principle of *jus nexi* and the right to citizenship (111.). Section IV. then applies *jus nexi* to the right to citizenship — more precisely, the obligations identified in Chapter 5 — to explore what a *jus nexi* based right to citizenship would actually entail. Ultimately, the aim is to show that a *jus nexi*-based right to citizenship can account for a stronger protection of the right to citizenship than its current interpretation under international law.

## 1 The Need to Strengthen the Right to Citizenship

Citizenship continues to be an important prerequisite for the enjoyment of fundamental rights, despite the universal validity of human rights. Nevertheless, access to citizenship is not always guaranteed. As I will discuss in the following section, the two prevailing modes of birthright-based citizenship acquisition, the principles of *jus soli* and *jus sanguinis*, are not sufficient to safeguard that everyone has a citizenship or, even less so, an effective citizenship in the place where one is at home. Therefore, I argue that the individual rights dimension inherent to citizenship cannot be sufficiently secured by birthright-based modes citizenship acquisition alone — those based on birth in the territory, descent and the additional, largely discretionary, possibility of naturalization (1.1). Secondly, I address the need for the adequate representation and

9 See Chapter 2.
participation of migrants to improve the legitimacy of decision making in democratic states (1.2). The third argument relates to the exclusionary character of citizenship and suggest that access to citizenship should be opened to secure the inclusion of all persons with genuine connections to the society (1.3). Finally, I argue that the individual rights-character of citizenship implies that the autonomy and individual choices of a person have to be respected and citizenship should be accessible for individuals who consider that state to be their center of life (1.4). All these arguments have been thoroughly discussed in political and democratic theory. It is not my ambition to reiterate this debate in its full complexity. Rather, I refer to the discussion where it is instructive to my argument that the current legal framework for the protection of the right to citizenship should be strengthened.

1 The Limitations of Birthright-Based Modes of Citizenship Acquisition

The principles of *jus soli* and *jus sanguinis* continue to shape citizenship laws worldwide. As discussed previously, both birthright principles are criticized for being under- and over-inclusive at the same time.10 On the one hand, under-inclusive due to the exclusion of second (or more) generation migrants born in a state, forcing them to a status of non-citizen and thereby perpetuating their status as legal outsiders. On the other, over-inclusive by allocating citizenship on the basis of the mere accident of birth, in case of *jus soli* countries, and by allowing non-resident citizens to transmit citizenship over generations irrespective of any continuing actual ties to the state of citizenship, as in *jus sanguinis* countries.11 Shachar points out that:

Both criteria for attributing membership at birth are arbitrary: one is based on the accident of birth within particular geographical borders while the other is based on the sheer luck of descent. By focusing selectively on the event of birth as the sole criterion for allocating automatic membership,
existing citizenship laws contribute to the conceit that this assignment is no more than an apolitical act of membership demarcation.\textsuperscript{12}

Moreover, the two birthright-based modes of citizenship acquisition cannot prevent statelessness. Rather to the contrary — conflicts between \textit{jus soli} and \textit{jus sanguinis} systems are a major cause of statelessness.\textsuperscript{13} Statelessness caused by conflicts of \textit{jus soli} and \textit{jus sanguinis} systems primarily affects children who can neither acquire nationality from their parents — who are nationals of a \textit{jus soli} country — nor from the state in which they are born — which attributes nationality \textit{jure sanguinis}. They are left stateless in violation of the right to nationality.\textsuperscript{14}

Calls for an abandonment of birthright-based modes of citizenship acquisition, have, nevertheless, been rejected — particularly with regard to \textit{jus sanguinis} systems.\textsuperscript{15} Transferring citizenship from parent to child, so the argument goes, is one of the clearest and thus most secure ways of attributing citizenship.\textsuperscript{16} Birthright-based modes of citizenship acquisition offer protection against statelessness at birth. Moreover, being based on descent, the principle of \textit{jus sanguinis} secures that children have the same citizenship as their parents and thus contributes to safeguarding the right to family life. In a migration context having the possibility and right to remain as a family in one place can be especially important.\textsuperscript{17} Linking citizenship to the place where one was born, by contrast, can reduce membership to a consequence of mere coincidence without any substantive connection between the person concerned and the state in question.\textsuperscript{18}

In conclusion, the way the birthright-based modes of citizenship attribution are currently applied by states lead to both under- and over-inclusion, still cause statelessness and fail to provide migrants with a reliable and meaningful

\begin{thebibliography}{9}
\bibitem{12} Shachar, \textit{The Birthright Lottery} (n 6) 7.
\bibitem{13} Laura van Waas, \textit{Nationality Matters: Statelessness under International Law} (Intersentia 2008) 49 ff.
\bibitem{14} See also Chapter 5, 111.3.1.
\bibitem{15} See for an overview on the debate the contributions to Costica Dumbrava and Rainer Bauböck (eds), \textit{Bloodlines and Belonging: Time to Abandon Ius Sanguinis?} (2015) <http://cadmus.eui.eu/bitstream/handle/1814/37578/RSCAS_2015_80.pdf?sequence=1&isAllowed=y>.
\bibitem{17} \textit{ibid} 38.
\bibitem{18} See Shachar, \textit{The Birthright Lottery} (n 6) 116.
\end{thebibliography}
way of acquiring the citizenship of their host state. The need for a reform of the current system becomes apparent. Yet, the solution for a more inclusive approach is neither found in relying either on *jus sanguinis* or *jus soli* alone, nor in rejecting both principles altogether.\(^\text{19}\) Both principles fulfill certain legitimate functions. They allow for a relatively reliable, coherent and consistent attribution of citizenship at the moment of birth without requiring any further connection.\(^\text{20}\) What they fail to provide, however, is reliable access to membership for non-citizens who establish a close connection to the host state after birth. Even though all states allow the acquisition of citizenship through naturalization, in addition to acquiring citizenship at birth, the current system of naturalization is not really an effective mechanism to mitigate the exclusionary effects of birthright-based citizenship either. Naturalization continues to be a highly discretionary procedure and based on strict and exclusionary, sometimes even discriminatory, criteria. In practice, the material barriers imposed exclude many migrants with close ties to the host society from membership. This includes barriers such as naturalization requirements assessed in tests, formal hindrances such as complicated procedures or excessive fees, and the discretion of the authorities involved.\(^\text{21}\) In order to actually alleviate the limitations of birthright-based modes of citizenship acquisition, non-citizens should have access to citizenship on the basis of a rights-based non-discretionary procedure.

2    The Claim for Political Participation and Representation

Political participation and representation are central to the discussion on citizenship and the inclusion of migrants in the citizenry. There is a vast body of literature on political membership and democratic participation.\(^\text{22}\) The legitimacy of democratic systems is premised on the fair and equal participation of

\(^{19}\) van Waas, *Nationality Matters* (n 13) 53.


\(^{21}\) See on exclusionary effects of naturalization tests eg Ricky van Oers, *Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom* (Brill Nijhoff 2013).

those who are subjected to legislative decisions in adopting those decisions.\textsuperscript{23} There are different approaches how to determine those who should have a say in democratic processes. In an ideal scenario, the legislator would be largely congruent to the legal subjects of that political entity. The larger the mismatch between the legislator and those being governed by the legislator, the weaker the legitimacy of democratic decisions becomes.\textsuperscript{24}

In reality, this ideal scenario of an overlap between the people in a state and the body politic is disrupted in several respects. In practice, democratic systems usually exclude certain groups for different reasons. Children below the voting age, for example, but also persons with disabilities and persons lacking legal capacity or, in some jurisdictions, persons serving criminal sentences.\textsuperscript{25} Moreover, non-citizens do not generally have political rights in their host state irrespective of their legal status.\textsuperscript{26} There are certain exceptions where non-citizen residents are granted political rights at a local or sub-state level\textsuperscript{27} or in the particular case of the EU on supra-state level.\textsuperscript{28} Nevertheless, political decision-making is usually restricted to citizens, especially at the national level. In a world where international migration is on the rise and an increasing number of states are confronted with a considerable number of residents that have no say in political discussions, this mismatch becomes a challenge for the legitimacy of democratic systems. Non-citizens who remain involuntarily excluded from political participation risk being dominated.\textsuperscript{29} As the literature


\textsuperscript{23} Bauböck, ‘Political Membership’ (n 22).


\textsuperscript{25} The UK, for example, does not allow prisoners to vote. This has been found to be a violation of Article 3 of Protocol 1 to the \textit{ECHR} by the \textit{Hirst v The United Kingdom (No 2) (GC)} [2005] ECHR Application No. 74025/01.

\textsuperscript{26} Article 25 \textit{ICCPR} explicitly restricts the personal scope of the right to vote to citizens. See also Linda Bosniak, ‘Status Non-Citizens’ in Ayelet Shachar and others (eds), \textit{The Oxford Handbook of Citizenship} (Oxford University Press 2017) 328; Luicy Pedroza, \textit{Citizenship Beyond Nationality: Immigrant’s Right to Vote Across the World} (University of Pennsylvania Press 2019).

\textsuperscript{27} In Switzerland, for example, eight Cantons grant non-citizens the active right to vote on cantonal or municipal level. The right to stand as a candidate in elections is granted in four Cantons. See the database on indicators of Swiss citizenship law, Jean-Thomas Arrighi and Lorenzo Piccoli, ‘\textsc{swisscit}: Index on Citizenship Law in Swiss Cantons’ (nccr — on the move 2018) <https://indicators.nccr-onthemove.ch/how-inclusive-are-citizenship-laws-in-the-26-swiss-cantons/>.

\textsuperscript{28} Article 22 Treaty on the Functioning of the European Union, 26 October 2012, OJ C 326/47, ‘\textsc{tfeu}’.

\textsuperscript{29} Bauböck and Paskalev (n 8) 67.
shows, means of including non-citizens in democratic political decision making processes are necessary to prevent democratic legitimacy problems. It would go beyond the scope of the present study to trace this debate. What is interesting for the question under discussion here, however, is that it illustrates that the current citizenship framework with birthright attribution of membership without a right to citizenship is not a sufficient to safeguard for a representative democratic political system in immigration states with a certain proportion of non-citizen residents.

Reframing the right to citizenship to being based in the principle of *jus nexi* could help reduce the increasing democratic deficit in migration societies. *Jus nexi*, as Shachar asserts, “reflects the idea of democratic inclusion, according to which those who are habitually subject to the coercive powers of the state must gain a hand in shaping its laws, if they so choose”. It aims to offer access to citizenship to those non-citizens who have genuine connections to that place. A *jus nexi* based right to citizenship would allow non-citizens with substantive connections to a state to participate fully in the society as citizens. This would allow the inclusion of those non-citizens that are most affected by political decisions taken in democratic processes.

3 The Exclusionary Effects of Citizenship

Distinguishing between those who belong to a citizenry and those who remain outside is a characteristic of citizenship. As discussed in Chapter 2, citizenship therefore produces both inclusion and exclusion. This boundary-creating consequence of membership to the state has been described as the ‘janus face’ of citizenship.

In the context of this study, the primary divide lies between citizens and foreign nationals; between those with (legal) citizenship status and those without. Migrants — non-citizens present in a state make this exclusionary function of citizenship visible. Citizens bear the full bundle of rights (and duties) attached to citizenship. They have, at least in principle, full political

30 Shachar, *The Birthright Lottery* (n 6) 178 f.
32 See Chapter 2, ii.2.
35 See Chapter 2, ii.3.3.
rights, access to social and economic rights and, importantly, an unconditional right to enter, remain in and leave their state of citizenship.\textsuperscript{36} Non-citizens, in contrast, lack at least some of these rights, remain subject to deportation and have no unconditional right to re-enter their state of residence once they have left it.\textsuperscript{37} Even though universal human rights apply irrespective of one’s citizenship, states may therefore restrict crucial rights of non-citizens on the basis of citizenship, particularly when it comes to political rights and mobility rights, but also social rights.\textsuperscript{38}

The right to enter and remain in a state has even been described as a “\textit{sine qua non} of legal citizenship”.\textsuperscript{39} It serves as a territorial marker between citizens and non-citizens and contributes to the formation of a sense of identity and belonging within the state.\textsuperscript{40} As Jacqueline Bhabha noted:

\begin{quote}
A key, perhaps the most important, attribute of nationality is non-deportability, or the \textit{lifelong guarantee of a right to entry and to indefinite residence} in the country of one’s nationality irrespective of criminal conviction, prolonged foreign absence or any other personal behavior. It is through this entitlement that the enduring bonds of national identification are protected. (emphasis added)\textsuperscript{41}
\end{quote}

In \textit{Serrano Sáenz v Ecuador}, the Inter-American Court of Human Rights found a violation of the right to nationality in a case concerning an Ecuadorian citizen who was deported to the US. The Court ruled that the deportation deprived Mr. Serrano Sáenz of an elemental right inherent to nationality — the right to remain in the state and not be deported.\textsuperscript{42} This judgment highlights the

\begin{footnotesize}
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\item \textsuperscript{36} See for a discussion of degrees of rights among those who formally have legal nationality Lindsey N Kingston, \textit{Fully Human: Personhood, Citizenship, and Rights} (Oxford University Press 2019).
\item \textsuperscript{37} See also Vanessa Barker, ‘Democracy and Deportation: Why Membership Matters Most’ in Katia Franko Aas and Mary Bosworth (eds), \textit{The Borders of Punishment: Migration, Citizenship, and Social Exclusion} (Oxford University Press 2013).
\item \textsuperscript{38} Article 25 ICCPR, for example, explicitly limits political rights to citizens.
\item \textsuperscript{39} Audrey Macklin, ‘Who Is the Citizen’s Other? Considering the Heft of Citizenship’ (2007) 8 Theoretical Inquiries in Law 333, 343. See also Barker (n 37); Bosniak, ‘Status Non-Citizens’ (n 26). See further Chapter 2, 11.3.3.
\item \textsuperscript{41} Jacqueline Bhabha, ‘The Importance of Nationality for Children’ in Institute on Statelessness and Inclusion (ed), \textit{The World’s Stateless: Children} (Wolf Legal Publishers 2017) 36.
\item \textsuperscript{42} \textit{Nelson Iván Serrano Sáenz v Ecuador} [2009] IACtHR Report N. 84/09, Case 12.525 para 67.
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importance of the right to remain as part of the exclusionary functions of citizenship. While long-term residents might be granted a permanent residence permit that grants them an unlimited right to remain, this right is not unconditional.\textsuperscript{43} Residence permits, including long-term residence permits, can be withdrawn under the current international legal framework for different reasons — be that for reasons of national security, for economic reasons if a person is dependent on social welfare, for political reasons if a person is deemed to constitute a threat to political interests, or merely because a person has left the country for too long. Thus, non-citizens thus remain vulnerable to deportation or expulsion from the place where they are at home.\textsuperscript{44} In cases where non-citizens have significant, permanent connections to their state of residence, this exclusion becomes particularly worrying.\textsuperscript{45}

In recent years, a number of states have tightened the requirements for migrants to acquire citizenship by naturalization or on the basis of birth in the territory.\textsuperscript{46} At the same time, the increasing securitization of citizenship has led to a renewed interest in the use of denationalization as the primary means of undercutting the right to remain in the country.\textsuperscript{47} These

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\item \textsuperscript{43} See Bosniak, ‘Status Non-Citizens’ (n 26) 326 ff.
\item \textsuperscript{44} See also Mirna Adjami and Julia Harrington, ‘The Scope and Content of Article 15 of the Universal Declaration of Human Rights’ (2008) 27 Refugee Survey Quarterly 94; Barker (n 37) 246.
\item \textsuperscript{45} See Bosniak, ‘Citizenship Denationalized’ (n 34).
\item \textsuperscript{46} See eg the 2014 Swiss Swiss Citizenship Act, which reduces the residence period at national level from twelve to ten years while at the same time increasing the other requirements for naturalization, see Barbara von Rütte, ‘Das neue Bürgerrechtsgesetz’ [2017] Anwaltsrevue 202. Austria announced to increase the residence period for naturalization for refugees, Gerd Valchars, ‘Verschärfung für Ungewollte’ Der Standard (Wien, 9 July 2018) <https://www.derstandard.at/story/2000083140956/verschaerfung-fuer-ungewollte>. During the Trump administration, the US has announced to change the country’s \textit{jus soli} system, see Patrick J Lyons, ‘Trump Wants to Abolish Birthright Citizenship. Can He Do That?’ The New York Times (New York, 22 August 2019) <https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html>. In other states, such as Portugal, the acquisition of citizenship has been facilitated, see Lorenzo Piccoli, ‘2018: A Year in Citizenship’ (\textsc{globalcit}, 8 March 2019) <http://globalcit.eu/2018-a-year-in-citizenship/>. See on the evolution of citizenship policies moreover Orgad (n 2); Ayelet Shachar, ‘Beyond Open and Closed Borders: The Grand Transformation of Citizenship’ (2020) 11 Jurisprudence 1, 13 ff.
\item \textsuperscript{47} An extension of deprivation powers has been discussed in countries such as Canada, the UK, Belgium, France, Germany, or Denmark. See eg Matthew J Gibney, ‘Denationalisation and Discrimination’ (2020) 46 Journal of Ethnic and Migration Studies 255; Honohan (n 3); Arnfinn H Midtbøen, ‘Dual Citizenship in an Era of Securitisation: The Case of Denmark’ (2019) 9 Nordic Journal of Migration Research 293; Patrick Sykes, ‘Denationalisation and Conceptions of Citizenship in the “War on Terror”’ (2016) 20 Citizenship Studies 749;
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developments reinforce the exclusionary effects of citizenship. The boundary created between citizens and non-citizens based on the rights tied to citizenship remains very much alive. Citizenship is “a privilege for some that works to the exclusion of others”.48 One approach to mitigate the exclusionary effects of this privilege would be to detach the rights, particularly political rights and the right to remain, from citizenship and grant them to non-citizens on an equal basis. The other approach, which is the approach I propose here, is not to replace citizenship with another status, but to make access to citizenship (and its retention) a right. Applying the principle of jus nexi to the right to citizenship would allow for inclusion into the citizenry of those who are most affected by the exclusionary effects of citizenship in their daily life; those who have their center of life in a state without having that state’s citizenship. Based on the principle of jus nexi, those persons could be granted an enforceable legal entitlement to acquire citizenship. This would allow for the inclusion of, at least, some of those who belong to the society and hence alleviate some of the exclusionary effects of citizenship.49

4 The Individual Rights’ Dimension
The two previous sections have discussed the implications of citizenship as an individual’s membership in a social and political group. I have argued before why citizenship has the quality of a human right.50 Now I would like to make the point that recognizing citizenship as an individual human right has implications for the state’s competence to decide who qualifies as a citizen and, in

49 I am aware that this approach shifts the pressure quite literally to the border. If access to citizenship is recognized as an enforceable right for those in a country the question who gets access to the territory in the first place becomes predominant. Those in favor of a restrictive migration policy will aim to limit access to the territory to preclude claims to access to citizenship. This discussion, however, goes beyond the scope of this study. From an international human rights law perspective, the right to enter a state (and possibly the right to asylum) and the right to citizenship are two different questions. My concern in this study is for the latter without in any way questioning the legitimacy or importance of the former. See also Chapter 1, 11.
50 See Chapter 2, 111.
turn, the way the law regulates access to citizenship. As the IACtHR noted in its opinion on the *Amendments to the Naturalization Provision of the Constitution of Costa Rica*:

The classic doctrinal position, which viewed nationality as an attribute granted by the State to its subjects, has gradually evolved to a conception of nationality which, in addition to being the competence of the State, is a human right.  

Recognizing the right to citizenship as a human right entails granting an enforceable legal entitlement to membership that can be claimed against a specific state. This, as the opinion of the IACtHR illustrates, means that the individual is no longer merely a subject, but a rights holder. This shift of perspective from the state to the individual has considerable legal and practical consequences. The state is “dethroned as the author and owner of citizenship”. Instead, the claim to acquire citizenship is transferred to the individual. Hence, the position of the individual is strengthened at the cost of states’ discretion. It is no longer exclusively within the *domaine réservé*, the sovereign and sole competence of states, to decide on access to and loss of citizenship without any restriction derived from international standards.

As a human right, citizenship is subject to the choices and autonomy of the individual. The individual and her interests must be taken into consideration, even where they are not parallel to the interests of the state. Citizenship should not be imposed against the will of the individual and should only be revoked under exceptional circumstances. Individuals should have a meaningful way to acquire nationality. This shift from state privilege to individual right becomes apparent in the social identity approach of the ECtHR, where it qualifies citizenship as a part of the social identity of an individual, falling within her private life. If citizenship is part of a person’s social identity,

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52 Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 162.
54 Bauböck and Paskalev (n 8) 64.
55 See also Chapter 5, 111.3.6. Similarly also Honohan (n 3) 11.
56 *Genovese v Malta* [2011] ECtHR Application No. 53124/09 para 33.
that person has the right and the autonomy to shape that identity.\textsuperscript{57} As social beings, humans have to be able to establish social relationships and be members of the society where those social relationships exist; where one’s center of life is. As Bauböck and Paskalev point out, the view that citizenship is an individual right implies that individuals have a right to choose their own identities.\textsuperscript{58} The state, by contrast, has an obligation to accommodate and administer the choices and entitlements of the individuals concerned.\textsuperscript{59}

Recognizing the right to citizenship, in other words, entails recognizing non-citizens’ claim to equal membership and limiting states’ sovereignty.\textsuperscript{60} Rather than making access to citizenship dependent on the decision of a state or attributing it automatically, a right to citizenship on the basis of the principle of \textit{jus nexi} would give necessary weight to the individual’s intentions, her subjective circumstances, connections and her sense of belonging.\textsuperscript{61} It would give sufficient weight to the individual’s will and accommodate the need for dual or even multiple citizenship.\textsuperscript{62}

This section has discussed several reasons why the current international citizenship law framework does not sufficiently protect the rights of individuals, nor accommodate the realities of modern migration societies. The system of attributing membership on the basis of \textit{jus soli} and \textit{jus sanguinis}, or alternatively through naturalization, threatens to exclude individuals who effectively are members of the society; it risks weakening democratic processes, as non-citizens remain excluded from political participation and representation, and fails to give sufficient weight to individuals’ choices on where their center of life is. I have suggested the principle of \textit{jus nexi} as a possibility to close these gaps in the current framework. In the following section, I will discuss in more detail what the principle of \textit{jus nexi} entails and illustrate why I believe it could be a helpful approach.

\begin{itemize}
\item \textsuperscript{57} By the notion of ‘identity’ I refer to an individual’s personal identity which is formed by her personal characteristics and social ties, see also \textit{Mennesson v France} (n 1) para 97. Hence, it is to be distinguished from notions of collective, cultural, ethnic or national identity which refer to ideas of group identity. See also Ernst Hirsch Ballin, \textit{Citizens’ Rights and the Right to Be a Citizen} (Brill Nijhoff 2014) 17 ff.
\item \textsuperscript{58} Bauböck and Paskalev (n 8) 64.
\item \textsuperscript{59} Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 163.
\item \textsuperscript{60} See \textit{ibid} 162 f.
\item \textsuperscript{61} See also Ayelet Shachar, ‘Earned Citizenship: Property Lessons for Immigration Reform’ (2011) 23 Yale Journal of Law and the Humanities 140. See in a similar vein also Bauböck and Paskalev (n 8) 68.
\item \textsuperscript{62} See also Macklin, ‘The Citizen’s Other’ (n 39) 354.
\end{itemize}
11  Jus Nexi — a Genuine-Connection Principle for Citizenship Acquisition

In the previous section I have presented arguments why the right to citizenship, as it is currently interpreted, does not offer the necessary corrective to the shortcomings of the current international citizenship regime. I would like to propose an interpretation of the right to citizenship based on the principle of *jus nexi* in order to address these shortcomings. In order to show how the principle of *jus nexi* could be applied to the right to citizenship, I first want to elaborate on the concept of *jus nexi* itself. After establishing its historical evolution and theoretical foundations (II.1), I will draw upon the jurisprudence of international human rights bodies and soft law instruments to illustrate that the idea of a genuine-connection principle for membership in itself is not foreign to human rights law (II.2). I then identify different elements that build a genuine-connection that then serve as points of reference for citizenship acquisition based on the principle of *jus nexi* (II.3). I end this section by concluding that the concept allows for a non-exclusive and dynamic mode of membership attribution that takes a person’s individual circumstances into account and thus paves the way for a rights-based approach to citizenship acquisition (II.4).

1  **Theoretical Foundations of the Concept of Jus Nexi**

The principle of *jus nexi*, most prominently developed by Shachar, is an alternative mode of citizenship attribution that refers to membership acquisition based on a genuine connection to the society in question.\(^{63}\) Shachar defines *jus nexi* as a “genuine connection principle of membership acquisition”\(^ {64}\) that “reflects a social relational conception of citizenship”.\(^ {65}\) The term ‘*jus nexi*’, as she notes, is a short version of the term ‘*jus connexion*’.\(^ {66}\) Shachar refers to the judgment of the ICJ in the case of *Nottebohm* and the evolving case law of the CJEU on EU citizenship, as well as practices of urban citizenship and the creation of city IDs — as a form of local membership based on social

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\(^{63}\) Shachar, *The Birthright Lottery* (n 6). See also Shachar, ‘Earned Citizenship’ (n 6i), where she elaborates on the principle of *jus nexi* and describes it as a theoretical framework that takes rootedness in a society as the basis for membership. See in more detail Chapter 2, II.2.5.

\(^{64}\) Shachar, *The Birthright Lottery* (n 6) 164.

\(^{65}\) Shachar, ‘Earned Citizenship’ (n 6i) 128.

\(^{66}\) Or ‘*jus connectionis*’ for that matter. See Shachar, *The Birthright Lottery* (n 6) xii. See on the terminology also Hirsch Ballin (n 57) 83.
attachment — to illustrate that it is not new to tie membership status to the existence of effective connections to a society.67

Shachar proposes to complement the principles of *jus soli* and *jus sanguinis* with the principle of *jus nexi* in order to overcome the negative consequences of automatic transmission of entitlement based on citizenship obtained through birthright-based modes of transmission, particularly over- and under-inclusion.68 Unlike the accident of birth, a person’s effective connection to or rootedness in a society would be decisive for membership attribution based on the principle of *jus nexi*. Shachar argues that

*jus nexi* provides substance to the idea that real and genuine ties fostered on the ground deserve some form of legal recognition: here, by granting secure membership status based on the social connectedness that has already been established. Such an approach enables us to welcome into the political community those who have already become social members based on their actual participation in the everyday life and economy of the jurisdiction, and through their interdependence with its legal and governance structures.69

Accordingly, actual, functional connections a person has to the political community should be decisive for legal citizenship and not purely formalist considerations.70 As the basis for a *jus nexi* model for accessing citizenship, Shachar proposes a ‘center of interests test’.71 Such a test, she finds, would offer a pragmatic and functional way to evidence the existence of a genuine connection between a person and the political community she lives in. *Jus nexi* could thereby trace “attachment between the individual and the political community on the basis of factual membership and affected interests”.72 Hence, the principle of *jus nexi* would provide an opportunity to adjust political and legal membership and base citizenship on existing social facts of membership rather than only on an entitlement on the basis of birthright.73

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67 Shachar, *The Birthright Lottery* (n 6) 167 and 175 ff.
68 ibid 164 f. Shachar, ‘Earned Citizenship’ (n 61) 115.
69 Shachar, *The Birthright Lottery* (n 6) 169.
70 Shachar, ‘Earned Citizenship’ (n 61) 122.
71 Shachar, *The Birthright Lottery* (n 6) 168.
72 ibid.
73 ibid 165.
Others have raised similar arguments. Hirsch Ballin, for example, argues for “a human right to be a citizen of the state where one is effectively at home” and “a citizenship that is appropriate to everyone’s life situation, where he or she is at home — which can change during the course of a person’s life”. Goldston proposes to turn to the notion of genuine and effective links in order to “give further content to the limits on state discretion in regulation citizenship access”. In her work, Anuscheh Farahat develops a ‘principle of progressive inclusion’ (Prinzip der progressiven Inklusion). Based on this principle, the legal status of migrants should progressively be approximated to the status of citizens based on the connections between them and the state of residence — even if they still have ties to the state of origin or other states. The ‘stakeholder principle’ developed by Bauböck also bears strong similarities to the principle of jus nexi. He argues that the “Westphalian conception of citizenship” must be based on a genuine link, a political and legal relation between individuals and states. He claims that a genuine link is necessary to sort individuals into states, which is a crucial function of citizenship. He proposed a ‘stakeholder principle’ for determining who has a claim to membership in the political community. This claim should be based on an individual’s stake in the political community that depends on that person’s circumstances of life, rather than a subjective preference. Based on the stakeholder principle, “self-governing political communities should include as citizens those individuals whose circumstances of life link their autonomy or well-being to the common good of the political community”. Against the background of statelessness and deprivation of citizenship, Owen refers directly the jus nexi principle and

74 Hirsch Ballin (n 57) 125 and 145.
75 Anuscheh Farahat, Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht (Springer 2014) 76 f.
76 Bauböck, ‘Genuine Links and Useful Passports’ (n 20).
77 ibid 4.
80 ibid 479.
Bauböck’s stakeholder principle when he discusses the ‘right to have nationality rights’ and argues that it is necessary to attribute membership on the basis of a “reciprocal relationship between individuals and states”.82 The legitimacy of the international political order “requires that it acknowledges ius nexi as a basic constitutional principle and, hence, a human right to naturalize under conditions where a person has a genuine link to a state”.83

In international legal instruments, the principle of *jus nexi* has, so far, not gained much traction as a mode of citizenship acquisition. Nevertheless, tying membership and legal status rights to the existence of functional connections to a society is not unknown to international law.84 Even in international law, the concept of nationality is, in fact, built on the idea that nationality should reflect a meaningful and genuine connection between the individual and the state in question. Vlieks et al argue that the “concept of nationality acknowledges that nationality has effective and social features, and that in the absence of a factual basis and genuine connection between the individual and the state, the claim of nationality becomes increasingly meaningless”.85 Especially in cases concerning diplomatic protection of dual nationals, the principle of effective nationality has long played an important role in determining whether one state of nationality can exercise protection *vis-à-vis* the other state of nationality.86

One of the early sources in international law that touches upon the relevance of actual connections for citizenship is the report by Manley Hudson, the ILC Special Rapporteur on Nationality, Including Statelessness, of 1952. In that report, Hudson argues that the situation of stateless persons can only be improved if the individual concerned has “the nationality of that state with which he is, in fact, most closely connected, his ‘effective nationality’”.87 Such an effective nationality based on the closest connection is the only way, he

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83 Owen, ‘The Right to Have Nationality Rights’ (n 82) 314.
85 Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 164.
86 See eg *Mergé Case (United States v Italy)* [1955].
argues, to eliminate both *de jure* and *de facto* statelessness.\(^8\) He then refers back to a Conference of the International Law Association in 1936, where it was suggested that neither *jus soli* nor *jus sanguinis* should be decisive, but a right of attachment, a ‘*jus connectionis’*.\(^8\) Such *jus connectionis* would allow for the attribution of the “nationality of the state to which a person has proved to be most closely attached in his conditions of life as may be concluded from spiritual and material circumstances”.\(^9\) The relevant factors for a *jus connectionis*, or in other words a *jus nexi*, would thus be both the actual and emotional facts of attachment. The Hudson Report was the most comprehensive study on nationality, statelessness and their relationship with international law of the time. This reference to the principle of *jus connectionis* shows that the idea to link citizenship to the actual connections of a person was already known in the first half of the 20th century.

In 1955, the idea of citizenship as a legal status based on an actual, close connection was at the heart of the seminal *Nottebohm* judgment.\(^9\) In its ruling the ICJ famously defined nationality as

>a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. (emphasis added)\(^9\)\(^2\)

In order to be externally valid *vis-à-vis* other states, the Court argued, nationality must correspond to the factual situation of a person.\(^9\) The ICJ found that, in conflicts concerning diplomatic protection of dual nationals, preference was usually given to the ‘real and effective nationality’; the nationality that

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8 See also Carol A Batchelor, ‘UNHCR and Issues Related to Nationality: International Assistance to Stateless Persons’ (1995) 14 Refugee Survey Quarterly 91, 112.
9 For the terminological similarity between *jus nexi* and *jus connectionis* see Shachar, *The Birthright Lottery* (n 6) xii.
12 *Nottebohm* (n 91) 23.
13 *ibid* 22.
came with stronger factual ties to the person concerned.\textsuperscript{94} The Court defined the notion of genuine connection in a negative way. It found the connections between Nottebohm and Liechtenstein to be extremely tenuous. There was “no settled abode, no prolonged residence”, no intention of doing so and no economic interests or activities exercised there.\textsuperscript{95} Hence, there was no bond of attachment between Nottebohm and Liechtenstein. At the same time, there was a long-standing and close connection between Nottebohm and his state of permanent residence, Guatemala. The Court concluded that Nottebohm’s naturalization in Liechtenstein for these reasons was “lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a state in the position of Guatemala”.\textsuperscript{96} Liechtenstein consequently had no right to exercise diplomatic protection on his behalf.

Obviously, the \textit{Nottebohm} ruling has to be seen in its particular context.\textsuperscript{97} The case — an interstate dispute — concerned the effectiveness of citizenship for the purpose of diplomatic protection exercised at the international level against another state.\textsuperscript{98} Whether Nottebohm actually acquired the citizenship of Liechtenstein from the perspective of Liechtenstein’s domestic law did not factor into the case. This purely external dimension clearly distinguishes the genuine connection doctrine developed in the \textit{Nottebohm} case from the principle of \textit{jus nexi}. The former does not determine the basis upon which nationality should be attributed or acquired.\textsuperscript{99} The ICJ simply applied the genuine connection doctrine to the question whether a state has the right to exercise diplomatic protection on behalf of one of its citizens \textit{vis-à-vis} another state. The Court, \textit{ergo}, imposed a limitation upon the external effectiveness of nationality. A positive implication of the genuine connection doctrine, which would suggest that an individual with a genuine connection has a right to the citizenship of a specific state, cannot be derived from the judgment.\textsuperscript{100}

\begin{footnotes}
\item 94 \textit{ibid.}
\item 95 \textit{ibid} 25.
\item 96 \textit{ibid} 26.
\item 97 See critically Spiro, ‘Nottebohm and “Genuine Link”’ (n 74). See further Chapter 3, 111.4.
\item 98 See also Shachar, \textit{The Birthright Lottery} (n 6) 167.
\item 99 See also the International Court of Justice, ‘Dissenting Opinion of Judge “Ad Hoc” Guggenheim in Liechtenstein v Guatemala (Nottebohm)’ (1955) ICJ Reports 1955, p. 454.
\item 100 See also Jeffrey Blackman, ‘State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law’ (1998) 19 Michigan Journal of International Law 141, 1158. If anything, Mr. Nottebohm would have had an actual, close connection to Guatemala and not to Germany or Liechtenstein, see also Shachar, \textit{The Birthright Lottery} (n 6) 167; Robert D Sloane, ‘Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality’ (2009) 50 Harvard International Law Journal 18 and 32.
\end{footnotes}
Nevertheless, the doctrine of genuine connection or genuine link is interesting for the discussion of the principle of *jus nexi*.¹⁰¹ Both the doctrine of genuine connection and *jus nexi* build on a close, factual connection between a state and a citizen — or a prospective citizen. The ICJ mentions different factors that can create a social attachment or genuine connection: habitual residence is an important element, as are one’s center of interest, possible family ties in a country, the participation in public life or, generally, attachment shown for a state.¹⁰² The sum of these links between individual and state — or as the Court interestingly said, the “population of a state” — establishes the genuine connection.¹⁰³ Social relationships, based on different factors, are therefore directly linked to the legal bond of citizenship.¹⁰⁴ This is the lesson to be drawn from the *Nottebohm* case for the theory of *jus nexi*. It supports Shachar’s argument that “instead of relying on mere formal status of affiliation, the more important criterion is to examine the social fact of attachment, the genuine connection of the person to the polity as a valid and relevant basis for membership allocation”.¹⁰⁵

The idea of an effective link as the basis for citizenship has also found its way into some of the more recent instruments on citizenship in international law. The European Convention on Nationality touches upon the principle of *jus nexi* without recognizing it explicitly. Articles 6, 7 and 18 ECN all recognize attachment, integration and belonging as part of the underlying concept of citizenship of the ECN and thus mirror a *jus nexi* principle.¹⁰⁶ According to Article 6 ECN persons with a certain connection to a state — based on residence, birth, family ties or protection status — shall be granted access to citizenship.¹⁰⁷ In parallel, the loss of a genuine link can be a legitimate reason for

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¹⁰¹ Shachar refers to it as the principle of real and effective citizenship, a citizenship which accords with the facts. See Shachar, *The Birthright Lottery* (n 6) 167.

¹⁰² *Nottebohm* (n 91) 22.

¹⁰³ ibid 23.


¹⁰⁵ Shachar, *The Birthright Lottery* (n 6) 167. Similarly, the CJEU ruled that it is legitimate for an EU member state ‘to take the view that nationality is the expression of a genuine link between it and its nationals’, see *Tjebbes and Others v Minister van Buitenlandse Zaken [2019] CJEU C-221/17* para 35.

¹⁰⁶ See also Ineta Ziemele, ‘State Succession and Issues of Nationality and Statelessness’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 225.

¹⁰⁷ See Chapter 4, [II.2.2.1.1.](#)
the loss of citizenship in cases of habitual residence abroad. This reflects the negative side of *jus nexi*, limiting transmission of citizenship from generation to generation to those who have a genuine connection to their country of citizenship in order to prevent over-inclusion. In cases of state succession the importance of a genuine and effective link is explicit: an individual affected by state succession should have the nationality of the successor state to which a substantial connection exists. The ECN thereby mirrors the principle that in case of state succession the legal bond of nationality should correspond to an individual’s genuine connection to that state.

A similar understanding of a genuine connection, as a precondition for acquiring citizenship in the context of state succession, can be found in the ILC Draft Articles on Nationality. As we have seen, Article 1 ILC Draft Articles guarantees a right to a nationality in the context of state succession. Everyone who, on the date of the succession, had the nationality of the predecessor state has the right to the nationality of at least one of the states involved in the succession. The state that bears the obligation to grant nationality shall be determined based on the existing links between said individual and the states involved in the succession:

The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the links that persons referred to in article 1 may have with one or more States involved in the succession (emphasis added).

Such links can consist of residence or birth on the territory, as well as family or professional ties. These factors normally connect a person to one state, but

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108 Article 7(1)(e) ECN. See also Council of Europe, ‘Explanatory Report to the European Convention on Nationality’ (Council of Europe 1997) para 70.
109 See for the aspect of over-inclusion Shachar, *The Birthright Lottery* (n 6) 183 f.
110 Article 18(2) ECN.
112 See generally on the emergence of positive obligations from the principle of effective nationality in the case of state succession Blackman (n 100) 1160 ff.
113 See Chapter 4, ll.1.3.2.
they can also create links to two or more states involved in the succession.115 Hence, the ILC Draft Articles on Nationality also link the right to a nationality to the existence of a genuine link between the individual concerned and the states involved in the succession and imply a positive obligation for the state to which such genuine connection exists to its grant nationality to the individual concerned.116

Several other provisions of the ILC Draft Articles on Nationality also refer to the requirement of a connection between the individual in question and the state involved in the succession. Article 5 creates a presumption of nationality for habitual residents. Persons having their habitual residence in the territory affected by a succession shall acquire the nationality of the successor state over said territory. This shows that habitual residence provides a strong indication for the existence of an effective connection and can function as an important criteria for determining which state is bound to grant the right to citizenship.117 Another example is Article 11(2), which holds that each state concerned shall grant a right to opt for its nationality to persons who have an appropriate connection with that state if they would otherwise become stateless. According to the Commentary, this right to opt has the aim of resolving problems of attribution of nationality to persons that fall within an area of overlapping jurisdictions.118 The notion of ‘appropriate connection’ used in Article 11(2) shall be interpreted broader than the notion of ‘genuine link’, in order to highlight the importance of the prevention of statelessness, which in some cases can supersede the requirement of effective nationality.119 Besides habitual residence, an appropriate legal connection with the predecessor state can be established by birth on the territory.120 By referring to an ‘appropriate connection’ as the basis for the attribution of citizenship, the ILC Draft Articles effectively apply the principle of *jus nexi* in the context of state succession. They use a mix of criteria determine the effective nationality, with domicile as the predominant criterion but also including others, such as prior nationality or family ties. The right

115 Article 1 International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 3 April 1999, Supplement No. 10, UN Doc. A/54/10 (‘ILC Draft Articles on Nationality’); see *ibid.*
117 International Law Commission, ‘Commentary Draft Articles on Nationality’ (n 114) 29, para 4.
118 *ibid* 34, para 6.
119 *ibid* 34, para 9.
120 *ibid* 34, para 10.
of option moreover gives individuals a claim to the nationality of the state with which they have the closest connection.\textsuperscript{121}

The Draft Protocol on Nationality of the African Union takes the idea of a genuine connection as the basis for the right to nationality even further.\textsuperscript{122} It proposes to oblige states to facilitate the acquisition of nationality for persons who were habitual residents in their territory as children and remain residents as adults (Article 6(2)(d)). The Draft Protocol, moreover, addresses, specifically, the situation of persons “whose habitual residence is in doubt, including persons who follow a pastoralist or nomadic lifestyle and whose migratory routes cross borders, or who live in border regions” (Article 8). In such situation states shall be obliged to take all appropriate measures to ensure that these persons have the right to the nationality of at least one of the states to which they have an appropriate connection (let. a). Such an appropriate connection shall be recognized in cases of:

i. repeated residence in the same location over many years;
ii. the presence of family members in that location throughout the year;
iii. the cultivation of crops on an annual basis at that location;
iv. the use of water points and seasonal grazing sites;
v. the burial sites of ancestors;
vi. the testimony of other members of the community;
vii. the expressed will of the person.\textsuperscript{123}

This provision would introduce a novel approach to the acquisition of nationality entirely based on a diverse range of possible individual connections to a place. The criteria are not based on a perceived image of integration or successful participation of a person in society, but on actual ties to the country and the society. It mirrors a specific conception of \textit{jus nexi} for the context of nomadic and cross-border populations that is informed by the African context, but at the same time, illustrates how access to citizenship generally could be tied to the individual’s actual and multifaceted links.

These examples show that linking nationality and a genuine connection to a state, its territory and population is not new to international law. In fact, the notions of ‘genuine connection’ and ‘effective nationality’ have been central to discussions around nationality and citizenship in international legal theory for

\begin{itemize}
\item \textsuperscript{121} Blackman (n 100) 1170.
\item \textsuperscript{122} See Chapter 4, ii.2.3.2.
\item \textsuperscript{123} Article 8(c) AU Draft Protocol.
\end{itemize}
most of the 20th and the 21st century. It was at the heart of the ICJ’s decision in the case of Nottebohm, and is mirrored in most recent international instruments on nationality. Younger instruments, such as the ECN and also the AU Draft Protocol, reflect this turn towards genuine and effective links as relevant criteria for granting citizenship. In addition, the idea of an effective link as the basis for citizenship — which is at the heart of the principle of jus nexi — is also found in domestic nationality legislation that stipulates requirements such as residence, family ties or participation in public life in order to acquire citizenship. Applying the principle of jus nexi to the right to citizenship would build on this existing framework. In addition, it would strengthen the role of the individual in the attribution of citizenship. Jus nexi allows to recognize the individual as an international legal person and thus promises to grant her an active entitlement to claim access to citizenship in a specific state. The next section introduces this change of perspective by discussing how international human rights law already incorporates elements of the principle of jus nexi.

2 From ‘Private Life’ and ‘One’s Own Country’ to Jus Nexi

In international human rights law, the notion of a person’s social and familial ties is at the heart of the right to private and family life. Where a person’s center of life is and what relationships a persons has to the persons around her and to the state of residence are central to assess the legitimacy of restrictions to the right to private and family life. This is particularly important with regard to the rights of migrants to enter and stay in a country. Against that background, the similarity of the principle of jus nexi to the notions of private life and ‘one’s own country’ becomes apparent. In the following the relevant case law in this regard shall be discussed. This discussion shall help illustrating the individual rights character inherent to the principle of jus nexi.

2.1 The Right to Private Life and the Concept of Social Identity

The right to private life is guaranteed in all major international human rights instruments. While some of these instruments refer to the notion of ‘private life’ and others to ‘privacy’, all these provisions entail some form of protection for the right of everyone to personal autonomy. Particularly interesting for

124 Adjami and Harrington (n 44) 106.
125 See also Bauböck and Paskalev (n 8) 67.
The discussion at hand is the social identity doctrine developed by the ECtHR under its right to private life as protected by Article 8 ECHR. According to the well-established case law of the ECtHR “the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. [...] It can sometimes embrace aspects of an individual’s physical and social identity [...] (emphasis added).”

Thus, besides protecting aspects such as one’s physical and psychological integrity, health, home, environment, correspondence, one’s personal development and legal capacity, the right to private life also protects one’s social identity. This social identity covers the “personal, social and economic relations that make up the private life of every human being” and the free pursuit of “the development and fulfilment of his personality.” In short, the right to private and family life under Article 8 ECHR can guarantee non-citizens a right to remain in a state and sometimes even a right to be granted access to a state, provided they have sufficient ties. In the case of Üner v The Netherlands the Strasbourg Court has held that:

[A]s Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of “private life” within the meaning of Article 8.

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127 Pretty v UK (n 126) para 61.
128 See eg also Dadouch v Malta [2010] ECHR Application No. 38816/07 para 47.
130 An v Lithuania [2016] ECHR Application No. 17283/08 para 111.
131 Social identity as developed by the ECtHR under Article 8 ECHR is to be distinguished from concepts of national or collective identity which are put forward by liberal nationalists as arguments for restricting access to citizenship. Social identity, understood in this sense, hence is not to be equated with national identity. It is a network of individual relationships and ties and not a collective identity or identification with a national idea. See on citizenship as identity in a collective sense Bosniak, ‘Citizenship Denationalized’ (n 34) 479 ff.
The concept of social identity — as an individual’s personal, social and economic relations being a fundamental aspect of the life of every human — is similar to the principle of *jus nexi*, which also aims at weighing in the social, familial, economic and cultural ties of non-citizens, only with greater regard for access to citizenship.

When are the ties protected by the right to private life sufficiently strong to override the competing state interest to migration control? In the cases of *Boultif v Switzerland* and *Üner v the Netherlands*, the ECtHR developed a list of criteria to be taken into consideration when balancing the right to family and private life of the individual against the state’s interests to control the entry and stay of non-citizens in the territory. These criteria include the degree of integration in the state of residence, the length a person’s stay in the country, the family ties, the best interests of children involved and the solidity of social and cultural ties. In the case of *Maslov v Austria*, a case concerning a young Bulgarian national that came to Austria with his parents as a child and was to be deported as a young adult after committing a criminal offense, the Court developed that argument further and found that the right to private life as such, without additional family ties, also protects the social ties of settled migrants who have not yet founded a family of their own as part of their social identity. Even if a person is not protected by the right to family life, the expulsion of a settled migrant might interfere with his or her right to respect for private life.

The judgment in *Sisojeva v Latvia* dealt with the regularization of the legal status of a Russian-origin family living in Latvia for most of their life. The applicants belonged to the stateless minority of so-called ‘erased’ or ‘non-citizens’ in Latvia who were neither granted Latvian nationality after the independence in 1991, nor received a residence permit. The judgment of the Chamber found that Latvia violated the right to private life under Article 8 *ECHR* by not regularizing the legal status of the applicants. It argued that the family was determined to have spent all or almost all of their lives in Latvia and, despite not being of Latvian origin, had developed personal, social and economic relations as a fundamental aspect of their life.

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133 *Boultif v Switzerland* [2001] ECtHR Application No. 54273/00 para 48; *Üner v The Netherlands* (n 132) paras 57 and 58.
134 *Maslov v Austria* [2008] ECtHR Application No. 1638/03 para 63.
135 *Sisojeva and others v Latvia (Chamber)* [2005] ECtHR Application No. 60654/00. See also the cases *Slivenko v Latvia* (n 129); *Kolosovskiy v Latvia* [2004] ECtHR Application No. 50183/99.
economic ties strong enough for them to be regarded as sufficiently well integrated.\textsuperscript{136}

The case of \textit{Hoti v Croatia} also concerned the regularization of a stateless person.\textsuperscript{137} Mr. Hoti, born to Albanian refugees in Kosovo, entered Croatia as a teenager and continued to reside there.\textsuperscript{138} After the collapse of the Socialist Federal Republic of Yugoslavia (\textit{SFYR}) he did not acquire any nationality. During the nearly forty years he lived in Croatia he repeatedly applied for a legal status, but was never granted a stable residence permit. He ultimately took the refusal of an application for a residence permit to the ECtHR and argued that the insecurity of his residence status, due to the fact that he had no effective possibility to regularize his status, violated his right to private life.\textsuperscript{139}

In its judgment the ECtHR confirmed that

\begin{quote}
Article 8 protects, inter alia, the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity. Thus, the totality of social ties between a migrant and the community in which he or she lives constitutes part of the concept of private life under Article 8.\textsuperscript{140}
\end{quote}

The Court considered that the applicant had no formal or \textit{de facto} ties to any other country than Croatia, where he had lived for several decades, worked and accumulated social ties in the local community.\textsuperscript{141} Being stateless, he had no other country that he could turn to. Croatia’s refusal to provide for any meaningful procedure to regularize his legal status and stay in the country lawfully and permanently violated Article 8 \textit{ECHR}. The case of \textit{Hoti v Croatia} shows the weight the Court attributes to a person’s social ties in the country of residence. The case did not concern acquisition of citizenship and the Court explicitly

\begin{thebibliography}{10}
\bibitem{136} Sisojeva v Latvia (n 135) para 107. In the Grand Chamber judgment of 15 January 2007 the complaint under Article 8 \textit{ECHR} was struck out as it had been resolved by the state party.
\bibitem{138} \textit{Hoti v Croatia} (n 137) para 7.
\bibitem{139} \textit{ibid} 75.
\bibitem{140} \textit{ibid} 99.
\bibitem{141} \textit{ibid} 125.
\end{thebibliography}
noted that it was “not called upon to examine whether the applicant should be granted Croatian citizenship but rather whether, if he had chosen not to become Croatian citizen or had failed to do so, he would have an effective possibility to regularise his residence status”. Nevertheless, it shows that the ties based on a person’s social identity can be so strong as to give rise to a positive right to acquire a particular legal status in a specific state.

When balancing the competing interests, the Court not only takes into consideration the ties of the individual concerned to the country of residence but also to the country of origin. In this regard, the case of Beldjoudi v France is particularly interesting. The applicant was born in France to parents of Algerian origin, who at that time, under the French colonial system, had French nationality. After the independence of Algeria, the parents failed to lodge a declaration for the family recognizing their French nationality and consequently lost it. Though born in France to then French parents, Mr. Beldjoudi suddenly found himself being an Algerian national. When France sought to deport him to Algeria after a criminal conviction, he claimed that the deportation would violate his private life since his family ties, social links, cultural connections and linguistic ties were in France. The Court not only examined the applicant’s rootedness in France, but also his ties to Algeria. Noting that he had no links to Algeria other than his nationality, the Court found a violation of Article 8 ECHR. In other words, the ECtHR in Beldjoudi v France decided in favor of the effective nationality of the applicant, which was French. The Court confirmed this approach in subsequent cases.

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142 ibid 131.
143 Boultif v Switzerland (n 133) para 48; Üner v The Netherlands (n 132) paras 57 and 58. See eg also Samsonnikov v Estonia [2012] ECHR Application No. 52178/10 para 88.
145 ibid 71.
146 ibid 77.
concerning second generation migrants, the Court not always decides in favor of the applicant but sometimes finds the state's interest to migration control to outweigh the individual's right to private life. A striking example here is the case of *Pormes v The Netherlands* where the court rejected a violation of Article 8 ECHR. The case concerned a young man born to an Indonesian mother and a Dutch father, though the paternity was never formally established. Growing up with the family of his paternal uncle in the Netherlands, the applicant was unaware that he had not formally acquired Dutch citizenship and had no legal status in the Netherlands. After finding out, he applied unsuccessfully for a residence permit. During this procedure, he was convicted of assault and, subsequently, ordered to leave the Netherlands. The Court acknowledged that the applicant had very close ties to the Netherlands and cannot be reproached for the unlawful character of his stay. Nevertheless, it concluded that given the seriousness of the offences the removal to Indonesia — despite the absence of any social or family ties — was proportionate. The fact that the applicant only by accident was not a Dutch citizen, however, was not discussed in the judgment.

The ECtHR's social identity doctrine under Article 8 ECHR is interesting for the principle of *jus nexi*. It allows for the consideration of social, economic and cultural ties, as well as the development of one's identity of non-citizens in their state of residence. In fact, the elements taken into consideration under the notion of social identity are similar to factors examined in the ‘center of interests’ test to determine the *jus nexi* based right to citizenship. As Robert Sloane has noted, what the Court effectively does in these cases is apply a variant of the genuine link theory to protect long-term residents — ie persons who have the center of their lives in a Convention state — against a merely formal nationality.

The ECtHR has mainly developed its case law through cases concerning the withdrawal of a residence permit and the deportation from the country of...
residence or the legalization of undocumented migrants. Some commentators have even argued that the protection offered to long-term residents amounts to de facto citizenship or to a protection of rights that are otherwise only secured by citizenship itself. But is it also relevant for questions directly relating to access to or loss of citizenship? In the case of Hoti v Croatia the Court has been careful to stress that the cases did not concern acquisition of citizenship. Nevertheless, the Court has also established a clear line of case law according to which access to and loss of citizenship raise an issue under the right to private life according to Article 8 ECHR. This is despite a right to citizenship not being covered by the Convention. As the judgment in the case of Genovese v Malta makes clear

[...] the denial of citizenship may raise an issue under Article 8 [ECHR] because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity.

Thus, the Court's concept of social identity includes citizenship. Acquisition and loss of citizenship are covered by the right to private life. One can argue that the social identity approach, which considers whether a person has such close ties to a state that the connection to that state becomes part of their social identity, corresponds to the center of interests concept, which is at the heart of the jus nexi principle. In such an interpretation, having or not having


157 Hoti v Croatia (n 137) para 131.

158 Karassev v Finland (Decision) [1999] ECHR Application No. 31414/96. See also Slivenko v Latvia (n 129) para 77; Kuduzovic v Slovenia [2005] ECHR Application No. 63723/00; Rienert v Bulgaria [2006] ECHR Application No. 46343/99; Makuc and others v Slovenia [2007] ECHR Application No. 26828/06; Kurić and Others v Slovenia (Chamber) [2010] ECHR Application No. 26828/06 para 353. See Chapter 4, 1.1.2.1.2.

159 Genovese v Malta (n 56) para 33. Subsequently confirmed in Ramadan v Malta [2016] ECHR Application No. 7636/12. The idea of a link between a person's social identity and her citizenship was in fact first brought up in a partly dissenting opinion by Judge Maruste in Rienert v Bulgaria, European Court of Human Rights, ‘Dissenting Opinion Judge Maruste in Rienert v Bulgaria’ (2006) Application No. 46343/99.
citizenship becomes a matter of private life where there are such close ties and genuine connections to a place.

The Human Rights Committee has adopted a similar approach in their interpretation of Article 17 ICCPR. According to the jurisprudence of the Committee, the deportation of non-citizens with substantial ties to the host state can amount to a violation of the right to private and family life. Under the framework of the ICCPR, however, there is a second line of case law developed by the Human Rights Committee that is interesting in the context of the principle of *jus nexi* — the case law on the right to enter one's own country under Article 12(4) ICCPR, which shall be discussed in the following section.

2.2 The Right to Enter One's Own Country

Article 12(4) ICCPR stipulates that no one shall be arbitrarily deprived of the right to enter his or her own country. In the case of *Stewart v Canada*, a British national who lived in Canada from an early age was later to be deported due to a criminal conviction. The HRCttee examined whether the complainant could claim that Canada was 'his own country', even though he did not have Canadian citizenship. The Committee famously noted that the notion of 'his own country' under Article 12(4) ICCPR is broader than the concept of 'country of his nationality'. It "applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not 'aliens'". As the Committee later noted in General Comment No. 27, the concept of one's own country "is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien". Thus, the right to

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160 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR').


163 *ibid* 12.3. See on the concept of one's own country under Article 12(4) ICCPR generally Babak Fargahi, *Das Konzept des eigenen Landes gemäss Art. 12 Abs. 4 UNO-Pakt 11 im Lichte der Strassburger sowie der Schweizer Wegweisungspraxis gegenüber Ausländern der zweiten Generation* (Dike 2016).

164 *Stewart v Canada* (n 162) para 12.3.

165 Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement)' (HRCttee 1999) UN Doc. CCPR/C/21/Rev.1/Add.9 para 20. See also *Stewart v Canada* (n 162) para 12.4.
enter one’s own country applies to everyone whose ties to the country of residence are so strong that it becomes their center of life. In the case of Stewart v Canada, the HRCttee ultimately found that such ties were only given if a person was stripped of his or her nationality in violation of international law, if the nationality was denied in the context of a state succession or if a stateless person was arbitrarily deprived of his or her right to acquire the nationality of the country of residence.\textsuperscript{166} Considering that Canada was not Stewart’s ‘own country’ because he had never attempted to acquire Canadian citizenship and thus lacked the necessary special ties, the Committee found no violation of the ICCPR.\textsuperscript{167} This limitation of the concept of one’s own country was criticized as too formalistic.\textsuperscript{168} A dissenting opinion pointed out that the aim of the right to enter one’s own country was to protect individuals against the deprivation of close contact with their families, friends and “web of relationships that form his or her social environment”.\textsuperscript{169} The Committee subsequently confirmed this approach in a number of cases but continued to interpret it very restrictively and denied a violation of Article 12(4) ICCPR. Both in the case of Canepa v Canada as well as in Madafferi v Australia the Committee was not convinced by the complainants’ claim that Canada and Australia were their own countries.\textsuperscript{170} In the case of Toala et al. v New Zealand, the complainants argued they had a right to enter New Zealand based on Article 12(4) ICCPR after New Zealand revoked a law granting New Zealand citizenship to all citizens of Western Samoa.\textsuperscript{171} The Committee rejected the claim that the applicants had been arbitrarily deprived of their right to enter their own country as they had no connection with New Zealand by birth, descent or residence and had never been to New Zealand.\textsuperscript{172}

\textsuperscript{166} Stewart v Canada (n 162) para 12.4. See also Canepa v Canada, Communication No 558/1993 [1997] HRCttee UN Doc. CCPR/C/59/D/558/1993 para 11.3.

\textsuperscript{167} Stewart v Canada (n 162) para 12.6 ff.

\textsuperscript{168} Fargahi (n 163) 47.


\textsuperscript{170} Canepa v Canada (n 166); Madafferi v Australia (n 161).


\textsuperscript{172} ibid n 5.
The Committee continued to develop the concept. In the case of *Nystrom v Australia*, it opened the scope and confirmed that the concept of one’s own country is not limited to nationality in the formal sense:

[T]here are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words “his own country” invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

The approach taken in *Nystrom v Australia* — and subsequently in *Warsame v Canada* and *Budlakoti v Canada* — is broader than that in *Stewart v Canada*. The HRCttee not only accepts formal ties, but also offers protection for informal links based on long standing residence, social and family ties, the absence of ties to any other country and the individual’s intention to remain. In the case of *Warsame v Canada* the Committee acknowledged that these “factors other than nationality which may establish close and enduring connections between a person and a country may be stronger than those of nationality”. Building on the ties of a person to her country of residence, the concept of one’s own country developed by the Human Rights Committee is similar to the principle of *jus nexi*. The approach embraces categories of long-term residents, such as “stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence”, as well as other individuals with close and enduring connections to the country. Interestingly, the HRCttee also takes into consideration the individual’s intention when assessing the concept of one’s own country. Even though the right to one’s own country does not as such entail access to the citizenship of that country, it directly establishes a
right of persons with a ‘jus nexi’ to enter and remain in that state. This implies that states may be obliged to enable long-term residents to ultimately acquire nationality. Ultimately, the right to be and remain in a country and to establish links there should give rise to a claim to become a full member, a citizen. As Vlieks et al note:

the concept of “own country” represents an approach which asserts the relevance of particular forms of connection with regard to the exercise of particular rights, helping to bridge the gap between the freedom of States to determine what connection between individual and State is sufficient for the acquisition of nationality, and the right of every person to a nationality.181

Thereby, the concept of ‘one’s own country’ indirectly contributes to shaping the contours of a jus nexi-based right to citizenship.

The evaluation of the case law of the ECtHR and the HRCttee shows that the principle of jus nexi is not foreign to human rights law.182 Elements of jus nexi underpin the case law of both international tribunals.183 If the principle of jus nexi is rooted in internationally recognized and protected human rights such as the right to private life under the ECHR and the right to one’s own country under the ICCPR, what about applying it to the right to citizenship? I would argue that applying the principle of jus nexi to the right to citizenship would assist in better substantiating its scope and content. Based on jus nexi, the personal scope of the right to citizenship can be broadened to include everyone with a sufficiently close connection; with a jus nexi. Looking at the right to citizenship from the perspective of the principle of jus nexi would assist in determining the state responsible for protecting, respecting and fulfilling the right to citizenship, which is claimed to be underdetermined. Once the state responsible is identified — based on an individual’s ties under the principle of jus nexi — the enforceability of the right to access the citizenship of that state would be strengthened.184 Before turning to the discussion on what implications arise from reframing the right to citizenship on the basis of jus nexi (see

181 Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 169.
182 At the domestic level, jus nexi is rarely used, as Shaw demonstrates, Shaw, The People in Question (n 48) 101 ff.
183 See similarly Vlieks, Hirsch Ballin and Recalde-Vela (n 7) 169.
below III. and IV.), I first want to address when a person can be said to have an entitlement based on *jus nexi*. What are the factors that give rise to a genuine connection?

3 **Connecting Factors for a Jus Nexi**

I have referred to the principle of *jus nexi* as a genuine connection principle of membership acquisition.\(^{185}\) It provides for access to citizenship based on the social and factual connections of a person. But what kind of connections give rise to a *jus nexi*? According to the ICJ in the *Nottebohm* case

Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.\(^{186}\)

As this passage of the judgment shows, there is a broad range of different possible links between an individual and society that can form the basis for a genuine connection — residence, family ties, social connections and cultural, political or economic links. Attributing nationality based on particular links, as is suggested with *jus nexi*, is not new. The principles of *jus soli* and *jus sanguinis* are also based on a particular connection — place of birth in *jus soli* and descent in *jus sanguinis*. Thus, state practice recognizes birth in the territory and descent as the most important ties to justify the acquisition of nationality.\(^{187}\) Other connecting factors such as residence, marriage, language skills, social ties or participation in public life are, moreover, well-established criteria for acquiring of nationality through naturalization.\(^{188}\)

In the following section I propose to distinguish three broader groups of connections — territorial connections (III.3.1), familial or social ties (III.3.2) and

\(^{185}\) Shachar, *The Birthright Lottery* (n 6) 164. See above Chapter 6, II.1.

\(^{186}\) *Nottebohm* (n 91) 22.


\(^{188}\) See also Council of Europe, ‘Trends and Developments in National and International Law on Nationality, Proceedings of the 1st European Conference on Nationality’ (Council of Europe 1999) 49 ff.
emotional, cultural, professional or economic links (II.3.3). While I believe that these are the most relevant connecting factors, there are certainly other possible links not explicitly mentioned here that can create a connection to a state. The following discussion therefore does not aim to be conclusive.

3.1 Territorial Ties

The first group of possible nexi with a state are those factors that relate to the territory; to the territorial presence of a person within a state. Territorial connections are formal links relating to physical presence. They have the advantage of being relatively objective and easy to verify. Among possible territorial connections, the primarily link is residence but other connections arise, such as, for example, birth in the territory. The possession of a residence right on the basis of international obligations may also be a connecting factor based on territory, as the individual concerned is granted a right to remain on the territory based on this obligation.

3.1.1 Residence

Residence, namely long-term or permanent residence, is one of the most important connecting factors. Permanent residence in a state creates a strong indication of a genuine connection to that state. Residence is widely recognized as a prerequisite for acquiring citizenship. The vast majority of nationality laws worldwide foresee a minimum period of residence as one of the requirements for naturalization. The criteria of residence features prominently in those international instruments that discuss the acquisition of nationality. Article 6(3) ECN and the proposed Article 6 AU Draft Protocol on Nationality call upon states to provide for the possibility of naturalization for lawful and habitual residents. In the Nottebohm case, the ICJ found that habitual residence is an important factor to be taken into consideration to identify

189 For these three categories of possible meaningful kinds of connections see Ayelet Shachar, ‘The Marketization of Citizenship in an Age of Restrictionism’ (2018) 32 Ethics & International Affairs 3, 9.

190 Council of Europe, ‘1st European Conference on Nationality’ (n 188) 49.

191 van Waas, Nationality Matters (n 13) 32.

192 See already Paul Weis, Nationality and Statelessness in International Law (2nd ed, Sijthoff & Noordhoff 1979) 99. See also Article 6(3) ECN that urges states to limit the required period of residence to a maximum of ten years. Some states however know provisions that waive the residence requirements in special cases, eg in the case of investment citizenship programs. See also Global Citizenship Observatory (GLOBALCIT), ‘Global Database on Modes of Acquisition of Citizenship, Version 1.0’ (GLOBALCIT 2017) <https://globalcit.eu/modes-acquisition-citizenship/>.
a person's center of life. Similarly, the ECtHR has repeatedly confirmed that the duration of a person's stay in a country is a weighty element to be taken into consideration in an assessment of a violation of Article 8 ECHR, as there is the assumption “that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be”.

Residence as a connecting factor is not necessarily limited to legal residence, i.e., residence in accordance with the immigration laws of a state. Current state practice does not normally recognize the presence of undocumented migrants as residence when it comes to the attribution of citizenship. This is reflected in Articles 6 ECN and AU Draft Protocol, which allow states to require lawful residence as a precondition for naturalization. However, it is not decisive for the establishment of a genuine link whether a person has a legal status or not. A person can also establish substantial ties — in particular, social and cultural ties, but often also economic ties — without having a residence permit. In the case of Sisojeva v Latvia, the ECtHR found that the applicants, despite living irregularly in Latvia, had built strong enough ties to the state to fall under the notion of private life within the meaning of Article 8(1) ECHR. The Court concluded that the refusal of Latvian authorities to grant the applicants a permanent right to reside in the state violated their right to private life. In the case of Hoti v Croatia, the ECtHR found that Croatia was under a similar obligation to regularize the applicant who had lived in Croatia for almost forty years, though not always regularly. The two cases illustrate that irregular residence does not hinder the establishment of a genuine connection to the state that can give rise to a legal entitlement to membership.

193 Nottebohm (n 91) 22.
194 Üner v The Netherlands (n 132) para 58.
195 See for example also Article 6 (2) and (3) ECN that refers to ‘lawful and habitual residence’.
197 Sisojeva v Latvia (n 135) para 102.
198 ibid 105 f.
199 Hoti v Croatia (n 137). See also Sudita v Hungary (n 137); Pormes v The Netherlands (n 150) para 58.
Thus, permanent residence is an objective and reasonable basis to grant nationality.\textsuperscript{200} Some authors even argue that residence should be a necessary condition for acquiring citizenship. Yaffa Zilbershats claims that “[i]f residence is the basic moral justification for obtaining citizenship, then the process of naturalization which is not preceded by residence in the place is defective in nature”.\textsuperscript{201} If the criterion of residence is met, she argues, the state is under a duty to grant citizenship.\textsuperscript{202} Similarly, Rubio-Marin argues that permanent residents should be recognized as citizens without having to fulfill additional criteria.\textsuperscript{203} Based on a \textit{jus domicili}, individuals who permanently live in a state should be recognized automatically and unconditionally as citizens.\textsuperscript{204}

I agree that residence is a central condition for acquiring citizenship and that it allows for an objective criterion that can be applied in a non-discriminatory manner. In that sense, it can be a sufficient basis for acquiring nationality, especially in the absence of other links.\textsuperscript{205} However, I would argue that residence is neither the sole relevant connecting factor nor is it a necessary connecting factor for \textit{jus nexi}. There can be situations where a person has substantial ties to a place without necessarily being a habitual resident.\textsuperscript{206} Imagine a cross-border commuter that has worked in a state for years, has close social ties to their colleagues and friends, is integrated into the labor market, speaks the language and maybe even participates in public and political life — for example by being active in a professional association. However, they do not legally reside in the state. Does that mean she cannot claim a genuine connection to that state? Such a person could, depending on the depths of other connecting factors, build a connection to the state that can be strong enough to be considered a center of life and hence give rise to a \textit{jus nexi} claim. Another example could be a binational couple where each partner resides in a different country but regularly spends time in the other. If in such a situation an additional connecting factors exist, it is not impossible for a genuine connection to be built despite the lack of residence in a country.

\begin{itemize}
\item \textsuperscript{201} Yaffa Zilbershats, ‘Reconsidering the Concept of Citizenship’ (2001) 36 Texas International Law Journal 689, 713.
\item \textsuperscript{202} ibid 714.
\item \textsuperscript{203} Ruth Rubio-Marin, ‘National Limits to Democratic Citizenship’ (1998) 11 Ratio Juris 51; Rubio-Marin, \textit{Immigration as a Democratic Challenge} (n 22). See also Kostakopoulou who proposes to make citizenship anational and base it on domicile, Kostakopoulou (n 40).
\item \textsuperscript{204} See in more detail Chapter 2, III.2.3.
\item \textsuperscript{205} Batchelor, ‘Resolving Nationality Status’ (n 203) 163.
\item \textsuperscript{206} Farahat (n 77) 59 f.
\end{itemize}
I would argue that reducing the question where one’s center of life is — and ultimately where one should have citizenship — to the question where one resides bears two risks. First, it risks excluding modern forms of mobility where people do not move mono-directionally between two countries but move in circular and repeated patterns of transnational mobility. Focusing solely on residence might disproportionately affect highly mobile persons that do not necessarily have long periods of residence in a particular state and migrants who retain ties to their country of origin or the country of origin of their parents. In particular, children of migrants might have substantial ties to more than one country. Secondly, it shifts the discussion about the societal inclusion and exclusion of non-citizens ever more so to the border and to the question of who gets physical access to a state’s territory in the first place. The question of when someone is granted citizenship becomes purely based on their (legal) physical presence over a certain period of time, increasing pressure to physically exclude non-citizens from access to the territory. While I fully agree that residence is an important element of one’s center of life, and physical presence on a territory brings with it several other connecting factors and see the advantages of having a formal criterion, I concur with Shachar that making “territorial presence the all-or-nothing criterion” is not satisfactory. For these reasons, argue that residence can neither be the only nor can it be a necessary connecting factor.

Considering these different arguments, it becomes clear that residence is particularly important among several possible connecting factors and creates such ties between an individual and a state that it might give rise to a jus nexi based right to citizenship. The required duration of residence will vary from case to case, depending on the existence of possible other connecting factors. However, whether the person concerned is staying in the host state regularly or not does not affect the establishment of a genuine connection per se.

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208 See Human Rights Council, ‘Report 13/34’ (n 187) para 39. See also Conklin (n 104) 223.
211 Shachar, The Birthright Lottery (n 6) 179.
3.1.2 Birth in the Territory

A second connecting factor on the basis of territory is birth in a state. Birth as a connecting factor is mirrored in the principle of *jus soli*. While birth in the territory generally is a relatively weak link, in certain situations it can provide for an important connecting factor.

In particular, birth in the territory provides a sufficient enough link to claim access to citizenship, where a child is otherwise stateless. In this situation, the state of birth is the state to which the child has the closest connection. In fact, it is probably the only state to which the child has an objective connection at all, except maybe for the state of nationality of the parents. Hence, birth in the territory should be recognized as a link significant enough to substantiate a claim to citizenship.

As previously discussed, birth in the territory is an important connecting factor in many provisions that cover the right of the child to a nationality. Article 20(2) *ACHR* explicitly states that every person has the right to the nationality of the state in whose territory they were born if they do not have the right to any other nationality. Based on this provision, the IACtHR has argued in the case of the *Girls Yean and Bosico v the Dominican Republic* that:

> The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.

Similarly, both Article 1 of the 1961 Convention and Article 13 of the *ILC Draft Articles on Nationality* build on birth in the territory as the connecting factor for attribution of nationality to persons who would otherwise be stateless. Likewise, the provisions relating to the right of the child to acquire a nationality in Article 7 *CRC* and Article 24(3) *ICCPR* have been interpreted as entailing an entitlement for otherwise stateless children born in the territory.

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212 See also van Waas, *Nationality Matters* (n 13) 32.
214 Bauböck and Paskalev (n 8) 67.
It follows that birth in the territory can be one of the elements that contribute to the genuine connection an individual has with a state, in the sense of the principle of *jus nexi*. In cases of newborn children who would otherwise be stateless, birth in the territory might even be the only connecting factor and should be enough to give rise to a sufficient enough connection for a right to citizenship.\(^{216}\) This right to citizenship for otherwise stateless children is compatible with an interpretation of the right to citizenship based on the principle of *jus nexi*.

### 3.1.3 Protection

A third element that creates a particular connection to the territory of the host state, is the granting of international protection. This concerns two groups in particular, refugees and stateless persons. In the absence of a state of nationality or origin that can offer and exercise protection, the relationship between refugees and stateless persons and their state of residence becomes particularly important. The question is whether the protection status does not *per se* create a connecting factor that should facilitate access to citizenship.

Refugees in the sense of Article 1 of the Refugee Convention are unable or unwilling to avail themselves to the protection of their state of nationality and thus are granted international protection.\(^{217}\) With refugee status, the state of asylum offers the individual concerned a protection status that includes a number of social, economic and civil rights.\(^ {218}\) By granting asylum, the host state assumes responsibility, both internally by offering refugees at least the same rights as other non-citizens,\(^ {219}\) and, presumably, externally by exercising diplomatic protection on behalf of recognized refugees staying in the country lawfully and habitually.\(^ {220}\) This exercise of protection creates a particular bond

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\(^{216}\) See also Chapter 5, III.3.1 where I have argued that states have an obligation under the current international legal framework to grant children born on their territory citizenship if they would otherwise be stateless.

\(^{217}\) Article 1 (A) (2) Refugee Convention.


\(^{219}\) Article 7 Refugee Convention.

\(^{220}\) Article 8(2) International Law Commission Draft Articles on Diplomatic Protection, 2006, Supplement No. 10, UN Doc. A/61/10 (‘ILC Draft Articles on Diplomatic Protection’). However, states have been very reluctant to exercise diplomatic protection on behalf of refugees and courts have rejected claims by refugees *vis-à-vis* their host state to do so, see International Law Commission, ‘Commentary on the Draft Articles on Diplomatic Protection’ (ILC 2006) Yearbook of the International Law Commission, 2006, Vol. II, Part Two 48, para 2; Andreas Kind, *Der diplomatische Schutz: Zwischenstaatlicher Rechtsdurchsetzungsmechanismus im Spannungsfeld von Individualrechten*,
between the refugee and the host state. The Refugee Convention recognizes this link to a certain extent by suggesting in Article 34 that states should facilitate, as far as possible, the naturalization of refugees. Being granted protection therefore establishes a relevant connection in the sense of the principle of *jus nexi*.

The same is true for stateless persons. Just as Article 34 _csr_, Article 32 of the 1954 Convention suggests that state parties “shall as far as possible facilitate the [...] naturalization of stateless persons”. What is more, in the case of *Stewart v Canada*, the Human Rights Committee noted that long-term resident stateless persons have a special connection to their host state, to the extent that this state might become their ‘own country’ in the sense of Article 12(4) _ICCPR_. The recognition of statelessness creates a special connection between the person concerned and the host state, giving rise to a *jus nexi*. Considering that stateless persons have no nationality at all, the claim of stateless persons based on territorial presence and the granting of a protection should be even stronger. Also, in the absence of other links, these factors alone should be sufficient to justify access to citizenship for stateless persons. The principle of *jus nexi* might therefore be helpful to strengthen stateless persons’ right to nationality.

### 3.2 Familial Ties

#### 3.2.1 Family Ties

A second important group covers connections that are built on familial ties to a state. Within this group fall different kinds of family ties that bring with

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221 Annemarieke Vermeer-Künzli, ‘Nationality and Diplomatic Protection, A Reappraisal’ in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 90. The commentary to the ILC Draft Articles on Diplomatic Protection, however, explicitly states that “the exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality”, see ILC, ‘Commentary Draft Articles on Diplomatic Protection’ (n 114) 51, para 12.

222 See also Chapter 4, 11.1.2.3.

223 See by contrast the German Bundesverwaltungsgericht *Urteil i C 2088* [1988] BVerwG i C 20.88 para 35.

224 See *Stewart v Canada* (n 162) para 12.4.

225 See by contrast Bauböck and Paskalev who argue that a genuine link conception cannot account for the situation of stateless persons, Bauböck and Paskalev (n 8) 68.

226 International Law Commission, ‘Hudson Report’ (n 87) 20. See also Batchelor, ‘*UNHCR* and Nationality’ (n 88) 112.
them a qualitative connection to the state. Family ties are recognized as a ground for the facilitated acquisition of nationality (by naturalization or registration) in many jurisdictions. Article 6(4)(a) ECN recognizes this principle and suggests that states facilitate the acquisition of nationality for spouses of nationals. In some states marriage still leads to automatically acquiring nationality. Article 12 of the ILC Draft Articles on Nationality also mirrors the importance of family ties as a connecting factor. The provision holds that the states involved in a situation of state succession shall take all appropriate measures to allow a family to remain together or to be reunited on the basis of citizenship. Moreover, the importance of family ties for a person’s connection to the host state is mirrored in the extensive case law of the ECtHR on the right to family life in immigration cases.

As discussed in Chapter 5, the rules on acquiring nationality based on family ties should not discriminate on the basis of sex. Nevertheless, nationality laws should protect family ties and relationships of care. Thus, it is legitimate to recognize familial ties as important connecting factors under the principle of jus nexi. The notion of family should thereby be understood broadly, so as to include not only the core family of a married (heterosexual) couple and their children, but include non-traditional families such as unmarried couples, single parents, same-sex partnerships and non-Western concepts of family that are recognized in domestic law and practice. Moreover, it should accommodate new family structures made possible through assisted reproduction technologies — namely, surrogacy — to recognize different forms of parenthood. Having family ties in a country can constitute an important

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227 Nottebohm (n 91) 22.
228 According to the GLOBALCIT database this is the case in several African states, among them Benin, Mali or Somalia, but also in Turkey or Iran, see Global Citizenship Observatory (GLOBALCIT), ‘Database Acquisition of Citizenship’ (n 192). Such automatic acquisition rules are problematic from a gender equality perspective. The ECN rejects the automatic change of nationality on the basis of marriage or dissolution of marriage in Article 4(d).
229 See above Chapter 6, II.2.1.
230 See Chapter 5, III.2.1.1.
element of a person’s connectedness to a state. A *jus nexi*-based right to citizenship could take these ties into consideration.

### 3.2.2 Descent

The element of descent is also among the connecting factors that build on an emotional attachment to the state.\(^{234}\) Like birth on the territory, descent is one of the main connecting factors linking a person to a particular state. It is the connecting factor underpinning the principle of *jus sanguinis*.\(^{235}\) However, descent does not relate to the territory one is born in, but to the attachment to the state of citizenship through descent and the familial relationship. Descent in that sense relates to a particular form of family ties to one’s parents. The principle of *jus sanguinis* attributes citizenship based on a person’s social attachment to a state via her family ties and the link to her parents. This allows for the creation of intergenerational connections and protection of family unity. These kinds of connections could also be taken into consideration under the principle of *jus nexi*.

### 3.2.3 Childhood and Adolescence

Another example of an emotional attachment that creates a strong social and emotional attachment between a person and the society of her state of residence is the period of childhood and adolescence. Childhood and adolescence are particularly formative years for a person’s social identity.\(^{236}\) The situation of children born and raised in a state, who have spent their childhood and adolescence there, is often given particular weight in migration law.\(^{237}\) Article 6(4)

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\(^{234}\) Like family, descent not only covers a person’s biological descent but also the establishment of family ties based on assisted reproduction technologies such as surrogacy as well as adoption.

\(^{235}\) Batchelor, ‘Developments in International Law’ (n 213) 49.

\(^{236}\) Maslov v Austria (n 134) para 42.

\(^{237}\) William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 397; Daniel Thym, ‘Menschenrecht auf Regularisierung des Aufenthalts? Rechtsprechung des EGMR zum Schutz des Privat- und Familienlebens nach Art. 8 EMRK und deren Verhältnis zum nationalen Ausländerrecht’ (2006) 33 Europäische Grundrechte-Zeitschrift 541, 545. See also other cases concerning second generation migrants that were born in the host state or immigrated at a very young age, such as *Moustaqium v Belgium* [1991] ECHR Application No. 1233/86; *Mehemi v France* [1997] ECHR Application No. 25494/94; *Ezzouhdi v France* (n 148); *Benhebba v France* (n 148); *Samsonnikov v Estonia* (n 143). A similar approach is also taken by Council of Europe bodies arguing that persons born or raised in a state should not be expelled under any circumstances, see Council of Europe, Committee of Ministers, ‘Recommendation Rec(2003)15 of the Committee of Ministers to Member States Concerning the Security of Residence of Long-Term Migrants’
ECN, for example, calls upon state parties to facilitate the acquisition of nationality for persons who were born on their territory and continue to live there (let. e) and for persons who lawfully and habitually reside on the territory from a period beginning before the age of 18 and continuing into adulthood (let. f). There is also a rich case law recognizing the special weight of ties established at a young age. The ECtHR has stated in the case of *Maslov v Austria* that:

In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.

In the case of *Mokrani v France*, the Court found with regard to the elements to be assessed in expulsion cases under Article 8 that:

Les mêmes critères doivent à plus forte raison être utilisés pour les immigrés de la seconde génération ou des étrangers arrivés dans leur prime jeunesse, pour autant que ceux-ci aient fondé une famille dans leur pays d'accueil. Si tel n'est pas le cas, la Cour n'aura égard qu'aux trois premiers d'entre eux. S'ajoutent toutefois à ces différents critères, les liens particuliers que ces immigrés ont tissés avec le pays d'accueil où ils ont passé l'essentiel de leur existence. Ils y ont reçu leur éducation, y ont noué la plupart de leurs attaches sociales et y ont donc développé leur identité propre. Nés ou arrivés dans le pays d'accueil du fait de l'émigration de leurs parents, ils y ont le plus souvent leurs principales attaches familiales. Certains de ces immigrés n'ont même conservé avec leurs pays natal que le seul lien de la nationalité.

The ECtHR argued that, in case of second generation migrants (or children who immigrated at a very young age), stronger arguments have to be put forward to justify an expulsion. The Court confirmed that being born in a country makes

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238 See similarly the proposed Article 6(2)(d) AU Draft Protocol on Nationality.
239 *Maslov v Austria* (n 134) para 75.
a difference to that person’s social, cultural and family ties in that country.\textsuperscript{241} The Human Rights Committee gives considerable weight to the ties developed at a young age, as the case law on Article 12(4) illustrates.\textsuperscript{242}

These examples illustrate the special weight attributed to the process of socialization during childhood and adolescence. A person who has spent her childhood and adolescence in a state usually has a particularly close connection to the state.\textsuperscript{243} Thus, members of the 1.5 generation of migrants, and even more so members of the second generation who have spent their childhood and adolescence in a state, have a very strong claim to citizenship on the basis of \textit{jus nexi}.\textsuperscript{244} Hence, childhood and adolescence are connecting factors based on a particular emotional attachment that can create the foundation for a \textit{jus nexi}-based right to citizenship.

3.3 Social, Professional, Cultural or Political Ties

Within the third group are those kinds of links that arise based on personal ties to the host state. These social, emotional, cultural, political, professional or economic factors are often described with the notion of \textit{integration}. These factors reflect the connections that have developed between a migrant and the host state over time.\textsuperscript{245} They relate to the endeavors of the person concerned to establish a life, participate in public and social life and build social, cultural and economic ties in a host society. For example, migration law knows the assessment of such criteria in the form of hardship procedures, eg to regularize undocumented migrants or to grant persons with a removal order a right to remain.\textsuperscript{246} Weighing these personal ties and the integration of persons, however, runs the risk of excluding people who do not have the same opportunities to participate in public life. Hence, an assessment of personal

\begin{itemize}
\item \textsuperscript{241} \textit{Maslov v Austria} (n 134) para 73.
\item \textsuperscript{242} \textit{Eg Warsame v Canada} (n 175) para 9.3.
\item \textsuperscript{243} See also Thomas Soehl, Roger Waldinger and Renee Luthra, ‘Social Politics: The Importance of the Family for Naturalisation Decisions of the 1.5 Generation’ (2020) 46 Journal of Ethnic and Migration Studies 1240.
\item \textsuperscript{244} Shachar, ‘Earned Citizenship’ (n 61) 144. See also Shachar, \textit{The Birthright Lottery} (n 6) 183.
\item \textsuperscript{245} Shachar, ‘Earned Citizenship’ (n 61) 133.
\item \textsuperscript{246} Many states know some kind of hardship or regularization mechanism which allows to regularize irregular migrants. In the US, for example, ‘equities’, personal characteristics, are weighed in favor of the person concerned, see Shachar, ‘Earned Citizenship’ (n 61) 133 f. In Switzerland, ‘Operation Papyrus’, a regularization program for sans papiers in the Canton of Geneva granted irregular migrants a residence permit if they \textit{inter alia} were financially independent, more information <https://www.sem.admin.ch/sem/de/home/themen/aufenthalt/sans-papiers/papyrus.html>.
\end{itemize}
ties must in any case take the specific circumstances of the particular case into consideration.

*Social ties* are a central form of connection within this category. Social ties go beyond family ties in a narrow sense, as discussed above. They cover all forms of personal relationships, including friendships, professional relationships or contacts at the local level in one’s place of residence. All these social contacts should be recognized as connecting factors that can give rise to a relevant link under the principle of *jus nexi*. As the ECtHR does with regard to the right to private life where “the totality of social ties between settled migrants and the community in which they are living” are taken into consideration, these ties should also be recognized as elements of a *jus nexi* and thus support a claim to citizenship.\(^{247}\)

Other connections can be established on the basis of a particular effort or commitment of the person concerned in the host state. An example would be *education* in the host state. This is particularly true for children and young adults, where completing their education after birth in the territory, or entry into the country at a young age, as alongside a particular residence period creates strong social and cultural ties. It implies that a person has the necessary language skills and will generally be able to participate in the society. The ECtHR has repeatedly stressed the importance education for establishing ties to the country of residence in the context of the right to private life.\(^{248}\) In the *Üner* case, Strasbourg held that “it is self-evident that the Court will have to regard the special situation of aliens who have [...] received their education [in the host country]”.\(^{249}\) In *Trabelsi v Germany*, a case concerning a second generation migrant from Tunisia, the Court noted that the applicant had his main social ties — his center of life — in Germany, where he was not only born but also received his education.\(^{250}\) In the case of *A.A. v the United Kingdom*, that the applicant had obtained a number of high school qualifications, was enrolled in college and obtained a university degree was considered favorably by the Court.\(^{251}\) The CJEU has also confirmed that students who stay in a member state for a certain period of time in order to acquire an education establish

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\(^{247}\) *Üner v The Netherlands* (n 132) para 59.

\(^{248}\) *Boujlifa v France* (n 237) para 44; *Benhebbas v France* (n 148) para 33; *Slivenko v Latvia* (n 129) para 96; *Samsonnikov v Estonia* (n 143) para 88.

\(^{249}\) *Üner v The Netherlands* (n 132) para 58. See also *Kaya v Germany* (n 149) para 53; *Maslov v Austria* (n 134) para 74.

\(^{250}\) *Trabelsi v Germany* [2011] ECtHR Application No. 41548/06 para 62. See also *Mutlug v Germany* [2010] ECtHR Application No. 40601/05 para 58.

\(^{251}\) *AA v The United Kingdom* [2011] ECtHR Application No. 8000/08 para 62.
a certain connection to that state, and are to be considered integrated, which grants them certain rights vis-à-vis that state.252

Participation in the labor market is similar to education. It also serves as a connecting factor with the host state due to its impact on the social identity of a person. Like education, work or employment implies that the person concerned has certain social ties and, usually, language skills. Participation in the labor market has long been recognized as an important element of a person’s private life and social identity in immigration case law. In the case of Bajsultanov v Austria, for example, the ECtHR notes that the applicant had never worked in the host state despite living there for almost nine years and concludes, based on that and other factors, that he did not have significant ties to Austria.253 Moreover, participation in the labor market and, related to that, financial independence is a wide-spread requirement to acquire citizenship by way of naturalization.254

A third element I would like to mention that can represent a certain social fact of attachment is language.255 Like education and participation in the labor market, language is an element that has also been an important aspect of integration and private life in the case law of the ECtHR.256 Again, the case of Bajsultanov v Austria provides an interesting example. In casu, the Court found that the applicant did not have particularly strong ties to the host country despite a relatively long period of residence and explained, among other things, that its decision was based on his poor language skills.257

There are other possible connecting factors based on personal connections in the host state. For example, in the Nottebohm judgement, the ICJ lists participation in public life as one of possible additional factors that can constitute a genuine link.258 While the ICJ does not further specify what kind of participation it has in mind, it seems clear that political activities — maybe even the exercise of political rights, as far as such are granted to non-citizens — but also activities such as membership in civil society organizations, associations or clubs can be an important element in making a state the center of a person’s

253 Bajsultanov v Austria [2012] ECtHR Application No. 54131/10 para 85.
254 Shachar, ‘Beyond Open and Closed Borders’ (n 46) 21.
255 van Waas, Nationality Matters (n 13) 32.
256 Thym, ‘De Facto Citizenship’ (n 156) 125 n. 107.
257 Bajsultanov v Austria (n 253) para 85.
258 Nottebohm (n 91) 22.
life. Other examples could be voluntary work for a social institution or the provision of care work for family members or others. Some states, for example the US, facilitate the acquisition of citizenship for persons who have served in the military. Finally, there can be connections established on the basis of cultural, linguistic or even ethnic ties. In practice, such ties are sometimes seen as an indicator for a particular connection. Often, however, such connecting factors are purely instrumentalized for political purposes. In particular, cultural and ethnic ties bear a strong risk of discriminating on the basis of ethnicity, national origin, religion or race. Therefore, they should not be seen as independent ties but at best as supporting connecting factors.

These different connecting factors based on territorial connections such as residence, family and social ties create an emotional attachment, while links on the basis of work, education, participation in public life, language or cultural ties overall form a person’s social identity. They constitute the “network of personal, social and economic relations that make up the private life of every human being.” They determine where a person feels at home and where

259 In Switzerland, for example, membership in a club is found to be an indicator for a person’s integration in the local society and her connectedness to Switzerland but it cannot be a decisive element, see eg the judgment of the Swiss Federal Court BGE 138 I 305. See further id 5/2017, Urteil vom 12 Februar 2018 [2018] para 3.4; id 6/2017, Urteil vom 12 Februar 2018 [2018] para 3.4.

260 See also Shachar, ‘Earned Citizenship’ (n 61) 134.

261 US Immigration and Nationality Act, Section 328, 8 U.S.C. 1439.

262 See eg Üner v The Netherlands (n 132) para 58; van Waas, Nationality Matters (n 13) 32.

263 See on ‘ethnically’ selective citizenship policies Szabolcs Pogonyi, ‘The Right of Blood: ‘Ethnically’ Selective Citizenship Policies in Europe’ (2022) National Identities 1 ff. See also Honohan and Rougier (n 11) 354. One could, for example, also think of colonial ties as links that give rise to a right to citizenship, similar to Achiume’s argument for a right to immigration, see E Tendayi Achiume, ‘Migration as Decolonization’ (2019) 71 Stanford Law Review 1509, 1530 f.

264 See eg the proposal by the Austrian conservative People’s Party and the far-right Freedom Party to allow for dual citizenship for German native speakers in South Tyrol (Italy) while there is a strict prohibition of dual citizenship for other countries, Fritz Neumann and András Szigitvari, ‘Die politische Taktik hinter dem Doppelpass für Südtiroler’ Der Standard (23 December 2017) <https://www.dersstandard.at/story/2000070925036/die-politische-taktik-hinter-dem-doppelpass-fuer-suedtiroler>.


266 Honohan and Rougier (n 11) 354.

267 Slivenko v Latvia (n 129) para 96.
that person would most likely like to live. Thus, it determines where a person should be granted a right to citizenship in order to have an unconditional right to remain and participate in the political process to shape that place. As Hudson has already noted, “a person should have the nationality of the State to which he has proved to be most closely attached in his conditions of life as may be concluded from spiritual and material circumstances”. A *jus nexi*-based right to citizenship allows the different ties forming a person’s social identity to be taken into consideration and links them with a claim to citizenship. It allows for the acknowledgment of forms of social citizenship, in the context of legal citizenship, that have been neglected or blurred by state discretion. Based on the principle of *jus nexi* a person should thus have an entitlement to citizenship if the connection between an individual and state as determined by these factors is close enough. By giving weight to these different ties the principle of *jus nexi* would permit granting migrants full membership in a society, despite them not necessarily having a connection based on descent or place of birth and where they would consequently be excluded by the principles of *jus soli* and *sanguinis*.

4 **A Dynamic and Non-exclusive Concept**

The previous section identified different possible factors that can constitute a genuine connection. These connections have to be assessed individually and their weight can vary depending on the circumstances of a case. They may be subject to transformations across time and space depending on a person’s individual situation and biography. They are also not necessarily exclusive. An individual can have genuine and substantive connections to more than one state. As Karen Knop noted, “loyalties are potentially multiple, variable and interactive. Individuals may have loyalty to more than one state, and each loyalty may wax or wane over time”. Thus, citizenship is

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268 See also Benhabib (n 4) 139; Goris, Harrington and Köhn (n 184) 6.
269 International Law Commission, ‘Hudson Report’ (n 87) 20.
270 See also Macklin, ‘The Citizen’s Other’ (n 39) 354.
272 See also the ruling of the ECtHR regarding the balancing exercise under Article 8, *AA v UK* (n 251) para 57.
An Individual Right

Jus nexi as a dynamic and non-exclusive concept can accommodate these transformations.

This dynamic and non-exclusive nature is one of the main differences between the birthright-based principles of jus soli and jus sanguinis on the one hand and the principle of jus nexi on the other. Whereas an individual can develop changing connections that shift the center of their life over a lifetime, birthright acquisition of citizenship is static. The place of birth and the descent of one’s parents are fixed at the moment of birth. But what do I mean when I describe the principle of jus nexi as dynamic and non-exclusive?

Firstly, the principle of jus nexi is dynamic. In the foregoing, I defined the principle of jus nexi as a genuine connection principle of membership acquisition reflecting a social relation conception of citizenship. A genuine connection is built over time through different connecting factors. Most of these factors require a certain time period to reflect an actual genuine connection. Namely, criteria such as residence, education, work, the establishment of family and other social ties all include a certain temporal dimension. The longer a person stays in a country, the more ties she establishes and the stronger the entitlement to membership becomes.

The idea of solidifying rights is not new. In fact, it is well-established in domestic immigration legislation and nationality laws that the legal status of migrants may vary over time and become more stable the longer a person is in a state. This is well-illustrated, for example, by the notion of permanent residency or by requirements for a certain minimum period of residence as preconditions for naturalization, two conditions that are known in many jurisdictions. The principle of jus nexi would fall in this tradition and provide for

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275 Bauböck and Paskalev (n 8) 63.
277 See Chapter 6, ii.1, building on the definition advanced by Shachar, The Birthright Lottery (n 6) 164 f.
278 ibid 178.
279 See generally Farahat (n 77).
280 Shachar, ‘Earned Citizenship’ (n 61) 131 ff. See for a comparison of the residence requirements for ordinary naturalization, Global Citizenship Observatory (GLOBALCIT), ‘Database Acquisition of Citizenship’ (n 192). The European Convention on Nationality tried to standardize the differing residence requirements by introducing a maximum period of residence for naturalization of ten years in Article 6(3) ECN.
membership rights based on a connection that has continuously developed over time.\textsuperscript{281}

Secondly, the principle of \textit{jus nexi} should be understood as non-exclusive. A genuine connection does not necessarily exist with only one state.\textsuperscript{282} There is a vast literature on transnational migration that shows migration patterns are not necessarily one dimensional and that individuals have strong and effective ties to different communities and states.\textsuperscript{283} Transnational migrants have ties to more than one state; the country of origin, the country of residence and possibly other states, as well as repeatedly crossed borders between different states. Genuine connections are relational, they depend on one’s social identity and can exist with more than one state, just as the center of one’s life can be in more than one place at a time.\textsuperscript{284} For example, imagine the situation of a binational couple with strong ties to both countries.\textsuperscript{285} The existence of ties to more than one state is also mirrored in the case law of the ECtHR, albeit from a different perspective. In deportation cases, the Court examines not only the ties to the host state but also the ties to the country of origin.\textsuperscript{286} Even stronger is the case of children born to binational parents, who should have a right to acquire the nationality of both parents in order to physically secure a relationship with both parents.\textsuperscript{287} An alternative mode of citizenship attribution must be able to account for these transnational identities. Linking the entitlement to citizenship to a person’s effective ties instead of a static allegiance or descent provides a much more flexible and equitable approach.\textsuperscript{288}

\begin{itemize}
  \item \textsuperscript{281} Shachar, ‘Earned Citizenship’ (n 61).
  \item \textsuperscript{283} See among many Linda Bosniak, ‘Multiple Nationality and the Postnational Transformation of Citizenship’ in David A Martin and Kay Hailbronner (eds), \textit{Rights and Duties of Dual Nationals: Evolution and Prospects} (Kluwer Law International 2003); Farahat (n 77).
  \item \textsuperscript{284} See also Knop (n 231) 111; Hans Ulrich Jesserun d’Oliveira, ‘Once Again: Plural Nationality’ (2018) 25 Maastricht Journal of European and Comparative Law METRO 22, 31.
  \item \textsuperscript{285} For example, the Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality foresees that in cases of binational marriages each spouse shall have the right to retain her nationality of origin even if she acquires the nationality of the other spouse.
  \item \textsuperscript{286} Where those ties amount to nothing more than the nationality of that state a deportation is considered to be a particularly severe interference with the right to private and family life, see eg Beldjoudi \textit{v France} (n 144) para 77; Mokrani \textit{v France} (n 148) para 31.
  \item \textsuperscript{287} Knop (n 231) 104 f.
  \item \textsuperscript{288} See also Rubenstein and Adler (n 147) 546.
\end{itemize}
flexibility of the notion of ‘one’s center of life’ the principle of *jus nexi*, in my opinion, can accommodate these realities of contemporary migration biographies.\(^{289}\) To quote Shachar:

> precisely because of its anchoring in social fact, *jus nexi* permits multiple citizenship affiliations to remain and flourish; at the same time, it gives priority to the political relationships toward which the real and genuine ties are manifested.\(^{290}\)

For now, we note that the principle of *jus nexi* as developed here is both dynamic and non-exclusive in nature. The dynamic and non-exclusive nature of a *jus nexi* based right to citizenship at the same time is what makes the principle attractive for contemporary migration societies. As Shachar has shown, it helps in mitigating the over- and under-inclusion caused by birthright citizenship and in finding the state(s) to which the closest connection(s) exist.\(^{291}\) The element of time inherent in *jus nexi* can limit the membership entitlement for persons who have lost a genuine connection (over-inclusion) while, at the same time, offering a solution for *de facto* members of a society excluded from citizenship (under-inclusion) by offering them a claim to membership based on a growing connection.\(^{292}\) As Shachar noted:

> What *jus nexi* demands, then, is a closer correlation between democratic voice, factual membership, and citizenship entitlement. It offers a path for stakeholder residents whose lives have already become deeply intertwined with the bounded community in which they have settled to enjoy legal rights and protections as permanent residents and a predictable path to becoming full members. It also requires the nominal heir whose entitlement diminishes as the age or distance of the inheritance increases to establish some meaningful connection with the polity before claiming the manifold benefits that attach to citizenship’s property.\(^{293}\)

\(^{289}\) Swider and Vlieks (n 276) 152.
\(^{290}\) Shachar, *The Birthright Lottery* (n 6) 179. Shachar, however, is more reluctant towards the idea that *jus nexi* should give a claim to dual or multiple citizenship. One’s center of life may change over time, she argues, but at a given time it can be in place only.

\(^{291}\) *ibid* 171.

\(^{292}\) *ibid* 180 f.

\(^{293}\) *ibid* 181.
Even though the vast majority of humans live in the state they were born in or that of their parents’ nationality, a dynamic model of citizenship attribution compensates for a growing international mobility, for transnational identities that span across two or more states and for an ever increasing number of binational relationships and marriages, as well as the growing acceptance of dual and multiple citizenship. Given that every person has links to at least one state — be that the state of birth or the state of the parents’ nationality, the principle of *jus nexi* could also contribute to the reduction and prevention of statelessness.\(^{294}\) In short, the principle of *jus nexi* offers the necessary flexibility to accommodate the biographies and identities of the 21st century where the rights of the individual, her individual circumstances and interests should be central considerations.\(^{295}\)

### III Linking *Jus Nexi* and the Right to Citizenship

In the previous two sections I have discussed why it is necessary to strengthen the right to citizenship and why the principle of *jus nexi* is suitable to achieve this aim. Applying the principle of *jus nexi* to the right to citizenship would, as argued above, help in alleviating the exclusionary effects of citizenship, secure better representation for all members of the society in the democratic process, strengthen the individual rights dimension of citizenship and address the problem of the right to citizenship’s indeterminacy. The genuine connection an individual has to a state would be better protected.\(^{296}\) But what does it mean to apply the principle of *jus nexi* to the right to citizenship?

The idea is not to replace the acquisition of citizenship based on *jus soli* or *jus sanguinis* with the acquisition of citizenship through *jus nexi*. Rather, the principle of *jus nexi* could be applied in addition to *jus soli* and *jus sanguinis* to determine the scope and content of the right to citizenship.\(^{297}\) In other words, *jus nexi* should complement *jus soli* and *jus sanguinis*.\(^{298}\) Acquiring citizenship at birth should occur on the basis of *jus soli* and *jus sanguinis* and reflect the

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294 See also Vlieks, Hirsch Ballin and Recalde-Vela (n 7).
295 See also Shachar, *The Birthright Lottery* (n 6) 180.
296 Goldston (n 76) 340.
297 Shachar, *The Birthright Lottery* (n 6) 165.
298 Owen, by contrast, proposes to see *jus nexi* as the general principle for citizenship attribution and *jus soli*, *jus sanguinis* and *jus domicilii* as different routes through which a genuine connection can be established, Owen, ‘The Right to Have Nationality Rights’ (n 82) 311.
ties of place of birth and descent respectively. These provide for a relatively straightforward, formal and non-discretionary mode of citizenship acquisition which does not require the establishment of particular link. Jus nexi comes into play as a subsidiary mechanism of citizenship attribution in cases where an individual cannot acquire a nationality at birth through jus soli or jus sanguinis and is at risk of statelessness or, thereafter, if there is a mismatch between the citizenship acquired at birth through jus soli or jus sanguinis and a person’s actual connections and center of life. Thereby, jus nexi would not function as a mode for automatic acquisition of citizenship, but as a mechanism for the individual concerned to claim citizenship based on the social fact of membership. The decision to exercise the right to citizenship, especially to claim access to citizenship in a particular state, is left with the individual. Hence, by linking the principle of jus nexi with the right to citizenship, access to citizenship could accommodate the actual life choices of a person and thereby be reflective of human agency.

The principle of jus nexi, which is based on a person’s center of life, helps to determine the scope and content of the right to citizenship more effectively. The principle of jus nexi allows for the identification of the state to which a person has the closest connection and, for that reason, bears the obligation to protect, respect and fulfill the right to citizenship. One has to assume that everyone has a link to at least one state. A jus nexi-based right to citizenship would thus provide an effective mechanism to prevent and reduce statelessness. This would remedy one of the main flaws of the current framework protecting the right to nationality. It also offers a way to address the problem of the right to citizenship’s indeterminacy, strengthen its enforcement and re-draw the limits of state discretion in nationality matters. Based on a person’s genuine connection, it would be possible to determine the state against which that person has a claim to nationality. Thus, a jus nexi-based right to citizenship would broaden the content of the right to citizenship to offer not only protection against statelessness and discriminatory or arbitrary interferences, but to include an actual right to acquire citizenship in a particular state.

299 See also Honohan and Rougier (n 11) 353 f.
300 See also Shachar, ‘Earned Citizenship’ (n 61) 144. See similarly also Spiro, ‘New Citizenship Law’ (n 24) 723.
301 Shachar, ‘Earned Citizenship’ (n 61) 145.
303 See also ibid.
304 See also Mikulka, ‘Third Report’ (n 116) 36 f.
305 See similarly also Batchelor, ‘Developments in International Law’ (n 213) 50; Goldston (n 76) 340.
where a person has a genuine connection; a *nexus*. Moreover, it would identify legitimate criteria for acquiring citizenship. In that sense, *jus nexi* could guide state practice in regulating acquisition and loss of citizenship. Such an interpretation of a *jus nexi*-based right to citizenship would safeguard the effectiveness of citizenship and ensure that an individual can actually exercise her social, economic and political rights in the place where they are most significant to her.

Applying the principle of *jus nexi* to the right to citizenship gives sufficient weight to the will of the person concerned and their ‘legitimate interests’. The life choices of an individual are weighed in through the different connecting factors that constitute that person’s center of life. Thus, citizenship could more adequately reflect a person’s interactions with others. The effectiveness of citizenship could thereby be improved. Moreover, a *jus nexi*-based right to citizenship opens the possibility of making it an entitlement for the individual concerned, who can then exercise her right to citizenship rather than the state exercising a discretionary decision. The acquisition of citizenship would not be automatic or mandatory but subject to the individual’s agency. The state’s discretion to refuse naturalization where the conditions are fulfilled — if the person has a genuine connection — would, however, be reduced to zero.

In short, a *jus nexi*-based right to citizenship could contribute to making citizenship “more in line with a rights-based, individualized focus for international law, rather than a sovereignty-based one”. It could address statelessness by granting stateless persons a right to the citizenship of the state to which they have substantial ties. It would also offer a solution to the problem of under-inclusion by granting a right to citizenship on the basis of *jus nexi* where nationality is no longer effective or does not correspond to one’s center.

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307 See however *Urteil i C 20.88* (n 223) para 35.
308 See also Adjami and Harrington (n 44) 106.
310 See also Recital 4, Preamble to the ECN.
312 Rubenstein and Adler (n 147) 547.
313 See also Weissbrodt (n 302) 107.
of life. Therefore, linking the principle of *jus nexi* with the right to citizenship addresses the main exclusionary effects of citizenship and helps strengthen the right to citizenship.

### IV The Implications of a *Jus Nexi*-Based Right to Citizenship

In Chapter 5 I discussed the scope and content of the right to nationality under current international law. On that basis, I would now like to assess the implications of a *jus nexi*-based right to citizenship for the scope (IV.1) and the content (IV.2) of the right to citizenship. There is a particular focus on the aspects where the application of the principle of *jus nexi* would change the scope and content of the right, before looking at the possibilities for restricting a *jus nexi* based right to citizenship (IV.3).

#### 1 Scope of a *Jus Nexi*-Based Right to Citizenship

As discussed above, the right to nationality in principle has a universal personal scope of application.\(^1\) Equally, a *jus nexi*-based right to citizenship should have a universal personal scope of application. It should apply to everyone, irrespective of whether they have a nationality or not, their nationality if they have one or whether they have more than one nationality. Thus, a *jus nexi*-based right to citizenship applies to everyone with a sufficient connection to the state against which the right is invoked.\(^2\) However, in cases of particularly vulnerable persons, such as children, stateless persons or refugees, the requirements regarding the strength and breadth of possible connecting factors should be reduced in order to take into account the particular situation of the person.\(^3\) Moreover, the requirements to lawfully restrict the right to citizenship could be stricter when it comes to such vulnerable groups.

Generally, a *jus nexi*-based right to citizenship should also apply irrespective of the specific connecting factors a person has, provided the ties are strong enough to form a genuine connection. As elaborated above, depending on the specific circumstances, neither residence nor lawful residence are always necessary requirements.\(^4\)

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\(^1\) See Chapter 5, II.1.


\(^3\) See eg Batchelor, ‘Resolving Nationality Status’ (n 200) 181. See by contrast Zilbershats, ‘Reconsidering’ (n 201) 719.

\(^4\) See Chapter 6, I.3.1.1.
Content of a Jus Nexi-Based Right to Citizenship

Regarding the possible scope of a *jus nexi*-based right to citizenship, I will focus on those aspects of the right that are most affected by the application of the principle of *jus nexi*. Namely, the right to acquire citizenship at birth (iv.2.1), the right to a given nationality (iv.2.2), the right to dual or multiple citizenship (iv.2.3) and involuntary loss of citizenship (iv.2.4). The focus on these specific aspects should in no way be interpreted as putting into question the other obligations under the right to nationality as defined in Chapter 5.318

2.1 The Right to Acquire Citizenship at Birth

In principle, as I have argued in Chapter 5, states have an obligation under the current international framework on the right to nationality to grant citizenship to children born stateless on their territory.319 This obligation is derived, most importantly, from Article 7 *CRC*, Article 24(3) *ICCPR* and regional human rights instruments. However, the implementation of this right is insufficient in many states.320 The acquisition of citizenship for stateless children is often made conditional on additional requirements, such as a certain period of legal residence,321 on the immigration status of the parents322 or on procedural requirements such as lodging an application or undergoing a formal statelessness determination procedure.323 Switzerland, for example, only grants stateless children the possibility of a facilitated naturalization, ie a discretionary procedure with slightly reduced requirements, conditional upon a period of legal residence of at least five years.324 The practice shows that the

318 See Chapter 5, iii.
319 See Chapter 5, iii.3.1.
321 The United Kingdom foresees that children born stateless in the territory can register as citizens after a residence period of five years. See the country profile on the UK on European Network on Statelessness, ‘Statelessness Index UK’ <https://index.statelessness.eu/country/united-kingdom>.
322 In Slovenia, for example, stateless children can only acquire citizenship if their parents are unknown or also stateless (Article 9 of the Citizenship Act of the Republic of Slovenia), see the country profile on Slovenia, European Network on Statelessness, ‘Statelessness Index Slovenia’ <https://index.statelessness.eu/country/slovenia>.
323 In France children born stateless in the territory in principle acquire French citizenship *ex lege* (Article 19 of the French Civil Code). In practice, however, they must lodge a formal request with the authorities and prove their statelessness in a statelessness determination procedure. See the country profile on France, European Network on Statelessness, ‘Statelessness Index France’ <https://index.statelessness.eu/country/france>.
324 Article 23(1) and (2) Federal Act on Swiss Citizenship, 20 June 2014, SR 141.0 (‘SCA’).
protection offered to stateless children under the current international framework remains fragmentary.

A *jus nexi*-based right to citizenship for children born stateless in the territory of a state would offer an additional layer of protection in those states whose current legal frameworks impose additional requirements for acquiring citizenship in case of statelessness at birth. Here, *jus nexi* could grant an entitlement based on the connecting factor of birth on the territory. Given the overarching aim of the right to citizenship to prevent and avoid statelessness, a *jus nexi*-based right to citizenship should thus guarantee access to citizenship for newborn children. In the absence of any other substantial link, the strongest link is to the state where the child is born. Given the particular vulnerability of stateless children, the state would consequently be obliged to grant a child its nationality if they would otherwise be stateless. Here, the principle of *jus nexi* would be combined with a default *jus soli* to promote the overriding aim of preventing statelessness. Thereby, attribution of nationality could occur automatically or *ex lege* at birth to prevent statelessness and guarantee every child a secure legal status at birth. If, subsequently, the center of the child’s life shifts to another state, for example the state of the parents, a *jus nexi*-based right to citizenship would give rise to a right to acquire the nationality of that latter state.

2.2 The Right to the Citizenship of a Specific State

I have argued in the previous chapter that the current international legal framework obliges states to provide for the possibility of naturalization, at least for some groups of non-citizens. However, this right to naturalization only relates to the availability of a procedure to apply for the acquisition of nationality by administrative decision. It does not include a right to be granted nationality through naturalization. The current international legal framework fails to safeguard a general right to the citizenship of a particular state.

As the discussion above shows, the principle of *jus nexi* implies a right to acquire the citizenship of the state to which one has the closest connection, or — to quote Hirsch Ballin — to the citizenship “with its associated rights, that is appropriate to everyone’s life situation, where he or she is at home — which can change during the course of a person’s life.” Based on the principle of *jus

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325 See Chapter 5, 111.3.6.
327 See eg Serena Forlati, ‘Nationality as a Human Right’ in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 23.
328 Hirsch Ballin (n 57) 141.
**nexi**, the acquisition of citizenship by administrative decision should thus no longer be discretionary but an entitlement based on a person’s circumstances of life.

Other than the acquisition of citizenship at birth for otherwise stateless children, the right to a given citizenship based on *jus nexi* should not be automatic. Instead, it should be voluntary and based on a request or declaration of the individual concerned. As Shachar writes:

> like the *ex lege* idea, the *jus nexi* principle is normatively designed to shrink the gap between partaking in actual membership and gaining political voice; it views every long-term resident as a citizen-in-the-making. Unlike it, however, *jus nexi* does not force membership upon them. Instead, it creates an eligibility or presumption of inclusion on behalf of those whose life center has already shifted.

Any forced or automatic attribution of citizenship against the person’s explicit will would be incompatible with the character of *jus nexi*-based citizenship as a person’s center of life. This consent requirement reflects the negative aspect of the right to citizenship, the right not have a citizenship imposed against one’s will. Without the consent of the person concerned, the attribution of citizenship, moreover, becomes over-inclusive through the inclusion of individuals in the citizenry that do not have the necessary subjective links.

The right to a given citizenship based on *jus nexi* should thus grant access to citizenship upon application of the person concerned. The discretion of the state would be reduced to a mere examination of connecting factors. Citizenship must be granted if the links are strong enough. This approach still

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329 See also Bauböck, ‘Democratic Inclusion’ (n 11) 66; José Francisco Rezek, ‘Le droit international de la nationalité’ (1986) 198 Collected Courses of the Hague Academy of International Law 333, 366; Zilbershats, ‘Reconsidering’ (n 201) 720.

330 Shachar, *The Birthright Lottery* (n 6) 179.

331 See also International Law Commission, ‘Commentary Draft Articles on Nationality’ (n 114) 34. See by contrast Helder De Schutter and Lea Ypi, ‘Mandatory Citizenship for Immigrants’ (2015) 45 British Journal of Political Science 235.

332 See Chapter 5, III.3.5.


334 A number of states provide for naturalization based on declaration, see Global Citizenship Observatory (GLOBALCIT), ‘Database Acquisition of Citizenship’ (n 192).
leaves states a certain amount of discretionary power. On the one hand, the connecting factors that give rise to a *jus nexi* are not necessarily fixed at universal level but may vary depending on the specific local situation. As Shachar notes, the criteria that form one’s center of life “itself can be interpreted in more generous or more stringent ways”. Nevertheless, the connecting factors required must relate to the assessment of a sufficient link and must never be so restrictive as to hinder persons with a genuine connection from accessing citizenship. Any such criteria must be justifiable and may never be discriminatory or arbitrary. They must be objective and relevant for the question of whether a person has a nexus to the state in question. Any criteria relating to a person’s political or religious beliefs, race, ethnic or national origin, to her health, wealth or financial resources are problematic against that background as they are likely to be discriminatory. Moreover, to do justice to the principle of *jus nexi*, any such criteria must be applied in a flexible manner considering the particular circumstances of the person concerned. On the other hand, state authorities have a certain leeway in the assessment of those factors. But again, the assessment must take the concrete circumstances of the person concerned into consideration and may not be such as to exclude persons with a sufficient *nexus* from citizenship. Procedures should respect due process standards. In order to give sufficient weight to the will of the persons concerned and the establishment of their relevant connection, such assessment should give them adequate opportunity to participate. As Hirsch Ballin explains, “[s]tates have the right to apply procedures and criteria here, but these must not result in people not being able to acquire citizenship in the society/societies that they may regard as their home(s).”

How does such an interpretation of the right to a given citizenship based on *jus nexi* reinforce the individual’s right to citizenship? The decisive shift would be the recognition of the right to acquire the citizenship of the state where one’s center of life is as an individual right instead of a political privilege or discretionary favor. Acquiring citizenship is conceived of as a legal procedure

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335 See also the criticism of Shachar’s approach by Gonçalo Matias, *Citizenship as a Human Right, The Fundamental Right to a Specific Citizenship* (Palgrave Macmillan 2016) 212.
336 Shachar, *The Birthright Lottery* (n 6) 179.
337 Hirsch Ballin (n 57) 123.
338 See Chapter 5, i
340 See Chapter 5, ii
341 Hirsch Ballin (n 57) 123.
342 See Chapter 5, iii. See also Benhabib (n 4) 140.
343 ibid 131.
that is initiated at the initiative of the individual and where the state’s role is reduced to an assessment of objective and legitimate criteria. This would amount to a paradigm change in international (human rights) law.\textsuperscript{343} Thus, granting citizenship “is not a favour that can be arbitrarily bestowed or denied; it must be seen in the contest of ‘an implicit two-way contract’ that complies with the idea underlying citizenship”.\textsuperscript{344}

Practical examples of how the right to citizenship could be implemented can be found at the domestic level. Several states have a right to citizenship or a right to naturalization for certain groups or depending on certain circumstances. Portugal, for example, is one of the few states that has an actual right to naturalization.\textsuperscript{345} Under certain circumstances non-citizens in Portugal have a right to naturalization if they meet the necessary requirements.\textsuperscript{346} If these requirements are met, the state has no discretion to refuse the acquisition of citizenship.\textsuperscript{347}

The right to a given citizenship would thus protect the right to membership in a migration context. Non-citizens who effectively have their center of life in a state would be able to acquire that state’s citizenship. Stateless persons, on the other hand, would not just be granted any nationality, but an effective citizenship that reflects their actual connections.\textsuperscript{348} The right to a given citizenship would thereby complement the regular naturalization mechanisms in place for non-citizens without a genuine connection.

2.3 The Right to Dual and Multiple Citizenship

The principle of \textit{jus nexi} could also have an impact on the question of whether there is a right to dual or even multiple citizenship.\textsuperscript{349} As argued above, the principle of \textit{jus nexi} accommodates ties to more than one country.\textsuperscript{350} Not all individuals have their center of life exclusively in one state. In cases where a
person has equally strong (though not necessarily the same) ties to more than one county, a *jus nexi*-based right to citizenship should thus imply a right to dual or multiple citizenship.\(^{351}\)

Any interpretation of the right to citizenship that would require the person concerned to decide between two citizenships of equally strong connection would run counter to the aim of securing membership status in the place where one has her center of interests and respecting her will. Without a right to dual or also multiple citizenship, the right to citizenship would become ineffective. As Spiro explains, “requiring individuals to choose one over the other will deprive them of rights and equality in the state not chosen”.\(^{352}\) Denying the right to dual or multiple citizenship would “infringe autonomy values to the extent that it constrains identity composites”.\(^{353}\)

2.4 Limitations upon Involuntary Loss of Citizenship

Finally, the principle of *jus nexi* provides an interesting take on the determination of the negative right not to be deprived of one’s citizenship. *Jus nexi* can help in drawing the limits of involuntary loss of citizenship.\(^{354}\) Since the core obligation under the right to citizenship is to avoid and reduce statelessness, loss of citizenship should never occur where it would render a person stateless. Given that every person has, at least, one genuine connection to a state — however tenuous it may be — deprivation of nationality resulting in statelessness would inevitably violate a *jus nexi*-based right to citizenship. Deprivation of citizenship resulting in statelessness should therefore fall within this core content of a *jus nexi*-based right to citizenship and be prohibited absolutely. Measures that lead to the erasure of (former) citizens from official registers and so render them stateless, such as those imposed in the Indian state of Assam in 2019, would not be compatible with a *jus nexi*-based right to citizenship.\(^{355}\)

But the principle of *jus nexi* also restricts limitations upon involuntary loss of citizenship where it does not result in statelessness. A *jus nexi*-based right to citizenship would always be restricted where citizenship is withdrawn despite an existing link to that state. In such cases, the question becomes a matter

\(^{351}\) See similarly also Honohan (n 3) 11.


\(^{353}\) ibid.


of how strong the links are. If a person has her center of life in the state in question, and her closest connection is to that state, a deprivation measure would hardly ever seem proportionate given the extremely far reaching consequences that stem from a loss of citizenship in the state of one's center of life.\textsuperscript{356} As Gibney argues:

\begin{quote}
[T]he state has no moral right to deprive an individual of citizenship in a country where the individual has made his or her life. [...] Denationalization would violate the principle that citizenship should correspond to an individual's connections and residence.\textsuperscript{357}
\end{quote}

Against that background, policies aimed at depriving foreign terrorist citizens with dual citizenship fighting in a third country of citizenship seem highly problematic.\textsuperscript{358} the decision of the case of Jack Letts, a British–Canadian dual citizen who grew up in the UK and joined the IS in Syria, would not be compatible with a \textit{jus nexi}-based understanding of the right to citizenship as he has no ties to Canada, the country of nationality of his father.\textsuperscript{359} Similarly, the attempted deprivation measure ordered by Switzerland against a Swiss–Italian citizen fighting in Syria would violate a \textit{jus nexi}-based right to citizenship, even if the person concerned would not be rendered stateless.\textsuperscript{360} The measure seems hardly compatible with a \textit{jus nexi}-based right to citizenship, even in cases where persons committed a terrorist or criminal act in their country

\textsuperscript{356} See similarly also Hirsch Ballin (n 57) 126; Honohan (n 3) 12. See on the proportionality of deprivation of nationality Chapter 5, 111.6.
\textsuperscript{357} Matthew J Gibney, 'Denationalization' in Ayelet Shachar and others (eds), The Oxford Handbook of Citizenship (Oxford University Press 2017) 358, 371.
of citizenship and were subsequently deprived of their citizenship. Finally, cases like *Ramadan v Malta*, where the applicant had lived in Malta for over twenty years before his citizenship was nullified, also seem problematic under the principle of *jus nexi* — the applicant had his center of life in Malta. In fact, the ECtHR even argued that the applicant had not been threatened with removal despite the nullification of citizenship and, consequently, could stay in Malta to justify why Article 8 *ECHR* was not violated. Here, a *jus nexi* approach could limit the state's competence to nullify citizenship after a certain period of time or in cases where there are certain particularly strong links. This would prevent a ‘race to the bottom’ in the context of deprivation measures that shift responsibility to the other state of nationality.

In contrast, if a person is residing abroad and has closer links to the other state of nationality, loss of citizenship would not necessarily amount to a violation of the right to citizenship. The state's interest in the withdrawal measure would not override the individual's interest. The case of *Tjebbes* before the *CJEU* provides an interesting example. In that case, the Court considered a Dutch rule that provided for lapses in the genuine links of persons who had resided abroad for a certain period of time. The *CJEU* found this rule compatible with EU law so long as the measure remained proportionate and has the necessary procedural safeguards in place. Such a rule could also be compatible with a *jus nexi*-based right to citizenship, so long as the link has effectively expired and the person is not left stateless.

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361 See however *Ghoumid and others v France* [2020] ECtHR Application Nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52373/16; *Adam Johansen v Denmark* [2022] ECtHR Application No. 27801/19; *K2 v The United Kingdom* (n 137); *Said Abdul Salam Mubarak v Denmark (Decision)* [2019] ECtHR Application No. 74411/16.

362 *Ramadan v Malta* (n 159).

363 ibid 90.


365 See also Bauböck and Paskalev (n 8) 68.

366 See also Gibney, ‘Denationalization’ (n 357) 372.

367 *Tjebbes* (n 105). Similarly also *JY v Wiener Landesregierung* [2021] *CJEU* C-118/20.

Overall, it can be argued that involuntary loss of citizenship despite a persisting genuine link is problematic from a *jus nexi* perspective. Owen even argues that any deprivation that fails to acknowledge a genuine link is arbitrary. Involuntary loss of citizenship despite a persisting genuine link should only be compatible with a right to citizenship if the person concerned is not rendered stateless, if there are stronger links to the other state of nationality and if the state has a legitimate, overweighing interest in the withdrawal of citizenship.

### 3 Legitimate Interferences — Balancing a Jus Nexi-Based Right to Citizenship

Applying the principle of *jus nexi* to the right to citizenship does not make the right absolute. Limitations would also be possible for a *jus nexi*-based right to citizenship. In fact, I argue that the principle of *jus nexi* would facilitate the assessment of the lawfulness of limitations of the right to citizenship. The principle of *jus nexi* allows for a better determination of the interests involved. Clearly, the core content of a *jus nexi*-based right to citizenship should be the prevention and reduction of statelessness. Any violation of the right to citizenship resulting in statelessness should be absolutely prohibited. Regarding other aspects of the right, limitations are possible as long as there is a legitimate aim for the restriction, the restriction is necessary to achieve that aim, and the restriction is proportionate to the aim pursued. The individual’s interests relating to her genuine connections have to be weighed against the states’ interest not to grant access to citizenship or to withdraw citizenship. The competing interests could be balanced in a proportionality assessment similar to the examination of a violation of the right to private and family life under Article 8 *ECHR*. Of course, a criminal record or a possible threat to nationality can be a legitimate ground not to grant citizenship. However, if the person concerned has her center of life in the state in question and has no comparable ties to any other state, then the state’s interest to refuse access to citizenship must outweigh the individual’s interest to justify a restriction of the right to citizenship.

Now, one might object that such a *jus nexi*-based right to citizenship which is not absolute might just bestow states even more discretion. As elaborated above, the *jus nexi* approach cannot avoid a certain degree of state discretion.

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369 Owen, ‘The Right to Have Nationality Rights’ (n 82) 312.
370 See with regard to deprivation of citizenship also UNHCR, ‘Expert Meeting — Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)’ (UNHCR 2013) para 21 <https://www.refworld.org/docid/533a754b4.html>.
Be that regarding the relevant connecting factors and their assessment or the balancing of the individual interests against state interests. Yet, with the exception of absolute rights, the protection of all human rights usually entails a certain degree of flexibility, balancing and discretion on the part of the state. Absolute rights, as already noted, are the exception. Most human rights allow for limitations. Hence, in principle, the possibility of limitation does not reduce the validity of a right as a human right. More importantly the recognition of citizenship as a human right grants individuals a substantive entitlement to citizenship based on their actual connections and provides them, at least theoretically, with a legal pathway to claim full and effective legal membership in the state. The state, by contrast, has the burden to explain and justify any restriction or limitation of the right — even if it retains a certain discretion in the practical assessment of the circumstances of a case. If the state fails to provide a justification, the right is violated. Ultimately, this shifts the decision on access to citizenship from the state to the individual and reduces the element of state discretion in nationality matters. As Peters describes it, “the right confers a legal position which changes the equation” [between the individual and the state]. The right to citizenship is transformed from a mere aspiration to an enforceable human right.

V Conclusion: Strengthening the Right to Citizenship

This chapter has looked beyond the current international legal framework and asked how the right to citizenship could be strengthened to improve the protection of rights of individuals in practice. Arguing that one of the main protection gaps left open by the current interpretation of the right to nationality in international law is the lack of a right to citizenship of a specific state, I have proposed to apply the principle of *jus nexi* in order to strengthen the right to citizenship. Tying membership to one’s connection to the society — one’s social, familial, emotional, cultural or economic ties — would solve the problem of indeterminacy and identifying the state bearing the obligation to fulfil the right to citizenship. Thus, applying the principle of *jus nexi* to the right to

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372 See Chapter 5, 1 V


374 Ibid 539.
citizenship fills the protection gaps left open by the current interpretation of the right to citizenship. Namely, access to a given citizenship and disproportionate interferences with the right to citizenship.

I have discussed several reasons why the right to nationality in its current interpretation has considerable weaknesses. In states with restrictive citizenship regimes, democratic processes are undermined by a lack of adequate representation and participation. At the same time, the exclusionary function of citizenship fails to include those with genuine and substantive ties to society and leaves them at the fringes of society, permanently at risk of exclusion and deportation. The failure to provide for access to the citizenship of the state where one is at home as an individual human right disregards the fact that citizenship is part of a person’s social identity and central to her private life. In a second section, I have discussed the principle of *jus nexi* and its theoretical foundations and shown that the idea of genuine connections and of linking rights to one’s connection to society is not new — neither to international citizenship law, where the genuine link doctrine has long been important, nor to human rights law, where concepts of social identity and one’s own country have long been at the core of identifying migrants’ rights. Hence, I have argued, it would be consistent to apply the principle of *jus nexi* to solve the right to citizenship’s problem of indeterminacy. A final section has then outlined how the principle of *jus nexi* would affect the obligations under the right to citizenship and argued that the most significant impact would occur upon the right to acquire a given nationality. A *jus nexi*-based right to citizenship would give rise to a right to the nationality of the state to which one has such a *nexus*. Moreover, the principle of *jus nexi* could also clarify obligations relating to the child’s right to a nationality, allow for a possible right to dual or multiple nationality and draw limitations upon the state’s right to withdraw nationality against the will of the person concerned. Generally, the idea of a *jus nexi*-based right to citizenship assists in assessing interferences with the right to citizenship against the consequences for the individual concerned.

Overall, applying the principle of *jus nexi* would provide an alternative, more rights-oriented approach to the right to citizenship. This would not itself omit any discretion on the part of the state, be it in naturalization or deprivation procedures. But it would shift citizenship from a privilege granted on a discretionary basis to an effective and enforceable human right that can be claimed by individuals based on their ties to the state in question. In short, it would make citizenship a matter of entitlement. Applying the principle of *jus nexi* in addition to the existing modes of birthright-based forms of citizenship acquisition would therefore provide for a system that is better apt to accommodate biographies and identities of the 21st century, which are shaped by international connections, migration and globalization.