Retain Ius Sanguinis, but Don't Take it Literally!

Eva Ersbøll

There is no doubt that Costica Dumbrava has raised an important question about whether to abandon ius sanguinis citizenship. His arguments are that ius sanguinis is historically tainted and unfit to deal with contemporary issues such as developments in reproductive technologies and changes in family practices and norms; he also claims that ius sanguinis is normatively unnecessary, as it is possible to deliver its advantages by other means.

In my opinion, it is not time to abandon ius sanguinis, mainly because it is impossible to secure its advantages by other means. Admittedly, ius sanguinis, if taken literally, is unfit to deal with contemporary issues such as complex family arrangements involving, among other things, assisted reproduction technologies (ART). However, it seems possible to solve many problems by applying a modified principle of ius sanguinis translated into *ius filiationis*, as suggested by Rainer Bauböck and supported by most of the participants in this debate.

What matters is, as also expressed by many authors, that children from a human rights perspective need their parents' citizenship - or rather, the citizenship of their primary caretakers, be they biological parents or not.

A solution to many of the problems related to reproductive technologies has been advanced by the Council of Europe, the Committee of Ministers, in Recommendation CM/Rec(2009)13 on the nationality of children:

> Member states should apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognised by law.[1]

Still, it is of course necessary to examine more closely the arguments against ius sanguinis and the practical solutions to its shortcomings.

[1] See the recommendation at https://wcd.coe.int/ViewDoc.jsp?id=1563529

R. Bauböck (ed.), *Debating Transformations of National Citizenship*,
IMISCOE Research Series,
https://doi.org/10.1007/978-3-319-92719-0_27

History is not an argument

As Jannis Panagiotidis writes, history cannot justify abandoning ius sanguinis. The use of the principle may have been problematic in the past, and still, it may be all right today. Besides, as argued by Rainer Bauböck and others, it is possible to overcome ethno-nationalist dispositions by modifying a ius sanguinis principle, supplemented with ius soli and residence-based modes of acquisition.

As things stand, ius sanguinis citizenship is in my opinion irreplaceable. It provides, in accordance with the Convention on the Rights of the Child (article 7) for automatic acquisition of citizenship by birth. In addition, it seems to be one of the most simple and secure acquisition modes when it comes to protection against statelessness, as it has the ability to protect (most) children against statelessness from the very beginning of their life.

What is more, it is a central international law principle. For instance, state parties to the European Convention on Nationality are obliged to grant citizenship automatically at birth to children of (one of) their citizens (if born on their territory, cf. article 6(1)).

To me, it seems risky to jettison such an effective principle anchored in binding human rights standards.

Unity of the family

Ius sanguinis is not the only relevant principle. Others, like the unity of the family, safeguard the same interests and may be applied in a broader perspective. To mention a few situations, take acquisition by adoption and acquisition by filial transfer based on the fact that the target person is a natural, adopted or foster child of a citizen.

In addition, new automatic modes of acquisition by birth are developing. Denmark, for instance, has amended its law in 2014 to provide for automatic acquisition of citizenship by birth by children with ‘a Danish father, mother or co-mother’. [2] This is an example of citizenship acquisition based on *ius filiationis* as advanced by Rainer Bauböck.

[2] Costica Dumbrava gives an inadequate Danish example regarding the acquisition possibilities for children born out of wedlock. For long, such children have been entitled to naturalise regardless of residence in Denmark, although until 2013, it was a requirement that the father had (shared) custody over the child. This requirement is now repealed.

As Costica Dumbrava rightly anticipatesd, a reasonable reservation in this debate has been that the main problems connected with the development of ART do not lie with ius sanguinis citizenship but with the determination of legal parentage. Such determination may take long time and involve a number of legal uncertainties and ethical dilemmas. Still, as argued by among others Rainer Bauböck and Scott Titshaw, states have in any case to fix their family law and figure out how to determine legal parenthood. Subsequently, children's right to their legal parents' citizenship may not raise major problems.

Ius filiationis benefits

Developing a *ius filiationis* principle may entail even more advantages. Among others, it may solve some of the problems originating from loss or so-called quasi-loss of citizenship following the disappearance of a family relationship.[3] Disappearance or annulment of a family relationship may have consequences for a person's citizenship based on that family relationship. Many states assume that if a person has acquired his or her citizenship through a child-parent family relationship that citizenship will be lost or even nullified if the family relationship disappears.[4] If, however, states recognise citizenship based on social rather than biological parenthood, the threat of loss or quasi-loss may not arise in the case of disappearance of a biological family relationship.

Human rights protection at this stage

According to the Council of Europe recommendations on the nationality of the child, quoted in the introduction, member states should apply the ius sanguinis principle in ART-cases where the child-parent family relationship is established or recognised by law. The crucial question is of course under which conditions the intended parents' country must recognise such a family relationship if it has been legally established abroad.

David de Groot points out that states can only refuse recognition in case of overriding reasons of *ordre public*, and he criticises states' overuse of the *ordre public* exemption for the denial of parentage. As he rightly argues, it cannot be in the best interest of the child to have no parents at all, instead of

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3 See more about quasi-loss of citizenship at http://www.ceps.eu/publications/reflections-quasi-loss-nationality-comparative-international-and-european-perspective

4 See more about quasi-loss etc. at http://www.ceps.eu/publications/how-deal-quasi-loss-nationality-situations-learning-promising-practices

caring parents without blood ties. David de Groot refers to the 2015 judgment of European Court of Human Rights (ECtHR) in *Paradiso and Campanelli v. Italy*.[5] Here, the Court ruled that the removal of a child born to a surrogate mother and his placement in care amounted to a violation of the European Convention on Human Rights article 8 on respect for private and family life.

In 2014, the ECtHR dealt with another case concerning the effects of non-recognition of a legal parent-child relationship between children conceived through assisted reproduction, *Mennesson v. France*.[6] A French married couple had decided to undergo in vitro fertilisation using the gametes of the husband and an egg from a donor with the intention to enter into a gestational surrogacy agreement with a Californian woman. The surrogacy mother gave birth to twins, and the Californian Supreme Court ruled that the French father was their genetic father and the French mother their legal mother. France, however, refused on grounds of *ordre public* to recognise the legal parent-child relationship that was lawfully established in California as a result of the surrogacy agreement.

The ECtHR ruled that the children's right to respect for their private life – which implies that they must be able to establish the substance of their identity – was substantially affected by the non-recognition of the legal parent-child relationship between the children and the intended parents. Having regard to the consequence of the serious restriction on their identity and right to respect for their family life, the Court found that France had overstepped the permissible limits of its margin of appreciation by preventing both recognition and establishment under domestic law of the children's relationship with their biological father. Considering the importance of having regard to the child's best interest, the Court concluded that the children's right to respect for their private life had been infringed.

The Court also dealt with the children's access to citizenship as an element of their identity (see also *Genovese v Malta*).[7] Although the children's biological father was French, they faced a worrying uncertainty as to their possibilities to be recognised as French citizens. According to the Court, that uncertainty was liable to have negative repercussions on their definition of their personal identity.

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5 Case of *Paradiso and Campanelli v. Italy*, judgment of 27 January 2015.
6 Case of *Mennesson v. France*, judgment of 26 September 2014 (Final).
7 Case of *Genovese v. Malta*, judgment of 11 October 2011.

In *Mennesson*, the ECtHR's analysis took on the special dimension where one of the parents was the children's biological parent; it is, however, in my opinion difficult to imagine that the Court should reach a different conclusion in a similar case where both gametes and egg were from a donor. *Paradiso and Campanelli* may underpin this position that also appears to be supported by the fact that the Court has explicitly recognised that respect for the child's best interest must guide any decision in cases involving children's right to respect for their private life. In this context the Court has made it clear that respect for children's private life implies that they must be able to establish the substance of their identity, including the legal parent-child relationship.

Other ways to protect parent-child relationship

Costica Dumbrava argues that there are other and better ways to protect the parent-child relationship than through the same citizenship status, for instance by conferring full migration rights to children of citizens or establishing a universal status of legal childhood that protects children regardless of their or their parents' status.

I find it hard to believe that any of these means can afford children a similarly effective protection of their right to a family life with their parents in their country.

Children need their parents' citizenship, as pointed out by Rainer Bauböck and many others, because citizenship is a part of a person's identity. Where and to whom one is born are facts that feed into developing a sense of belonging. Moreover, the unity of the family in relation to citizenship secures that children can stay with their parents in their country.

The course of events that followed the independence of women in citizenship matters seems illustrative. In Denmark for instance, when married women gained independence in citizenship matters in 1950, it was a major concern that in mixed marriages, where the spouses had different citizenship, the woman might lose her unconditional right to stay in her husband's country. The legislator assumed that the aliens' law would be administered in such a way that a wife would not be separated from her husband unless a pressing social need necessitated the separation.[8] Things have, however, developed differently. Nowadays, foreigners married to Danish citizens are subject to the same requirements for family reunification as foreign couples.

[8] See the Danish citizenship report at http://cadmus.eui.eu/bitstream/handle/1814/36504/EUDO_CIT_CR_2015_14_Denmark.pdf?sequence=1

Thus, a foreign spouse may be expelled if for instance her Danish husband has received cash benefits within the last three years before a residence permit could be granted; notably, this may apply regardless of whether the couple has a child with Danish citizenship.

A need for international guidelines on legal recognition of parenthood

As already mentioned, there is no doubt that Costica Dumbrava has raised an important discussion about continuous application of ius sanguinis citizenship. While there seems to be little support for abandoning the ius sanguinis principle, there seems to be almost unanimous support for modifying and modernising it. As recommended by the Council of Europe, states should apply to children conceived through medically assisted reproductive techniques their provisions on ius sanguinis acquisition of citizenship.

The problem remains that states must establish or recognise the child-parent family relationship by law, and often, two states with different approaches are involved in the recognition procedure. Therefore, *ordre public* considerations may arise as demonstrated in many of the concrete cases mentioned in this Citizenship Forum. In order to achieve consensus about the recognition of a parent-child family relationship in the best interest of the child, states should engage in international cooperation with a view to adopting common guidelines – as they have done in adoption matters.