

Don't Put the Baby in the Dirty Bathwater! A Rejoinder



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This has been a fascinating debate that succeeded in unravelling some of the major issues about the past, present and future of *ius sanguinis* citizenship. I was delighted to see that many of the contributors shared my concerns about the failings of the current system of transmission of citizenship from parent to child. I learned a great deal from reading the various reactions to my deliberately provocative propositions. With these concluding remarks, I use the privilege of the last word to engage with several key points emerging from the debate and to clarify and, as much as possible, elaborate my position. However, I am hopeful that this debate does not finish here and I look forward to continuing through other ventures.

How ethnic is *ius sanguinis* and why does it matter?

I think we are in agreement that *ius sanguinis* is not inherently ethnic and that it can take on ethnic connotations depending on particular historical and policy contexts. The apple of discord is whether the gravity of such occurrences recommends the abolishment of *ius sanguinis*. I concede that empirical evidence is not conclusive for dismissing the principle of *ius sanguinis*. However, I caution that we should not underestimate the dangers of ethnnonationalist instrumental uses of *ius sanguinis*.

Panagiotidis explains clearly the difference between legal descent (descent from a citizen) and ethnic descent (descent from a non-citizen of a particular ethnicity) and shows that the objection about the ethnic character of *ius sanguinis* is founded on a big conceptual confusion. While I agree that *ius sanguinis* is conceptually distinct from ethnic or racial descent, I would hesitate to say that the two have 'nothing to do' with one another. Unfortunately, it is not only distracted scholars that make this confusion. The ambiguity between legal and ethnic descent is often present in legal practices and political discourses about birthright citizenship. In my initial contribution I mentioned co-ethnic citizenship because these policies frequently rely on the ambivalence between legal and ethnic descent. For example, legal criteria of descent from citizens (or from former citizens or

from former citizens of a former part of a country, etc.) are often used as a smoke screen for selecting future citizens according to (perceived) ethnic descent. It matters less that these policies rarely achieve the goal of ethnic selectivity as long as the very statement of the commitment to include co-ethnics is likely to bring significant political and ideological gains. As Decimo and Harder argue, despite being a technical and legalistic principle, *ius sanguinis* carries significant ideological connotations, among which the myth of commonality of blood or ethnic descent is often prevalent.

I also doubt that the ethnonationalist uses of *ius sanguinis* are only a matter of the past and I am not convinced that they are unlikely to be ‘used like that in the future’ (Panagiotidis). What else if not the fear of ethno-national extinction drove Latvia and Estonia in 1990 to reinstate their pre-war citizenship laws and to apply *ius sanguinis* retrospectively back to pre-1940 citizens? It is besides the point that not all newly recognised citizens were ethnic Latvians or Estonians (as not all of the pre-war citizens were). The political-nationalist gains obtained from the perception that the overwhelming majority of them were co-ethnics and from the symbolic reinstatement of the original national citizenry were significant. The same can be said about the Romanian policy to restore citizenship to all those who lost Romanian citizenship independently of their will. In this case, *ius sanguinis* has been used to trace descendants of citizens several generations back in view of recovering the ‘national stock’ lost with the territorial changes during WWII.

It is true, as Bauböck and Collins rightly point out, that both *ius sanguinis* and *ius soli* (and combinations thereof) can have either emancipatory or exclusionary implications, depending on the context. Since empirical facts do not translate well into normative arguments (Tanasoca), I think that wrestling over empirical evidence about the positive or negative effects of *ius sanguinis* is not going to help us settle the normative questions about the justification of the principle of *ius sanguinis*. If we have strong moral reasons for maintaining *ius sanguinis*, we should endorse it regardless of how wrong it is applied in practice and how often this happens. Of course, we should adjust the ways in which to implement a morally justified principle to match changing empirical circumstances. Yet, the prior question is whether *ius sanguinis* can be morally justified as a principle of admission to citizenship.

Why bother fixing *ius sanguinis*?

Many contributors to this debate grant that *ius sanguinis* is a morally justified principle and propose ways to reform the ways in which we implement it. Bauböck, Ersbøll and Abrams argue that the ethno-nationalist disposition of *ius sanguinis* can be counterbalanced through adopting supplementary *ius soli* and residence-based naturalisation. Bauböck, Titshaw, Abrams and De Groot discuss possibilities of rethinking legal parentage in order to accommodate complex cases of citizenship determination in the context of ART birth.

There is a broad consensus that *ius sanguinis* should be reformed, albeit disagreements prevail as to how and by whom. Bauböck's proposals of *ius filiationis*, which reinterprets legal parenthood as a combination of genetic and social parenthood, is cheered by some but welcomed with scepticism by others. Titshaw and Collins, for example, worry that *ius filiationis* will not eliminate the uncertainty related to the determination of legal parentage and that it may also encourage abuse. Another contention is about the administrative level at which decisions about *ius sanguinis* should be taken. Writing in the context of the US federal system, Titshaw argues that fixing the family law will solve many problems related to legal parentage and therefore to *ius sanguinis* citizenship. Yet, Collins fears that leaving citizenship determination to those applying the family law will unwarrantedly expose citizenship to parochial concerns (e.g. immigration control). I think this is an important point, which we should consider beyond the level of administrative decision-making. I argue that the recognition of legal parentage and the determination of citizenship should not only be implemented through two separate procedures, but also regarded as two normative processes driven by distinct principles. While I appreciate the practical importance of the proposals for reforming *ius sanguinis*, I am not convinced that the strategy of fixing legal parentage addresses the prior and more fundamental question about the moral justification of *ius sanguinis* as a principle of admission to citizenship.

It is surprising to me that in a debate about *ius sanguinis* citizenship so little is being said about citizenship. Most contributors seem to take for granted the normative link between parentage and citizenship and to give priority to instrumental arguments over normative ones. Let me explain this point by discussing three key arguments in support of *ius sanguinis*: (1) *ius sanguinis* protects children against statelessness; (2) *ius sanguinis* enables and protects family life; and (3) *ius sanguinis* expresses the social identity of the child.

Preventing statelessness

There is a wide consensus in the debate that children need (at least one) citizenship from birth and that *ius sanguinis* provides the ‘most simple and secure’ means (Ersbøll) to prevent statelessness. This view is accepted even by those who argue that birthright citizenship is ultimately an unfair arrangement (Swider and Vlieks). It is true that in today’s world the possession of the legal status of citizenship (aka nationality) predetermines access to a set of important rights and privileges, in the absence of which a person’s life is significantly constrained. It is also true that, despite a number of complications caused by changing family patterns and the spread of assisted reproductive technologies, *ius sanguinis* still provides a relatively simple solution to tackle statelessness at birth. However, one can think of other ways to prevent statelessness that are equally convenient, as well as better justified normatively.

The problem of statelessness could be arguably solved by a system of generalised unconditional *ius soli* or by a citizenship lottery in which newborns are assigned randomly the citizenship of a state. These alternatives remove the uncertainties associated with the determination of legal parenthood for the purpose of *ius sanguinis*. However, convenience alone does not count for normative justification. Against the citizenship lottery suggestion, defenders of *ius sanguinis* would probably insist that new-borns should receive the citizenship of ‘their’ parents. Notice that this is not an argument about convenience anymore but one about the importance of a shared citizenship between parents and children. But nothing in the argument about avoiding statelessness requires shared citizenship between parents and their children. To avoid statelessness at birth (in the absence of *ius soli*), it is sufficient that a child receives one citizenship from either of the parents. This means that in international families only one parent needs to transmit citizenship to the child and, if a parent has multiple citizenships, he or she needs to transfer only one these citizenships to the child. The argument about avoiding statelessness does not offer any guidance as to which citizenship should be shared between parents and children and why.

Alternative solutions based on *ius soli* elements may offer better normative justifications. I argued elsewhere that states have a collective duty to grant access to a fundamental status of legal protection (nationality) to those born and living in their jurisdiction due to states’ joint participation in an international system that leaves individuals no real possibility of opting out, i.e. to establish a new citizenship or to remain stateless. My point here is not that the parent-child relationship has no normative implications for

citizenship; it is merely that the argument about avoiding statelessness is unable to bring such normative concerns to the surface.

Protecting family life

The second major argument in defence of *ius sanguinis* is that the (automatic and immediate) transmission of citizenship from parent to child enables and protects family life. In the absence of a shared citizenship between parents and children, it is feared, family life would be severely disrupted as family members risk being separated from one another by borders and immigration restrictions. I do not contest that family life deserves special protection and that the legal recognition of parent-child relationship provides 'critical protection for their [children's] wellbeing' (Abrams). However, I am not convinced that the automatic and immediate transfer of citizenship from parent to child is a major normative prerequisite of family life.

It appears to me that the overwhelming majority of contributors subscribe to an indirect and instrumental defence of *ius sanguinis*. The biggest concern is about securing joint migration rights for family members, which are instrumental for family life. De Groot mentions two other important citizenship privileges, i.e. diplomatic and consular protection and political participation, but surrenders quickly to the concern about migration rights. The prevailing argument in these interventions is not so much a defence of *ius sanguinis* citizenship but a defence of *ius migrationis sanguine* – the right to migrate in virtue of a blood relationship. The downside of linking too tightly *ius sanguinis* to family migration rights is that the argument only holds as long as migration rights are strictly determined by citizenship status and as long as there are no other ways to secure migration rights for family members apart from *ius sanguinis*. Hence in a world of (more) open borders, where children would not be separated from their parents or siblings by migration restrictions, *ius sanguinis* citizenship loses its importance. However, a system of generalised family migration policies, such as the one suggested by Tanasoca, could provide the 'permanence and stability' (Titshaw) required for achieving meaningful family life in the absence of *ius sanguinis* citizenship.

Expressing social identity

Another intriguing argument in defence of *ius sanguinis* rests on the idea that (birthright) citizenship is an important part of a child's social identity. According to the judgement of the European Court of Human Right in the case *Genovese v Malta*, the failure to acquire a particular citizenship at birth

is likely to affect negatively the identity of the child. I distinguish two versions of this argument: a softer/instrumental version, according to which the *ius sanguinis* principle ‘makes citizenship a part of citizens’ personal identities that they are like to accept’ (Bauböck); and a harder/essentialist version, for which the *ius sanguinis* principle recognises and confirms the (inherited) identity of the child.

The essentialist version of the argument about a child’s social identity can be easily dismissed by pointing at the fact that citizenship is a contingent social and legal convention rather than a mechanism that confirms prior genetic, ethnic or cultural identities. Recall that in the *Genovese* case the Court used this argument in connection with the principle of non-discrimination. The failure to acquire citizenship via *ius sanguinis* by a child born out of wedlock will affect negatively his or her social identity because children born in wedlock do not face similar restrictions of *ius sanguinis* as children born out of wedlock. The situation can be remedied not only by removing the discriminatory treatment in the application of *ius sanguinis* but also by abolishing *ius sanguinis* altogether. The instrumental version of the identity argument is more interesting, not least because it supports our intuition that (birthright) citizens are likely to feel attached to their country of birth. However, this is valid for both *ius sanguinis* and *ius soli*, so the instrumental argument cannot show why we should preserve *ius sanguinis* or why we should chose one form of birthright citizenship over another.

Long-lasting institutions usually shape people’s attitudes and generate attachments and identities. They acquire the kind of ‘quasi-naturalness’ that Bauböck ascribes to birthright citizenship. However, the test of time and familiarity is not a valid moral test because bad institutions can also acquire that kind of ‘magical power’ (Harder). We ought to question the moral foundations of deeply rooted institutions such as birthright citizenship especially because they are so popular and because they shape our identity.

Opportunities for intergenerational membership

There are several arguments in the debate that deal more seriously with normative aspects of *ius sanguinis* citizenship. I agree with Owen that the principle of *ius nexi* or genuine connection is the best we have for determining access to citizenship and that this general principle can be served by different policy arrangements, including some form of qualified *ius sanguinis*. I assume that the principle of ‘appropriate citizenship’ defended by Swider and Vlieks goes along the same path. My concern with their proposal is that allowing for ‘a case-by-case evaluation of the individual situation of each

newborn' (Swider and Vlieks) might not serve well the commitment to avoid statelessness, which seems essential to the principle of appropriate citizenship.

Honohan endorses the principle of genuine connection and defends a limited version of *ius sanguinis* by arguing for imposing restrictions to the intergenerational transmission of citizenship. She endorses *ius sanguinis* but proposes that citizenship be withdrawn from (adult) citizens who fail to develop a genuine link with the country. I am sympathetic to this proposal but I am not fully convinced about its underpinning justification. Honohan's main objection to *ius sanguinis*, which is shared by Decimo and Harder, is that the unconditional acquisition of citizenship by children from their parents can amount to an unfair privilege. Although I acknowledge the implications of citizenship policies in today's world characterised by sharp economic inequalities, I think that the concern with economic privilege should be disconnected from the concern about admission to citizenship. I agree with Bauböck that there are more appropriate means to fight global inequality and injustice than redistributing citizenship (e.g. economic redistribution, fairer migration policies).

Honohan rightly argues that citizenship 'provides membership of a political community' but she does not explain why children should be admitted in the political community of their parents rather than in another (e.g. the best political community). My answer is that both parents and children have an interest in the continued participation to a particular intergenerational political project. This interest can be served through providing opportunities for intergenerational membership in the form of provisional *ius sanguinis*. The citizenship acquired provisionally at birth should be withdrawn upon majority from those (provisional) citizens who do not have a genuine link with the country. However, if a person fails to prove a genuine link with at least one country, his or her provisional citizenship should still be extended but only in the form of formal legal membership, i.e. without political rights.

Notice that the argument for intergenerational provisional citizenship stands even after we solve the problems related to the recognition of parenthood and to migration restriction for family members. Bauböck points at this when talking about the 'signalling effects of birthright citizenship' but his argument slides into an instrumental and collectivist defence of birthright citizenship. My argument for intergenerational citizenship puts emphasis on the individual interests in continued political membership. Incidentally, this solution is also likely to have positive implications for the political community as a whole, e.g. by fostering 'a sense of responsibility towards the common good and future generations' (Bauböck). I am sympathetic to

Harder's idea of political membership as a 'lively on-going process of negotiation in which everyone has a stake'. However, I disagree that admission to political membership should be entirely up to negotiation, as I maintain that there are certain concerns that demand inclusion regardless of people's preferences and abilities. I also do not think that political membership should be 'limited by our mortality' (Harder). While I reject continuation based on genetic, ethnic and racial traits or simply convenience, I argue that there should be opportunities for intergenerational political continuity, which can be provided through provisional *ius sanguinis*.

It is beyond dispute that any attempt to dislodge a deeply rooted and widespread institution such as *ius sanguinis* is bound to pose serious practical challenges. However, if one has compelling moral reasons for dismantling such an institution, one ought to work towards this end. Babies are born into a physical world and from actual bodies but they are not naturally born into families and citizenship. The latter are social conventions that demand our acceptance when they are justified and our courage to change and replace them when they are not. To my critics who worried that abolishing *ius sanguinis* amounts to throwing out the baby with the dirty bathwater I reply that we should not put the baby in the dirty bathwater in the first place.

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