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Bloodlines and belonging:
Time to abandon ius sanguinis?

Edited by Costica Dumbrava and Rainer Bauböck

European University Institute
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Abstract

This EUDO CITIZENSHIP Forum Debate discusses whether the widespread legal rule of ius sanguinis, through which citizenship is transmitted at birth from parent to child, can still be justified in the contemporary world. Together with addressing more traditional objections to ius sanguinis, such as its alleged ethno-nationalist character or its negative effects on the global distribution of wealth and opportunities, the debate also looks into more recent challenges to ius sanguinis, such as those posed by dramatic changes in family norms and practices and the rapid development and spread of reproductive technologies. One major worry is that current forms of ius sanguinis are unable to deal adequately with uncertainties related to the establishment of legal parentage, especially in cross-border surrogacy arrangements. Whereas most contributors agree that ius sanguinis should be reformed in order to adapt to contemporary circumstances, plenty of disagreement remains as to how this reform should be done. The debate also tackles the questions of whether and in what way ius sanguinis could be justified as a normative principle for admission to citizenship. Authors discuss important normative considerations, such as the need to prevent statelessness of children, to ensure the preservation of family life and to provide opportunities for intergenerational membership.

Kickoff contribution and rejoinder by Costica Dumbrava. Comments by Rainer Bauböck, Jannis Panagiotidis, Scott Titshaw, Kristin Collins, Lois Harder, Francesca Decimo, David Owen, Kerry Abrams, David de Groot, Iseult Honohan, Eva Ersbøll, Ana Tanasoca, Katja Swider and Caia Vlieks.

Keywords

Ius sanguinis, citizenship, ethno-nationalism, reproductive technologies, statelessness, family law

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Costica Dumbrava*

The transmission of citizenship status from parents to children is a widespread modern practice that offers certain practical and normative advantages. It is relatively easy to distribute legal status to children according to parents' citizenship, especially in the context of high mobility where the links between persons and their birthplace are becoming increasingly strained. Granting citizenship status to children of citizens may also be desirable as a way of avoiding statelessness, acknowledging special family links and fostering political links between children and the political community of their parents. These apparent advantages of ius sanguinis citizenship are, however, outweighed by a series of problems. In what follows I argue that ius sanguinis citizenship is (1) historically tainted, (2) increasingly inadequate and (3) normatively unnecessary. Ius sanguinis citizenship is historically tainted because it is rooted in practices and conceptions that rely on ethno-nationalist ideas about political membership. It is inadequate because it becomes increasingly unfit to deal with contemporary issues such as advances in assisted reproduction technologies and changes in family practices and norms. Lastly, ius sanguinis citizenship is normatively unnecessary because its alleged advantages are illusory and can be delivered by other means.

Tainted

As a key instrument of the modern state, the institution of citizenship has been closely linked to nationalism. Ius sanguinis citizenship was reintroduced in Europe by post-revolutionary France, which sought to modernise French citizenship by discarding feudal practices such as ius soli.[1] Whereas in modern France the adoption of ius sanguinis was premised on the idea of a homogenous French nation, in countries with contested borders, such as Germany, ius sanguinis played a key role in maintaining ties with co-ethnics living outside borders and thus in nurturing claims to territorial changes. Although ius sanguinis citizenship is not conceptually 'ethnic' (in the same sense in which ius soli citizenship is not necessarily 'civic'), there are a number of ways in which the application of the ius sanguinis principle has been used in order to promote ethno-nationalist conceptions of membership.

Firstly, the application of unconditional ius sanguinis in the context of a long history of emigration means that emigrants can pass citizenship automatically to their descendants regardless of the strength of their links with the political community. No less than twenty countries in Europe maintain such provisions.[2] Whereas one can find several non-nationalist arguments for justifying emigrants' citizenship, these weaken considerably when applied to successive generations of non-residents.

Secondly, there are cases in which countries rely on the principle of descent in order to confirm or restore citizenship to certain categories of people whom they consider to be linked with through ethno-cultural ties. Apart from cases where ethnic descent is an explicit criterion of admission (e.g. in Bulgaria, Greece), there are countries where ethnicity is camouflaged in the language of legal restitution or special duties of justice (e.g. in Latvia, Romania). In this way, persons can have their citizenship status 'restored' on the basis of descent from ancestors who had been citizens or residents in a territory that once belonged, even if briefly, to a predecessor state with different borders.

* Maastricht University.

1 Weil, P. (2002). *Qu' est-ce qu'un Français?* Paris: Grasset.

2 Dumbrava, C. (2015). Super-Foreigners and Sub-Citizens. Mapping Ethno-National Hierarchies of Foreignness and Citizenship in Europe. *Ethnopolitics* 14(3), 296-310. http://dx.doi.org/10.1080/17449057.2014.994883

Thirdly, the combination of unconditional ius sanguinis citizenship with the reluctance to accept alternative ways of incorporating children of residents (such as ius soli) is also a strong indicator of an ethnic conception of citizenship, especially in the context of a long history of immigration. Convoluted attempts to adopt and expand ius soli provisions in Germany and Greece illustrate this point. In 2000 Germany adopted ius soli provisions[3] but maintained that, unlike persons who acquire German citizenship through ius sanguinis, those who acquire citizenship via ius soli could retain it only if they relinquish any other citizenship before their 23rd birthday.[4] In 2011 the Greek Council of State halted an attempt to introduce ius soli citizenship in Greece[5] by claiming that ius sanguinis is a superior constitutional principle whose transgression would lead to the 'decay of the nation'.[6]

Inadequate

Consider the following two real cases.

Samuel was born in November 2008 in Kiev by a Ukrainian surrogate mother hired by Laurent and Peter, a married gay couple of Belgian and French citizenship respectively.[7] Samuel was conceived through in vitro fertilisation of an egg from an anonymous donor with Laurent's sperm. Upon his birth and according to practice, the surrogate mother refused to assume parental responsibility and thus transferred full parentage rights to Samuel's biological father. When Laurent requested a Belgian passport for Samuel, the Belgian consular authorities refused on grounds that Samuel was born through a commercial surrogacy arrangement, which was unlawful according to Belgian law. After more than two years of battles in court, during which Laurent and Peter also attempted and failed to smuggle Samuel out of Ukraine through the help of a friend pretending to be Samuel's mother, a Brussels court recognised Laurent's parentage rights and ordered authorities to deliver Samuel a Belgian passport. With it, Samuel was able to leave Ukraine and settle with Laurent and Peter in France.

In 2007 Ikufumi and Yuki, a married Japanese couple, travelled to India and hired Mehta as surrogate mother for their planned child.[8] Using Ikufumi's sperm and an egg from an anonymous donor, the Indian doctors obtained an embryo, which they then implanted in Mehta's womb. Only one month before the birth of Manji, the resulting child, Ikufumi and Yuki divorced. When Ikufumi attempted to procure a Japanese passport for Manji, the Japanese authorities refused on grounds that Manji was not Japanese. According to the Japanese Civil Code, the mother is always the woman who

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3 Hailbronner, K. and A. Farahat (2015). Country Report: Germany. EUDO Citizenship Observatory. http://cadmus.eui.eu/bitstream/handle/1814/34478/EUDO_CIT_2015_02-Germany.pdf?sequence=1

4 Bock, L. (2015). Germany: As 'Option Duty; reform comes into force, first figures on individuals having lost their citizenship emerge. *Citizenship News, EUDO Citizenship Observatory*. http://eudo-citizenship.eu/news/citizenship-news/1342-germany-as-option-duty-reform-comes-into-force-first-figures-on-individuals-having-lost-their-citizenship-emerge

5 Christopoulos, D. (2011). Greek State Council strikes down ius soli and local voting rights for third country nationals. An Alarming Postscript to the Greek Citizenship Reform. *Citizenship News, EUDO Citizenship Observatory*. http://eudo-citizenship.eu/news/citizenship-news/444-greek-state-council-strikes-down-ius-soli-and-local-voting-rights-for-third-country-nationals-an-alarming-postscript-to-the-greek-citizenship-reform

6 The Greek parliament has recently pushed forward another proposal regarding ius soli in an attempt to overcome the deadlock. See Christopoulos, D. (2015). Greece: New citizenship bill now opened for public consultation. *Citizenship News, EUDO Citizenship Observatory*. http://eudo-citizenship.eu/news/citizenship-news/1385-greece-new-citizenship-bill-now-opened-for-public-consultation

7 The European Parliament (2013). A comparative study on the regime of surrogacy in EU Member States. Study for the Directorate-General of Internal Affairs, *Policy Department: Citizen's Rights and Constitutional Affairs*, pp. 90-1. http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf

8 Points, K. (2009). Commercial surrogacy and fertility tourism in India: The case of Baby Manji. Case Study, *Kenan Institute for Ethics, Duke University*. https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf

gives birth to the child. Despite having three 'mothers' – a genetic mother, who contributed with the egg, an intended mother who later declined involvement, and a surrogate mother, who did not plan to take up parental responsibilities – Manji had no obvious legal mother. Indeed, Manji's Indian birth certificate mentioned Ikufumi as the father but left the rubric concerning 'the mother' blank. After much legal wrangling Manji was issued a certificate of identity stating that she was stateless, with which Ikufumi managed to take her to Japan.

These are just two of a growing number of cases that test the legal and normative linkage between human reproduction, legal parentage and citizenship. Not only do they question conventional assumptions about the biological and cultural basis of citizenship, but they also show the limits of the principle of ius sanguinis in ensuring the adequate determination of citizenship status.

The incongruity between reproduction, legal parentage and citizenship is not an issue triggered solely by advances in reproductive technologies. Traditionally, children born out of wedlock could not acquire the father's citizenship through descent. Many countries still maintain special procedures for the acquisition of citizenship by children born out of wedlock to a foreign mother and a citizen father. In most cases this implies submitting a request for citizenship after parentage is legally established, although in Denmark these children can acquire citizenship only if the parents marry. In the Czech Republic and the Netherlands (for children older than 7), the determination of parentage for the purpose of citizenship attribution requires showing evidence of a genetic relationship between the father and the child. As argued by the European Court of Human Rights in its 2010 judgment on *Genovese v Malta*,[9] the differential treatment of children born within and out of wedlock with respect to access to citizenship amounts to discrimination on arbitrary grounds. This practice is also at odds with contemporary trends that indicate an impressive surge in births out of wedlock; the share of such births in the EU27 rose from 17% of total births in 1990 to 40% in 2013.[10]

One of the biggest challenges to ius sanguinis citizenship comes from the spread of assisted reproduction technologies (ART). About 5 million babies worldwide have been born through ART since the birth of Louise Brown, the first 'test-tube baby', in 1978.[11] ART have developed rapidly generating a multi-billion dollar market in assisted reproduction. A significant share of this market involves the international movement of doctors, donors, parents, children and gametes. In order to avoid legal restrictions or to cut costs, a growing number of infertile men and women, usually from high-income countries, travel to destinations such as India, Thailand or Ukraine in order to have 'their' babies conceived through in vitro fertilisation procedures using sperm or eggs (or both) donated by people from places such as Spain or Romania.

Many problems arise because the international market for assisted reproduction is not properly regulated, which means that national regulations often conflict with one another. Countries that oppose surrogacy consider the surrogate mother as the legal mother even if they are not genetically related to the child. According to this reasoning, the husband of the surrogate mother is the presumed father of the child. However, countries that encourage surrogacy usually recognise the intended mother and father as the legal parents, regardless of whether they are genetically related to the child. As the stories on Samuel and Manji show, when these two approaches collide the children risk becoming, as Justice Hedley put it, 'marooned, stateless and parentless'.[12]

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[9] Genovese v. Malta, Application no. 53124/09, *European Court of Human Rights*, 11 October 2011. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106785#

[10] BBC News (2013). Two in five EU babies born out of wedlock. http://www.bbc.com/news/world-europe-21940895

[11] The European Society of Human Reproduction and Embryology (2014). *ARTs fact sheet*. http://www.eshre.eu/Guidelines-and-Legal/ART-fact-sheet.aspx

[12] Re: X & Y (Foreign Surrogacy), [2008] *EWHC (Fam) 3030 (U.K.)*. http://www.familylawweek.co.uk/site.aspx?i=ed28706

In some cases intended parents have the possibility to establish parentage and citizenship for their children born through surrogacy. However, such special arrangements often discriminate between (intended) mothers and fathers. For example, in the US children born to surrogate mothers outside the country are treated as children born out of wedlock, so fathers can be recognised as legal parents and therefore extend citizenship to children if they provide proof of a genetic relationship with the child (through a DNA test). Intended mothers, however, cannot be recognised as mothers even if the child was conceived using their eggs and even if they are married to the intended father.[13] It follows that, in cases where another woman's womb is involved, paternity and citizenship can still follow the sperm but not the eggs.

The practice of gamete donation has become increasingly accepted and regulated, so donors are in principle discharged of parental responsibilities with regard to children they help to conceive. However, it is not always clear what counts as donation. In a recent US case, a man successfully claimed parentage with regard to a child who was born after an informal agreement in which he agreed to 'donate' sperm to a friend. The Court decided in the man's favour arguing that his act did not count as donation because the procedure used in the insemination did not involve 'medical technology' (they used a turkey baster). The ultimate test of paternity in this case relied on a mere technicality, which can hardly be seen as a morally relevant fact for establishing fundamental ties of filiation and citizenship.[14]

The development of ART is likely to further complicate questions about parentage and citizenship. The new techniques of embryo manipulation, for example, make now possible the transfer of a cell nucleus from one woman's egg to the egg of another, which means that the resulting child will have three genetic parents. Advances in technologies for freezing gametes and embryos raise questions about the rights and responsibilities over future births and about the status of future children. There have already been a number of cases of posthumous conception in which the sperm or eggs of a deceased person were used by the spouse or another relative in order to conceive children. For example, it was recently reported that a 59 years old woman from the UK gave birth to 'her' daughter's child.[15] These practices raise obvious questions as to whom these children belong to and they may as well trigger issues of citizenship. Lastly, progress has been made on the creation or 'artificial' gametes through the modification of other types of human cells. Apart from opening possibilities for bypassing the heterosexual model of procreation,[16] these techniques raise concerns about abuse or reproductive 'crime'. Imagine a world in which it would be possible to create a child from a tissue sample collected from somebody's cup of coffee. Those famous actors and footballers would probably think twice before shaking their fans' hands.

Unnecessary

One could argue that the main problems do not lie with ius sanguinis citizenship but with the determination of legal parentage. Once we solve issues related to legal parentage, then the ius sanguinis principle will effectively address citizenship matters. However, this view ignores that dilemmas regarding the attribution of parentage are often triggered or complicated by citizenship (and migration) issues. It can also be argued that relying solely on legal parentage to settle citizenship

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[13] Deomampo, D. (2014). Defining Parents, Making Citizens: Nationality and Citizenship in Transnational Surrogacy. *Review of Medical anthropology*. Published online: 25 September 2014. http://dx.doi.org/10.1080/01459740.2014.890195

[14] Brandt, R. (2015). Medical intervention should not define legal parenthood. *Bionews*. http://www.bionews.org.uk/page.asp?obj_id=523229&PPID=523190&sid=282

[15] Smajdor, A. (2015). Can I be my grandchild's mother? *BioNews.* http://www.bionews.org.uk/page_504476.asp

[16] Shanks, P. (2015). Babies from Two Bio-Dads. *Biopolitical Times, Center for Genetics and Society*. http://www.biopoliticaltimes.org/article.php?id=8418

issues disregards fundamental normative questions about who should be a citizen in a political community.

Despite much liberal-democratic talk about social contract, democratic inclusion and active citizenship, the overwhelming majority of people in the world acquire citizenship by virtue of contingent facts about birth (descent or place of birth). While ius soli citizenship has received considerable political and academic attention recently due to pressing concerns about the inclusion of children of immigrants, ius sanguinis continues to be taken for granted. In the remainder of this essay, I briefly challenge two main theoretical defences of ius sanguinis: (a) that ius sanguinis citizenship recognises and cements the special relationship between the parent and child; (b) that ius sanguinis citizenship ensures the intergenerational stability of the political community.

The main problem of ius sanguinis citizenship is that it is parasitic on external factors concerning the legal determination of parentage. As one of the examples presented above shows, it may only take a choice between a petri dish and a turkey baster to make somebody a parent and hence a supplier of citizenship status. The relevance of horizontal family ties between spouses in citizenship matters has largely diminished, as a flipside of the spread of gender equality norms, since in liberal states wives no longer automatically acquire their husbands' citizenship. By contrast, parental ties continue to remain paramount for the regulation of citizenship. Even if there are good reasons for seeking to ensure the swift transfer of citizenship from parents to children (e.g. to prevent statelessness), this approach is questionable because it renders children vulnerable. Ius sanguinis citizenship makes access to citizenship for children dependent on parents' legal status, actions or reproductive choices.

As in the case of spouses, joint citizenship adds little to the legal and normative character of the parent-child relationship. There is little doubt that the law should treat children and the parent-child relationship with special attention. However, this could and should be achieved regardless of the citizenship status of children and parents. One could, for example, extend the legal rights associated with parentage and filiation (e.g. conferring full migration rights to children of citizens) or seek to establish a universal status of (legal) childhood that confers fundamental right and protection to children regardless of their or their parents' citizenship or migration status.

The second argument for ius sanguinis citizenship is that the automatic transition of membership status from parents to children ensures the smooth reproduction of the political community. As children of citizens grow, they become socialised in the political community of their parents and develop political skills necessary for furthering their parents' project of democratic self-government, skills that they will eventually pass on to their own children. An easy objection to this view is that it is empirically naïve, especially in the context of increased migration and diversification of family practices. Citizenship is thus based on a contested expectation. Instead of granting citizenship ex-ante to persons who are likely to develop desirable citizenship attitudes and skills, we could delay the attribution of citizenship until such attitudes and skills are confirmed. Alternatively, there may be other normative considerations for turning children into citizens. For example, being born in the country and/or living there at a young age makes children not only subject to the law of the country but also highly dependent on the state, which, for example, is required to provide regular and reliable access to medical care such as vaccinations. These considerations could justify granting children at least provisional citizenship.

The intergenerational dimension of democratic membership can hardly be achieved by relying on legal fictions or on biological contingencies. Our efforts should rather be channelled towards consolidating democratic institutions and promoting citizenship attitudes and skills among all those who find themselves, by whatever ways and for whatever reasons, in our political community. As for the children who happen to be born here, we should treat them as political foundlings and give them all the care and support they need to become full political members.

Ius filiationis: a defence of citizenship by descent

Rainer Bauböck*

Aristoteles famously defined a citizen as someone 'giving judgment and holding office' in the polity.[1] Yet, this does not settle the issue since we first need to know who qualifies for holding office. And so he continues: 'For practical purposes a citizen is defined as one of citizen birth on *both* his father's *and* his mother's side'.[2] Times have changed. From the French Revolution, which revived ius sanguinis, until the second half of the 20th century, citizenship was mostly transmitted only from the father to the child. Today, largely as a result of international conventions against the discrimination of women, all democratic states define a citizen as one of citizen birth on either the father's or the mother's side. Yet ius sanguinis remains the dominant rule for acquisition of citizenship worldwide. True, in the Americas the stronger principle is ius soli, the acquisition of citizenship through birth in the territory. But even there those born abroad to citizen parents who were themselves born in the country are recognized as nationals by birth.

Given this overwhelming presence of ius sanguinis in nationality law, Costica Dumbrava's call for abandoning it is bold. Some might even say, it is quixotic, but I disagree. It is indeed time to reflect on the future of ius sanguinis and to abandon it as a doctrine linking citizenship to biological descent. Yet there are good practical and normative reasons why the principle of citizenship transmission from parents to children will remain alive and ought to be retained.

Dumbrava runs three main attacks against ius sanguinis: It is tainted by its association with ethno-nationalism; it is inadequate because, in an age of artificial reproduction technologies, same sex marriage and patchwork families, biological descent no longer traces social parenthood; and it is unnecessary since its protective effects can be achieved by other means. I will accept the first and second argument with some modifications but reject the third.

Not the only one tainted

As Dumbrava points out, modern ius sanguinis was seen as a democratic and revolutionary principle in contrast with ius soli that had its origins in the feudal idea that any person (or animal) born on the territory was subject to the ruler of the land. Deriving citizenship from citizen descent rather than territorial birth made it possible to imagine a self-governing people reproducing itself. Dumbrava is of course right that seeing the nation as a community of shared descent across generations made it also easier to justify the exclusion of foreigners as well as the inclusion of co-nationals across the border. Yet this is not a sufficient reason for abandoning ius sanguinis.

First, an ethnonationalist disposition can be overcome while maintaining ius sanguinis if this principle is supplemented with ius soli and residence-based naturalisation. The latter has created an ethnically highly diverse citizenry in continental European immigration countries even in the absence of the additional inclusionary effects of ius soli. The reason for this ethnically inclusive effect of ius sanguinis is simple: If first generation immigrants have access to citizenship and take it up, then ius soli and ius sanguinis does not make much difference: the children of immigrants will be citizens under either rule.

Secondly, a pure ius soli regime is also tainted and not only because of the feudal origins of the principle. Territorial nationalism can be just as nasty as ethnonationalism and may be fanned by

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1 Aristotle (1962). *The Politics*. Transl: T.A. Sinclair, revised and commentary: J. Saunders ed. London Penguin, III. i: 169

2 ibid, III.ii: 171-2, original emphasis.

thinking of ius soli as the right of the 'sons of the soil Even the case of Romania that Dumbrava lists among the problematic ones is ambiguous in this regard. If Romania awards citizenship to the descendants of those born in its lost territories, is this an instance of ius soli or ius sanguinis and an illustration of ethnic or of territorial nationalism? The answer is probably: both. Ius soli and ius sanguinis are therefore not alternatives, but can be combined in benign ways that neutralise the potentially illiberal effects of either principle, as well as malign ways that enhance their nationalist potential for ethnic exclusion and territorial expansion.

Thirdly, pure ius soli also has vicious exclusionary effects for migrants. In most American states, the immigrant generation 1.5 – those who have entered the country as minor children – cannot acquire citizenship before the age of majority. President Obama's Dream Act is an attempt to mitigate some of the worst consequences for the children of irregular immigrants. Even more problematic is the common distinction between nationals and citizens in many Latin American states (see the new American country profiles on EUDO CITIZENSHIP). Only those born in the territory are considered nationals (they are sometimes also called 'naturals'). They turn into citizens with full voting rights at the age of majority. Immigrants who naturalise become citizens, but not nationals. They remain excluded from many public offices (also the US president still has to be a 'natural born citizens') and they can be deprived of their citizenship status, whereas nationality can often never be lost. In Uruguay even the concept of 'naturalisation' does not exist because those who are not born in the territory can never become 'naturals'. Similar exclusionary effects of ius soli traditions apply to those born abroad to citizen parents. They often do not acquire citizenship unless they are registered in time by their parents and they may lose it unless they 'return' before the age of majority.

If both ius sanguinis and ius soli are tainted in these ways, should we consider an even more radical alternative of abandoning citizenship by birth altogether? Why not replace it with *ius domicilii* so that citizenship is acquired automatically with taking up residence and lost with outmigration? Or should we maybe replace it with *ius pecuniae*,[3] i.e. a global market for citizenships in which individuals can bid for membership status anywhere and states can set the admission price? Neither of these alternatives is morally attractive and something important is lost when we give up birthright citizenship.

Why not *ius filiationis*?

Dumbrava's second argument is that developments in reproduction technologies and in the social and legal recognition of new family patterns make ius sanguinis increasingly unworkable and obsolete.

This problem is not entirely new and a solution is already available. International law has long abandoned the idea that children should acquire only one citizenship at birth. Since they can inherit two different citizenships from the mother's and the father's side (maybe in addition to a third one acquired iure soli), why should they not receive the citizenship of both an intended and a surrogate mother or an intended father and a sperm donor? Asking the question makes it already clear that the problem is not the multiplicity of citizenships per se, but the mismatch between biologically determined citizenship and parental care arrangements that would also open the door to abusive claims. The traditional solution that is already available in most nationality laws for cases where the biological parent is not the social parent is transmission of citizenship through adoption.[4] Why should

[3] Stern, J. (2011). Ius Pecuniae – Staatsbürgerschaft zwischen ausreichendem Lebensunterhalt, Mindestsicherung und Menschenwürde. *Migration und Integration – wissenschaftliche Perspektiven aus Österreich, Jahrbuch 1/2011*, Dahlvik/Fassmann/Sievers (eds.). See also the EUDO CITIZENSHIP forum 'Should citizenship be for sale?' (2013); Dzankic, J. (2015). Investment-based citizenship and residence programmes in the EU. *EUI Working Papers RSCAS 2015/08*. EUI: Florence.

[4] See the EUDO CITIZENSHIP modes of acquisition database: http://eudo-citizenship.eu/databases/modes-of-acquisition

it not be possible to generalise this model from the marginal case of adoption so that a modified ius sanguinis refers to social rather than biological parenthood (as it already does in several jurisdictions)?

The main issue with such a new *ius filiationis* might be that determination of citizenship is less automatic than it used to be for children born in wedlock to their biological mother and father. Yet states that are committed to the welfare of children have to figure out anyhow how to determine legal parenthood in the more complex family arrangements of contemporary societies. In order to avoid statelessness it is important that every child obtains at least one citizenship immediately at birth. And in order to make sure that children are not caught between conflicting legal norms and can develop stable relations to their countries of citizenship, it is important that their citizenship status does not change automatically when they become part of a new family. If these concerns are taken into account through a combination of ius soli with legally determined initial parenthood, what objections can be raised against recognizing primary caregivers as well as persons with additional custodial rights as legal parents who can transmit their citizenship to the child?

Don't abandon the children!

Dumbrava's third argument is that ius sanguinis is not necessary because children's rights can be protected through other means. He claims that ius sanguinis renders children vulnerable by making their 'access to citizenship … dependent on parents' legal status, actions or reproductive choices This is indeed a reason why the children of immigrants need ius soli as an independent right to citizenship in their country of birth. Unfortunately, in the US, their birthright citizenship does not prevent them from being deported together with their undocumented parents, whereas immigrant minors who are EU citizens have a right to stay that protects also their primary caregivers from deportation.[5]

Yet small children are in any case dependent on their parents' migration decisions. This is a an equally strong reason why they also have a claim to share their parents' citizenship, since they risk otherwise to remain stranded in their country of birth or be treated as foreigners in their parents' country of nationality. Dumbrava suggests preventing this by 'conferring full migration rights to children of citizens'. But would migration rights become more secure if they are disconnected from the legal status of citizenship that is the only one obliging states to unconditionally admit them? Alternatively, he suggests to 'establish a universal status of (legal) childhood that confers fundamental rights regardless of their or their parents' citizenship or migration status'. This is what the Children's Rights Convention, which is one of the mostly widely signed and ratified human rights documents, aims to do. The question is not only whether states are willing to respect these rights, but whether they can be held responsible for protecting them. For this, children need not only human rights, they also need their parents' citizenship.

Delayed citizenship for all?

Dumbrava has, however, a much more fundamental objection that targets both ius sanguinis and ius soli: Citizenship as membership in a political community should not depend on 'contingent facts of birth (descent or place of birth)'. This is a common critique that always leaves me puzzled.[6] My very existence depends on these contingent facts. Humans cannot will themselves into being but are thrown into the world without choosing where to be born and to which parents. What is morally arbitrary is not that states use these fundamental features of personal identity to determine membership in political

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[5] Case C-200/02 Zhu and Chen v Secretary of State for the Home Department, 2004; Case C-34/09 Ruiz Zambrano v Office National de L'emploi, 2011.

[6] For nuanced critiques of birthright citizenship based on this idea see Carens, J. H. (2013). *The Ethics of Immigration*. Oxford: Oxford University Press; Shachar, A. (2009). *The Birthright Lottery. Citizenship and Global Inequality*. Cambridge, MA: Harvard University Press.

communities, but that in our world citizenship provides individuals with hugely unequal sets of opportunities. This is not an inherent feature of birthright citizenship but of the global economic and political (dis)order. If we want to overcome it, we have to address the causes of global inequality directly instead of attributing them to those rules that make individuals equal in status and rights as citizens of a particular state.

Dumbrava's critique focuses, however, on another birthright puzzle that has bothered republican theorists. Shouldn't membership in a self-governing political community be based on consent? And does it not presuppose certain attitudes and skills that first need to be developed?[7] We may expect that children who are born and grow up in the state territory or who are raised by citizen parents will eventually want to join the political community and will also acquire the skills required for political participation. Yet these are expectations rather than certainties. Dumbrava suggests therefore that 'we could delay the attribution of citizenship until such attitudes and skills are confirmed'. However, since children also depend on the state for their health and education, he adds that they could at least be granted provisional citizenship. The Latin American distinction between nationality acquired at birth and citizenship acquired at majority seems to approximate this idea.

One reading of Dumbrava's proposal is that this is just a terminological distinction harking back to Aristotle's two definitions of citizenship. If we consider as citizens those who 'give judgments and can hold office', i.e. the members of the demos, then children are indeed only provisional citizens but will automatically become full citizens at the age of majority. The other interpretation draws, however, a line between the two statuses that can only be crossed by demonstrating the right attitude and skills. Instead of naturalising immigrants into a birthright community, this community itself would be denaturalised and reconstituted through a citizenship test imposed on all provisional native citizens. It may seem a form of poetic justice to treat natives like immigrants. Yet there is a big difference between expecting and promoting citizenship attitudes and skills and making them a requirement for access to citizenship rights. The only reason why immigrants can be expected to spend a few years as residents before becoming citizens, which gives them time to develop citizenship skills, and to apply for naturalisation, which demonstrates a civic attitude, is that they are birthright citizens of another state who have grown up there.

Citizenship across generations

Dumbrava concludes by suggesting that the intergenerational continuity of democratic membership should be achieved through consolidating institutions and educating citizens rather than the legal fictions and biological contingencies of birthright citizenship. One might ask why democracies need intergenerational continuity. The answer leads us back to the original justification for ius sanguinis after the French Revolution. It should not be the rulers who determine who the citizens are, nor the citizens themselves through some democratic procedure in which they decide whom to admit or reject, nor the mere fact of subjection to the laws due to temporary presence in the territory. All of these rules lead to too much contingency and discontinuity with regard to the composition of the citizenry. Promoting civic attitudes and skills among those who are citizens is important, but it cannot resolve the puzzle who has a claim to be a citizen in the first place. Automatic acquisition of membership at birth and for life sets this question aside. It makes citizenship a part of citizens' personal identities that they are like to accept. And it allows democracies to tap into resources of solidarity and to promote a sense of responsibility towards the common good and future generations.

In a nutshell, these are my two arguments why a modified version of ius sanguinis should be accepted as necessary for democratic states:

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[7] See Dumbrava, C. (2014). Nationality, Citizenship and Ethno-Cultural Belonging, Preferential Membership Policies in Europe. Houndmills Basingstoke, Palgrave Macmillan, chapter 8, 9.

In a world of territorial states that control immigration, ius sanguinis (or *ius filiationis*) is as indispensible as ius soli for protecting the children of migrants. It provides them with the right to stay and to be admitted in their country of birth as well as their parents' country of origin. No other legal status can secure these rights as well as a birthright to dual nationality.

Deriving citizenship from unchosen and permanent features of personal identity – where and to whom one is born – sets aside the politically divisive membership question for the vast majority of citizens, creates a quasi-natural equality of status among them and signals that membership is linked to responsibilities for the common good and for future generations. No citizenship education programme can fully substitute for these signalling effects of birthright citizenship.

Tainted law? Why history cannot provide the justification for abandoning ius sanguinis

Jannis Panagiotidis*

In his thought provoking piece, Costica Dumbrava rejects ius sanguinis as 1) historically tainted, 2) increasingly inadequate and 3) normatively unnecessary. In my response, I will mainly focus on the first, historical dimension. Drawing on examples from the case of Germany, often used as the prime example to show what is wrong with ius sanguinis, I will contest the idea that ius sanguinis as such has been discredited by history.

Regarding the second and third points, I will restrict myself to the following brief observations, which are broadly in line with Rainer Bauböck's comments: while the issue of ART and citizenship raised by Dumbrava is indeed intriguing, I would go along with his own observation that this is more about the determination of legal parentage than about ius sanguinis, and with Bauböck's emphasis on social rather than biological parenthood. Discarding the ius sanguinis principle due to certain specific cases it might not adequately cover would mean throwing the baby out with the bathwater.

I am also simultaneously intrigued and sceptical regarding the suggestion to introduce a sort of 'a-national', universal status for children. Against the backdrop of recent historical research into children as the object of nationalist contestation and agitation during the first half of the twentieth century, a scenario in which 'children belonged more rightfully to national communities than to their own parents', this idea appears intuitively attractive.[1] Having said that, one can turn the argument around and see the suggested disconnection of parent and child citizenship as another attempt to claim children from their parents, this time on behalf on an imaginary inter- or supranational community. Yet in a world still (and for the foreseeable future) structured by nation states, where most so-called human rights are in fact citizens' rights, one may indeed wonder about the benefits of such a status 'above' or perhaps 'beyond' the nation if the parents cannot enjoy similar rights.

Tainted by history?

As to the argument of ius sanguinis being historically tainted, Dumbrava first of all needs to be commended for recognising that 'ius sanguinis citizenship is not conceptually "ethnic" (my emphasis, J.P.). Nevertheless, he argues that 'there are a number of ways in which the application of the ius sanguinis principle has been used in order to promote ethno-nationalist conceptions of membership'. These include 1) the maintaining of emigrant citizenship beyond the first generation of emigrants; 2) the use of 'the principle of descent in order to confirm or restore citizenship to certain categories of people whom [states] consider to be linked with through ethnocultural ties'; and 3) the exclusion of immigrant children from citizenship by an exclusive use of ius sanguinis with no ius soli elements.

Regarding the third point, I fully agree with Bauböck that it can be remedied quite easily by combining these two principles of citizenship allocation and simultaneously allow for residence-based naturalisation. The first issue is similarly unproblematic: extra-territorial transmission can simply be interrupted at a certain generational stopping point, much like the rule Germany introduced in section 4, paragraph 4 of its reformed 1999 citizenship law regarding the non-acquisition of German citizenship by the offspring of German citizens who themselves were born abroad after 31 December

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1 Zahra, T. (2008). *Kidnapped Souls: National Indifference and the Battle for Children in the Bohemian Lands, 1900-1948.* Ithaca: Cornell UP, 3; See also: Zahra, T. (2011). *The Lost Children: Reconstructing Europe's Families after World War II*. Cambridge, MA: Harvard UP, 20.

1999.[2] There is no rule that says that the transmission of citizenship to descendants has to be possible ad infinitum.

Not all types of 'descent' are the same

I would like to discuss the second point in more detail, which touches upon the topics of preferential membership policies and co-ethnic citizenship and migration.[3] Here we are dealing with a terminological confusion quite typical for much of the literature in this field. The 'ethnic descent' that Dumbrava mentions as a criterion of admission to citizenship in some cases and the descent implied in the ius sanguinis principle are not the same and should not be conflated. In fact, they are mutually exclusive: 'descent' in ius sanguinis is about descent from a citizen, whatever his or her 'ethnicity'. The 'ethnic descent' used as a criterion in some cases of co-ethnic inclusion is precisely about people who are not citizens.

The supposed historical taintedness of the ius sanguinis principle results from the conflation of these different types of 'descent', and of the related unhappy connotations of the term 'blood', which invokes associations of 'race'. A lot of this confusion was created in the Brubaker-inspired debates of the 1990s about German citizenship. In a telling example, political scientist Patricia Hogwood claimed that 'the concept and law of citizenship in Germany were originally formulated in the context of nation-state development based on cultural or '*völkisch*' nationalism. … The fact that the German legal framework for citizenship and naturalisation remains firmly rooted in the jus sanguinis principle has meant that citizenship policy in Germany is inextricably entangled in concepts of ethnicity and race. … The principle of legal privilege [for ethnic Germans] on the basis of *racial* origins smacks of the racial policies of the Nazi period …' (my emphasis, J.P.).[4]

Yet ius sanguinis per se has nothing to do with 'ethnicity' and 'race'. As Dieter Gosewinkel pointed out in his important book on German citizenship, the 'blood' here is a 'formal and instrumental' notion, not to be confused with 'substantial' blood conceptions of racial biology.[5] Those only entered German citizenship law through the Nazi Nuremberg laws. Before, a German Jew, whom the Nazis would later construe to be of a different 'race' for having the wrong 'blood', would transmit his German citizenship to his children iure sanguinis, just like other Germans whom the Nazis would construe as 'Aryans'. Ius sanguinis is ethnicity-blind. In fact, when young Israelis nowadays claim German citizenship with reference to an ancestor who fled from Germany, they also do so iure sanguinis. I would find it hard to interpret this as an objectionable *völkisch* practice. This example shows that the problem is not with ius sanguinis itself, but with the respective contexts in which it is embedded.

Co-Ethnic citizenship is a different story

Nor is ius sanguinis particularly useful (or even necessary) for the conveying of citizenship upon 'co-ethnics' in other countries. This is a whole different discussion in my opinion which cannot be used to make a case against the ius sanguinis principle. Taking again the example of Germany, the main

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2 Joppke, C. (2003). Citizenship Between De- and Re-Ethnicization. *Russell Sage Foundation Working Paper No. 204*, 12-13. The full text of the law can be found at: http://www.gesetze-im-internet.de/rustag/BJNR005830913.html

3 Dumbrava, C. (2014) *Nationality, Citizenship and Ethno-National Belonging: Preferential Membership Policies in Europe*. Basingstoke: Palgrave MacMillan, 2014; Jannis Panagiotidis, J. (2012) *Laws of Return? Co-Ethnic Immigration to West Germany and Israel (1948-1992)*. PhD Diss., European University Institute.

4 Hogwood, P. (2000). Citizenship Controversies in Germany: the twin legacy of Völkisch nationalism and the Alleinvertretungsanspruch. German Politics 9(3): 125-144, here 127, 132-133.

5 Gosewinkel, D. (2001). *Einbürgern und Ausschließen: Die Nationalisierung der Staatsangehörigkeit vom Deutschen Bund bis zur Bundesrepublik Deutschland*. Göttingen: Vandenhoeck & Rupprecht, 327.

European supplier of co-ethnic citizenship in past decades, it needs to be stressed that 'ethnic Germans' from Eastern Europe did not receive German citizenship by means of the ius sanguinis of the 1913 citizenship law. This was not possible, as in most cases they had no ancestor with German citizenship to refer to. Their claim to citizenship rested on special provisions in the constitution and expellee law, which equalised the status of German *Volkszugehörige* with that of German citizens.

At this point we leave the solid ground of formal citizenship and enter into the murky territory of 'ethnicity'. But even here, it is not all about 'descent'. While the peculiar notion of *Volkszugehörigkeit* is often identified with 'ethnic descent', it was much more complex than that: it was actually very much a political-plebiscitary notion predicated on self-avowal (*Bekenntnis*) as German to be confirmed by an 'objective' criterion, which could be language, descent, upbringing, or culture (section 6 of the 1953 Federal Expellee Law).[6] 'Descent' (*Abstammung*) – notoriously hard to define in administrative practice – was thus neither a necessary nor a sufficient condition for recognition as a German.[7]

Conclusion

In sum, I would argue that the supposed 'taintedness' of ius sanguinis has to do with issues not intrinsic to this principle of transmitting citizenship, namely restrictive admission practices and racially based exclusion. The issue of co-ethnic citizenship should be kept apart from this discussion altogether. History cannot provide the justification for abandoning ius sanguinis, as its use in certain problematic ways and contexts in the past does not mean it necessarily has to be used like that in the future. If complemented by other, inclusionary mechanisms of allocating citizenship in conjunction with increased tolerance for multiple citizenship it certainly remains a useful – and necessary – method of transmitting citizenship in the day and age of multiple transnational migrations.

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6 See: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl153022.pdf

7 I elaborate on the plebiscitary, quasi-'Renanian' nature of the German conception of Volkszugehörigkeit in: Panagiotidis, J. (2012). 'The Oberkreisdirektor Decides Who Is a German': Jewish Immigration, German Bureaucracy, and the Negotiation of National Belonging, 1953–1990. *Geschichte und Gesellschaft 38*, 503-533, esp. 511.

Family matters: Modernise, don't abandon, jus sanguinis

Scott Titshaw*

I appreciate the ideas that Costica Dumbrava and others have introduced into this debate. States' concerns about the quality and political consequences of their citizenship are important. But citizenship is a two-way street. Our discussion of ius sanguinis laws should extend beyond the concerns of states to also consider the serious practical consequences of citizenship laws on citizens, including the long-term unity and security of their families. Families facing instability or separation because children are denied their parents' citizenship are unlikely to be satisfied with the explanation that ius sanguinis is inadequate or historically tainted; the resulting individual sense of injustice might even discourage the loyalty and identification states seek in citizens.

This debate about citizenship transmission is necessary because of two modern changes in the facts of life: (1) increased international mobility based on cheap and easy transportation and communication; and (2) the advent and diffusion of assisted reproductive technology (ART) and new legal family forms (e.g., same-sex marriage and different-sex registered partnership). I will address each in turn. First, I'll explain why Dumbrava's proposal to abandon the ius sanguinis principle is an undesirable response to increased international mobility. Second, I'll build on Dumbrava's and Bauböck's recognition of the inadequacy of unlimited and exclusive ius sanguinis rules for today's families by suggesting that ius sanguinis be modernised rather than abandoned altogether. I'll also illustrate how citizenship in federal states can add an additional layer of complexity to any universal proposal regarding citizenship.

In a mobile world children need their parents' citizenship

Dumbrava's proposal to eliminate the ius sanguinis principle would increase, rather than decrease, problems based on greater international mobility. It would eliminate one tool parents currently use for transmitting citizenship to children conceived through ART. While current versions of ius sanguinis are inadequate to deal with other ART issues, that problem can be corrected. And, as Jannis Panagiotidis points out, abandoning ius sanguinis because of this inadequacy would be like 'throwing the baby out with the bathwater'. Most children are still conceived through sexual reproduction rather than ART, and many of their families would be worse off without ius sanguinis.

An example is easy to imagine. Let's say an Indian couple moves every seven years for employment reasons. They obtain residence permits, but not citizenship, in South Africa, the United Kingdom, and the United States, in turn. They also have a child in each country. Under ius soli regimes with no ius sanguinis rules, the children of these Indian parents would each have different passports (from South Africa, the UK, and the US). This might pose no problem in the short term. But what happens if a parent dies or loses his job?

Under a ius sanguinis regime, the surviving family members would be able to enter India and remain there together permanently as citizens.[1]

Dumbrava argues that such common citizenship is unnecessary to recognise and cement parent-child relationships if children of citizens have 'full migration rights But 'migration rights' or benefits are substantially less stable than citizenship rights. What if a non-citizen family member becomes

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1 India would have automatically recognised these children as Indian citizens through 2004; it still recognises a greatly eased path to apply for citizenship in this context. http://www.loc.gov/law/help/citizenship-pathways/india.php

deportable because he or she commits a crime?[2] What if both Indian parents die while the children are minors? Without ius sanguinis, the children with their different nationalities might not be allowed to remain together anywhere, let alone in India where their extended family members (grandparents, aunts and uncles) most likely live.

Dumbrava's proposal of a universal legal status for all children would ameliorate some of these problems, but only until each child reaches the age of majority. At that time they might be separated from their parents and siblings.

ART requires fixing family and citizenship law

I agree with Dumbrava's and Bauböck's rejection of exclusive, unconditional ius sanguinis rules as inadequate in dealing with the consequences of ART and modern family law.

I disagree, however, with the conclusion Dumbrava draws from his argument that 'joint citizenship adds little to the legal and normative character of the parent-child relationship'. In fact, the permanence and stability stemming from common citizenship among close family members can have profound consequences for the unity required to develop and maintain family relationships.

I also disagree with Dumbrava's argument that 'the main problem' is that ius sanguinis 'is parasitic on external factors concerning the legal determination of parentage'. In fact, some federal States already delink federal citizenship determination and state or provincial family law,[3] creating greater problems than do citizenship laws that reflect legal parentage. In the United States, for example, legal parentage is generally a matter of state law. Yet, the US Constitution defines citizenship as an exclusively federal matter,[4] and Congress has established and revised a complex, autonomous algorithm for determining when a citizen parent transmits US citizenship to a child born abroad.[5] The problematic example Dumbrava points out regarding parents' inability to transmit US citizenship to children conceived through ART was created by a misguided autonomous federal policy, not parentage determinations under family law.[6] It could, and should, be corrected by federal reinterpretation of its rules to rely on family law parentage determinations.[7]

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2 While hardship of citizen relatives is sometimes considered, US immigration law generally requires removal of non-citizens who commit any of a long list of criminal infractions. 8 USC §1227(a)(2). https://www.law.cornell.edu/uscode/text/8/1227

3 (2014). A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, Prel. Doc. No 3C. Hague Conference on Private International Law,66-68 (listing Australia, Canada and the United States as examples). http://www.hcch.net/upload/wop/gap2015pd03c_en.pdf

4 The Fourteenth Amendment guarantees that '[a]ll persons born or naturalized in the United State and subject to the jurisdiction thereof are citizens of the United States and the state in which they reside. Not only does this Amendment adopt a nearly absolute ius soli rule, but it clarifies that citizenship is a purely federal matter, with no meaningful state role beyond establishment of its own standards for recognising state residence.

5 8 USC §§1401 - 1409. http://www.uscis.gov/sites/default/files/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9696.html

6 Under current US law, a genetic and legal father and/or one or more legal and 'biological' mothers (i.e., genetic and gestational mother(s)) transmit birthright citizenship to children conceived through ART, but non-biological parents do not. Titshaw, S. (2014). A Transatlantic Rainbow Comparison: 'Federalism' and Family-Based Immigration for Rainbow Families in the U.S. and the E.U. Rights on the Move: Rainbow Families in Europe, edited by Carlo Casonato & Alexander Schuster, 189, 194-9. http://eprints.biblio.unitn.it/4448/

7 Titshaw, S. (2013). Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-Windsor World. *Vand. L. Rev.* (66), 174-75 (2013). http://www.vanderbiltlawreview.org/2013/10/revisiting-the-meaning-of-marriage-immigration-for-same-sex-spouses-in-a-post-windsor-world

Rather than misplaced reliance on family law, the problems Dumbrava and Bauböck describe regarding the application of ius sanguinis following ART are consequences of outdated family law or of international conflict-of-law issues where relevant jurisdictions define parentage differently.

To the extent that the problems stem from conflict-of-law issues, it is worth noting that the Hague Conference on Private International Law is currently exploring whether to draft a multilateral instrument on international parentage and surrogacy, which might resolve some issues.[8]

To the extent that the problems stem from outdated family law, the best solution is to fix the family law. Family law generally reflects a more individualized, in-depth understanding of parent-child relationships than do citizenship or migration laws. Based on long experience and empirical data, family law tends to favour the stability of permanent family relationships with commensurate duties and benefits in the best interests of children. By tending to ensure the same citizenship for children and their parent(s), ius sanguinis rules also generally promote stable solutions in the best interests of children in a way that less permanent migration rules do not.

I agree with Bauböck that multiplicity of citizenships for children is generally not a problem, and I support his call for a more generous understanding of parenthood for purposes of citizenship transmission. But I would not opt for a *ius filiationis* proposal if it requires an entirely independent determination of social parenthood for citizenship transmission purposes. Officials dealing with citizenship issues are not as well suited to determine these issues as those administering family law. Also, too much generosity in this area might instigate cross-border mischief in familial disputes by 'social parents'.

Instead, I would suggest replacing all outmoded rules that fail to consider parental intent and the best interests of the child in the context of children conceived through ART, whether these are family laws determining parentage or autonomous federal citizenship laws reading ius sanguinis as a literal 'right of blood'.

[8] At: http://www.hcch.net/upload/wop/gap2015pd03a_en.pdf

Abolishing ius sanguinis citizenship: A proposal too restrained and too radical

Kristin Collins*

Costica Dumbrava maintains that ius sanguinis citizenship is a historically tainted, outmoded, and unnecessary means of designating political membership. He argues that it is time to abandon it. His proposal is bold, and it has significant implications for an array of policies and practices. The parent-child relationship not only serves as a basis for citizenship transmission; it also entitles individuals to immigration preferences, and – in some countries – it facilitates automatic or 'derivative' naturalisation of the children of naturalised parents. In many countries that recognize ius soli citizenship, the parent-child relationship serves as an added requirement: one must be born in the sovereign territory and be the child of a citizen or a long-term legal resident. Dumbrava limits his challenge to ius sanguinis citizenship per se, and even suggests that family-based migration rights could be used to minimise the disruptive effect of abolishing citizenship-by-descent. But his core complaints about ius sanguinis citizenship – the mismatch of biological parentage and political affinity, the difficulties of determining legal parentage – can be, and have been, levied against these various family-based preferences and statuses, which are likely found in every nation's nationality laws. It is therefore important to consider his proposal in light of the role that the parent-child relationship plays in the regulation of migration, naturalisation, and citizenship more generally. With this broader context in mind, I concur with Rainer Bauböck and Jannis Panagiotidis that Dumbrava's proposal rests on an under-informed assessment of the historical record. I also argue that that, as a remedy for the problems that he has identified, Dumbrava's proposal is at once too restrained and too radical.

The Complex History of Ius Sanguinis Citizenship

Dumbrava first argues that ius sanguinis citizenship should be abolished because, historically, it has been associated with ethno-nationalist conceptions of citizenship. I appreciate Panagiotidis' insistence that 'the problem is not with ius sanguinis itself, but with the respective contexts in which it is embedded'.[1] Panagiotidis also reminds us that ius sanguinis citizenship has sometimes functioned to create political communities that draw from different ethnic and religious groups, as in the case of German Jews whose membership in the German polity was secured by the country's ius sanguinis laws prior to the Nazi era. I want to elaborate and underscore the importance of this point with an additional example from United States history: During seventy years of Chinese exclusionary laws, ius sanguinis citizenship provided one of the very few routes to entry, and to American citizenship, for ethnic Chinese individuals born outside the U.S. For precisely that reason, exclusionists sought to limit or repeal the ius sanguinis statute, which recognised the foreign-born children of American fathers as citizens.[2] If one expands the historical frame to include parent-child immigration preferences and derivative naturalisation, the story becomes even more complex. By 1965, the race-based exclusions and national-origins quotas had been abolished, and previously excluded Asian families began

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1 Jannis Panagiotidis, 'Tainted law? Why History Cannot Provide the Justification for Abandoning Ius Sanguinis', in EUDO Citizenship Forum.

2 For a discussion of these laws and efforts to restrict the recognition of ethnic Chinese individuals under the ius sanguinis citizenship statute, see Kristin A Collins, K.A. (2014). Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation. *Yale Law Journal 2134*, 2170-2182. Starting in 1934, the ius sanguinis statute also allowed American mothers to transmit citizenship to their foreign-born children. See id. at 2157.

immigrating to the U.S. in unprecedented numbers.[3] They were able to do so by relying on the generous family-based preferences in American nationality law, which facilitated entry, settlement, and – especially significant to this discussion – derivative naturalisation for children.[4]

Even a cursory review of the historical record thus counsels a cautionary assessment of the contention that ius sanguinis citizenship's tainted past justifies its abolition. First, calls to end ius sanguinis citizenship have their own ugly history. Second, although one cannot gainsay that, in certain circumstances, ius sanguinis citizenship has been used to maintain ethnic homogeneity, the notion that parents and children do and should share the same political affiliation has also facilitated racial, ethnic, and religious diversification of some political communities. Rather than abolish ius sanguinis citizenship wholesale, we should be alert to the ways that it can operate as a tool of ethnic exclusion and degradation in particular socio-legal contexts, and work to minimise those effects.[5]

A Proposal Too Restrained and Too Radical

To be fair, Dumbrava does not extend his proposal to migration and naturalisation policies that enlist the parent-child relationship; indeed, he would preserve such migration policies. He speaks only of traditional ius sanguinis citizenship, and argues that it often fails to map on to the reality of modern family formation, making it inadequate to 'deal with contemporary issues such as advances in assisted reproduction technologies' (ART), same-sex coupling and marriage, and the steady rise of nonmarital procreation. The problems Dumbrava identifies in this regard are important and difficult. But as a remedy for these problems, abolishing parent-child citizenship transmission is simultaneously too restrained and too radical. It is too restrained because, after abandoning ius sanguinis citizenship we would still be confronted with the difficulty of determining which parent-child relationships should count for purposes of regulating migration, derivative naturalisation, and (in many ius soli countries) birthright citizenship. Moreover, in all of these contexts, the 'fundamental normative questions about who should be a citizen in a political community' – and about the role that the parent-child relationship should play in that determination – would persist.

At the same time, Dumbrava's proposal is too radical. He argues that ius sanguinis citizenship is not necessary to protect children from statelessness and 'adds little to the legal and normative character of the parent-child relationship'. On this point I agree entirely with Bauböck and Scott Titshaw that Dumbrava underestimates the disruptive potential of his proposal. If all countries recognised unrestricted ius soli citizenship, Dumbrava's assertion that ius sanguinis citizenship is unnecessary to prevent statelessness would be basically correct. But, in fact, very few ius soli countries go that far. Instead, as noted, they use ius sanguinis concepts to restrict the operation of ius soli birthright citizenship, thus leaving some children at a risk of statelessness if traditional ius sanguinis citizenship were abolished. And it is not just formal statelessness that would increase in a world without ius sanguinis citizenship. Children whose citizenship does not align with that of their parents can find themselves divided by nationality from the individuals who are charged, ethically and legally, with their care. As Bauböck and Titshaw observe, in an era of voluntary and compelled migration, ius sanguinis is the most effective method of protecting against such destabilising and precarious circumstances.

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3 See Reimers, D. (1983). An Unintended Reform: The 1965 Immigration Act and Third World Immigration to the United States. *Journal of American Ethnic History 9(3)*: 23-24; Ong Hing, B. (1999). *Making and Remaking Asian America Through Immigration Policy, 1850-1900.* Stanford: SUP, 81-120.

4 See, for example, *Immigration and Nationality Act of 1952*, 66 Stat. 163, 245, § 323.

5 A particularly notable example of how ius sanguinis principles can operate as tools of ethno-racial exclusion is the 2013 ruling of the Constitutional Tribunal of the Dominican Republic, TC/0168/13, which effectively expatriated ethnic-Haitian individuals born and residing in the D.R., leaving hundreds of thousands of people stateless.

How to Modernise?

I agree with Titshaw and Bauböck that the modernisation of ius sanguinis citizenship, rather than its complete repudiation, offers a better way to address the problems Dumbrava identifies. The difficult question is how? I am hesitant to embrace Titshaw's proposed method of modernisation, and I offer a friendly but important amendment to Bauböck's proposal.

Titshaw argues that the officials who administer citizenship law should adhere to the parentage determinations made by officials who generally administer family law. In the U.S., these are state-level family law judges applying state law. But domestic family law, in the U.S. and elsewhere, does not necessarily generate ideal or even tolerable outcomes on questions of citizenship. Titshaw holds up a particularly poorly drawn U.S. federal policy that regulates ius sanguinis citizenship as it applies to foreign-born children conceived using ART, but there are many examples of how the use of state family law to regulate citizenship transmission has generated equally objectionable outcomes. [6]

Alternatively, Bauböck would have us adopt a '*ius filiationis*' standard that recognises the 'social parent' or the 'primary caregiver' as the parent for purposes of ius sanguinis citizenship. He urges that this would help remedy the 'mismatch between biologically determined citizenship and parental care arrangements that would also open the door to abusive claims'.[7] He is correct. My concern, however, is that his emphasis on 'social parenting' and 'primary caregiving' is insufficient and has its own perils. First, it could increase the likelihood of abusive denials of citizenship by officials who, at least in the U.S., are often all too eager to find reasons to reject claims to citizenship.[8] In the case of nonmarital children – who make up a far greater portion of the global population than children conceived through ART – the restriction of parent-child citizenship transmission to 'primary caregivers' could lead to circumspect treatment, or outright rejection, of the father-child relationship as a basis for citizenship transmission. Indeed, the primary caregiver standard could stymie the caregiving efforts of unwed fathers who are divided by nationality from their children, and hence may never be able to establish themselves as the 'primary caregiver'. The emphasis on caregiving as a prerequisite could also aid unwed fathers who prefer to avoid parental responsibility by distancing themselves geographically from their children. The result: a ius sanguinis citizenship regime that would buttress gender inequality by undermining men's parental rights and helping them to avoid their parental responsibilities.[9] Moreover, and regardless of one's view of the equities as between parents, it is ultimately the nonmarital child's citizenship and migration rights that could be destabilised, depending on how officials understood the concept of 'social parent'. Dumbrava recognises the inequities associated with 'the differential treatment of children born within and out of wedlock with respect to access to citizenship', but his solution – to abolish parent-child citizenship transmission altogether – would give cold comfort to nonmarital children and marital children alike.

This is not an endorsement for a purely genetic model of citizenship transmission. Despite the references to 'blood', ius sanguinis citizenship has never rested on purely biological conceptions of citizenship. Traditionally, marriage was fundamental to the ability of fathers to secure citizenship for their children, and – at least in the development of U.S. law – the presumption that the mother is the

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6 For example, in 1940 the federal ius sanguinis citizenship statute was amended to include the nonmarital children of U.S. citizen fathers under certain circumstances, such as when the father had 'legitimated' the child. Federal officials turned to the law of the father's domiciliary state to determine whether legitimation had, in fact, occurred. In the 1940s and 50s, marriage to the child's mother was a very common mode of legitimation, but federal officials making citizenship determinations would not recognise an interracial marriage as the basis of a child's citizenship claim if the father's home state banned such marriages – and many did. See Collins, 'Illegitimate Borders', above n 2, at 2210.

7 Rainer Bauböck, '*Ius Fliationis*: A Defence of Citizenship by Descent', EUDO Citizenship Forum.

8 See, for example, Saldana Iracheta v. Holder, 730 F.3d 419 (5th Cir. 2013).

9 I develop this argument in: Collins, K.A. (2000). When Fathers' Rights Were Mothers' Duties: The Failure of Equal Protection in Miller v. Albright. *Yale Law Journal* (109) 1669, 1699-1705, and in 'Illegitimate Borders', above n 2, at 2230-34.

sole caregiver of the nonmarital child led to the recognition of the mother-child relationship as a source of citizenship for foreign-born nonmarital children.[10] Rather, I suggest that – unless and until we move beyond citizenship as the enforcement mechanism for basic human rights, and beyond the family as a foundational source of material and psychological support for children, we cannot overstate the importance of the generous recognition of the parent-child relationship for citizenship transmission. The modernisation of ius sanguinis citizenship should thus include the recognition of 'social parents' and parents with 'custodial rights'– as Bauböck rightly asserts – and also recognition of all who can be held legally responsible for a child's care or support. Dumbrava may be unhappy that the whims of parents, people's reproductive choices, and factors beyond the control of the individual would continue to determine membership in a political community. But it is precisely because citizenship designations rest on factors such as these that I wholly agree with his admonition that we channel our efforts 'towards consolidating democratic institution and promoting citizenship attitudes and skills among all those who find themselves, by whatever ways and for whatever reason, in our political community'.

[10] See Collins, 'Illegitimate Borders', above n 2, at 2199-2205.

Citizenship without magic

Lois Harder*

I share Costica Dumbrava's critique of ius sanguinis citizenship, and ultimately what is, I think, his rejection of birth as the basis for political membership generally. Of course, there are issues of practicality - of the world as we find it - that might limit whether and how one would advance the abolishment of birthright citizenship in light of specific political dynamics. But it is precisely those practicalities, and the near unthinkability of alternatives to birth-based citizenship that demand our interrogation of birthright in the first instance. As Joseph Carens has argued with respect to his advocacy of open borders, 'even if we must take deeply rooted social arrangements as givens for purposes of immediate action in a particular context, we should never forget about our assessment of their fundamental character. Otherwise we wind up legitimating what should only be endured'.[1]

In his contribution to this forum, Rainer Bauböck defends birthright citizenship and argues that in both of its iterations (ius sanguinis and ius soli) it avoids political division and 'creates a quasi-natural equality of status' among citizens who are entitled to claim it. But what about the inequality that divides the entitled from the unentitled? Political communities may be unavoidably bounded, but if a normative commitment to human rights is our guiding frame, it seems incumbent upon us to advance methods or prospects for membership that reduce the barriers to belonging as much as possible. Moreover, as Jacqueline Stevens trenchantly observes, in defining the bounds of equal citizenship, borders also form the boundaries of our non-emergency expressions of compassion.[2] To the extent that birthright entitlement advances a seemingly unassailable claim to exclusionary membership, its advocacy runs counter to a broader commitment to humanitarianism.

Bauböck's description of birthright citizenship evades the fact that establishing citizenship through birth, as with any other basis for membership, is an inherently political decision. One of the central appeals of birthright is that it involves innocent, vulnerable babies, infants who are not (yet) marked by misdeeds, criminality, inadequate knowledge or commitment, or the wrong ideological proclivities. It is this innocence that helps to obscure the profoundly political basis of birthright; that makes it possible to describe birthright citizenship as avoiding political division and establishing a quasi-natural equality. However, the use of criteria of birth to determine political membership – whether it is birth to a citizen parent (variously defined) or birth in the territory (variously defined) – is not innocent. Prevailing views about

- wedlock and patriarchal forms of social organisation (e.g. unwed mothers having responsibility for their children and conferring citizenship, but unwed fathers having no such responsibility or capacity);
- the relative significance of biological and social parenting as well as gender and sexuality (can a lesbian co-mother confer citizenship on her genetic progeny to whom she did not give birth – just as fathers do?);
- national attachment (is this child born abroad as second or subsequent generation?); and
- how generous territorial definitions should be (is a child born to a Ugandan mother on an American airline flying in Canadian airspace from Amsterdam to Boston a Canadian? Answer = yes)[3]

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1 Joseph Carens, J. (2013). *The Ethics of Immigration*. New York: Oxford University Press, 229.

2 Stevens, J. (2010). States without Nations: Citizenship for Mortals. New York: Columbia University Press, 9.

3 Levenson, M. (2009) 'Birth and joy midflight' Boston Globe 1 January 2009. http://www.boston.com/news/local/massachusetts/articles/2009/01/01/birth_and_joy_midflight/?page=full

all play out in the rules that determine birthright entitlement. The magical power of birthright citizenship is that it makes it possible for us to know and rehearse these rules while simultaneously making birthright seem straightforward, static and apolitical. In contrast to citizenship debates that engage migration, legal and illegal status and naturalisation, birthright citizenship makes these political choices disappear with a wave of a wand.

I am currently researching a book on the lost Canadians. These are people who thought they had a birthright claim to Canadian citizenship, but subsequently learned that they were mistaken. Their difficulties arose for various reasons, and have now largely been resolved through statutory amendment (a rule change). In making their case to Parliament, the courts and the media, their primary, and highly successful, strategy, was to denigrate the rule-boundedness of 'mean-minded bureaucrats' and advance the merits of their claims through appeals to lineage and blood-based belonging.[4] Despite being born in the UK, residing in Canada for five years as a small child, and having subsequently lived in the UK for six decades, one such lost Canadian insisted, 'I, sir, am a Canadian. To the roots of me, to the spirit of me, to the soul of me, I'm Canadian'. [5] This impassioned claim to Canada – not exactly your 'go to' example of an ethnic nation – nonetheless succeeds as a rhetorical strategy because it re-enchants the nation,[6] underscoring the country's desirability to the Canadian public, and insisting that this connection is an essential feature of her identity. This is a logic that only works in a world of birthright citizenship. And it is a strategy that eventually succeeded in securing legislative amendments, because the birth-based claims of the lost Canadians (and not necessarily residency or connection) carried an overwhelming political potency.

To the extent that birthright citizenship enables progressive people to cordon off a substantial portion of membership determination from a potentially nasty political debate, one can certainly understand its attractions. But the occlusion of politics with an unsupportable appeal to nature is ethically dubious. If we are committed to democratic equality, we need principles to manage how we live together that refuse the privilege of birth over naturalisation, and that require us to come to terms with our mortality.[7] Political membership should be a lively, on-going process of negotiation in which everyone has a stake. Some critics might argue that abandoning birthright citizenship and its intergenerational character will create the conditions for decision making in which we are no longer future-oriented, or indeed, that we will neglect the lessons and obligations of our past. If our children do not have a stake in the polity to come, why should we commit ourselves to making it better? This kind of argument is morally bereft. We can continue to care about the future and attend to the damages we, and our ancestors, have wrought, even if, or precisely because, our political membership is limited by our mortality. It was, of course, ever thus.

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4 Canada, 26 February 2007, House of Commons Standing Committee on Citizenship and Immigration 39th Parliament 1st Session no. 38. (at 11:50).

5 Canada, 26 February 2007, House of Commons Standing Committee on Citizenship and Immigration 39th Parliament 1st Session no. 38. (at 11:45).

6 Honig, B. (2001). *Democracy and the Foreigner*. Princeton: Princeton University Press, 74.

7 For a full elaboration on the dangers of intergenerational citizenship, see Stevens (2010), at n.2 above.

The Janus-face of ius sanguinis: protecting migrant children and expanding ethnic nations

Francesca Decimo*

Costica Dumbrava's proposal for abandoning ius sanguinis is timely and bold. My intuition is to reject his suggestion that children's citizenship might be disconnected from that of their parents, but to join his advocacy for a radical rethinking of the ius sanguinis principle with a view towards eliminating it once and for all. These are rather contrasting stances in relation to the same principle. Let us see if the apparent contradiction can be resolved.

To begin, let us consider the element of Costica Dumbrava's proposal that has elicited most attention and controversy among the respondents, but was picked up and expanded by Lois Harder, namely the assertion that granting citizenship at birth is unnecessary and, above all, that making children dependent on the legal status of their parents exposes them to a form of vulnerability. The idea of postponing the acquisition of citizenship until adulthood, taking into account birthplace and residence or possession of the appropriate attitudes and skills, derives from the classic opposition between ius sanguinis and ius soli according to which the former is considered ethnic and exclusive while the latter is considered civic and inclusive. Yet Rainer Bauböck's comments on this point explain how, in the absence of parental transmission of citizenship to children, ius soli and *ius domicilii* can generate individual and familial conditions that are both legally paradoxical and morally unfair.

I share the doubts and critiques raised by Rainer Bauböck, Scott Titshaw and Kristin Collins regarding the alleged emancipatory value of a citizenship system that disconnects children from their parents. Particularly, I consider any legal system that fails to specifically protect the relationship between parents and children to be highly risky. Indeed, who should children depend on if not their parents? Dumbrava's proposal that children might instead be subject to, and protected by, a kind of international law faces the problem of subordinating the individual and familial reproductive spheres to institutional logics.

As Luc Boltanski has noted,[1] the event of birth is inextricably linked to the definition of belonging and social descent – and therefore legal, political, cultural, national, etc. descent as well. Historically, devices for legitimating the procreative event were provided by religion, ancestry, the nation-state and, in more recent times, a long-term relationship among a couple. In a scenario in which parentage and citizenship are not tightly connected from the beginning, the risk is not only that of generating stateless children but also an excess of state power. Even after World War Two, the Catholic Church in Ireland took children considered illegitimate away from their unmarried mothers. It was nationalist demographic policies, both in Europe and overseas, that shaped the reproductive choices of individuals and families during the 20th century with a view to producing children for the fatherland. We might recall these policies when interpreting some recent nationally-oriented arguments encouraging the children of immigrants to rid themselves of the burden of their cultures of origin in which their inadequately assimilated mothers and fathers remain stuck.[2] With this in mind, do we really want to define children's citizenship irrespective of their parents'? Do we really want to shift the task of determining the legitimate membership of our offspring from relationships to institutions?

The considerations made thus far therefore lead me to agree with those who have argued that, as long as the system of nation-states regulates our rule of law, children's citizenship must be linked from birth to that of their parents.

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* University of Trento.

1 See Boltanski L. (2004). *La condition foetale.* Paris: Gallimard.

2 See Hungtinton S. (2004). *Who are we?* New York: Simon and Schuster.

At the same time, it seems to me that ius sanguinis is a legal instrument which, especially in a global context of increased geographical mobility, opens the way to policies of attributing nationality that go far beyond protecting the parent-child relationship. This point relates to Dumbrava's observation that ius sanguinis is historically tainted that was critically addressed by Jannis Panagiotidis but has not yet been decisively refuted.

As scholars have noted, ius sanguinis makes it possible to recognise a community of descendants as legitimate members of the nation regardless of its territorial limits, but that is not all. This principle has been used to grant the status of co-national to individuals dispersed not only across space but also across time, leading to the construction of virtually inexhaustible intergenerational chains.[3] This principle is based on blood, identified as the essential and primordial element of descent, belonging and identification. It is true that this potential for unlimited intergenerational transmissibility is effectively defused by the fact that many countries interpret ius sanguinis narrowly, applying it generally only up to the second generation born abroad. And yet, is this limit enough to bind and delimit the potential of ius sanguinis? In national rhetoric the image of a community of descendants continues to exert a powerful appeal that goes beyond the attribution of birthright citizenship. In historical emigration countries - but also others -,[4] ius sanguinis as a legal practice is used to grant preferential conditions and benefits to descendants as part of the direct transmission or 'recovery' of ancestral citizenship well beyond the second generation.[5] Generational limits in the granting of citizenship to descendants can thus be bypassed because, in principle, ius sanguinis itself poses no particular restrictions in this regard.

The most controversial aspects of ius sanguinis emerge when this principle ends up competing with ius soli or *ius domicilii*, that is, when individuals born and raised elsewhere enjoy a right to citizenship in the name of lineage and an assertion of national affiliation while immigrants who participate fully in the economic, social and cultural development of the country are denied this same right or face serious obstacles in accessing it. In such context — Germany in the past and Italy today – the right to citizenship effectively becomes a resource which, like economic, human and social capital, is distributed in a highly unequal way, benefitting certain categories of people – 'descendants' – at the expense of others – 'foreigners'.

In view of its unlimited intergenerational potential, I conclude that, if its purpose is merely to bind children's citizenship to that of their parents, ius sanguinis as a legal instrument suffers from ambiguity and disproportionality. All of these critical points seem to be implicitly overcome in Bauböck's proposal of a *ius filiationis* principle, which would focus entirely on linking children's citizenship to that of their parents, especially for migrants and non-biological offspring. Under a different name and with distinct content, does this move not suggest that, rather than modifying or modernising ius sanguinis as advocated by Rainer Bauböck and Scott Titshaw, it is time to abandon it once and for all, adopting in its place a principle that explicitly protects parentage and citizenship in contexts of geographical mobility instead of linking it to genealogical lineage and nationhood?

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3 See: Brubaker R. (1992). *Citizenship and Nationhood in France and Germany*. Cambridge: Harvard University Press.

4 Joppke's comparison of three highly divergent countries, France, Italy and Hungary, is quite effective in shedding light on this issue in Joppke C. (2005). *Selecting by Origin*. Cambridge: Harvard University Press, 240-250

5 For an in-depth analysis of the Italian case, see Tintori G. (2013). *Naturalisation Procedures for Immigrants*. Florence: EUI, EUDO Citizenship Observatory. http://cadmus.eui.eu/bitstream/handle/1814/29787/NPR_2013_13-Italy.pdf?sequence=1

The prior question: What do we need state citizenship for?

David Owen*

In his kick-off contribution, Costica Dumbrava offers a threefold critique of ius sanguinis as a norm of citizenship acquisition. In reflecting on this critique, I share the scepticism expressed by Rainer Bauböck, Jannis Panagioditis, Scott Titshaw and Kristin Collins. In particular I would note, along the lines of Titshaw's Indian family example, that the abolition of ius sanguinis would have led in my own family context to four siblings, of whom I am one, being split among three different nationalities: Nigerian, British and Malaysian). However rather than address Dumbrava's critique head on, I want to suggest that the kind of critique of ius sanguinis that he offers – and the same point would apply to the critique or defence of any of the classic membership rules taken singly as free-standing norms – gets things moving askew from the start. To see this, one needs to take a step back and situate this debate within a slightly different context. When asking what citizenship rules we ought to endorse or reject, we ought to begin with a prior question: 'what do we need state citizenship rules for?'

In a world of plural autonomous states, there are two basic functions that such rules are to play:

1. to ensure that each and every human being is a citizen of a state and hence that everyone has, at least formally, equal standing in a global society organised as a system of states;
2. to allocate persons to states in ways that best serve the common interest, that is, where this allocation supports protection of the fundamental interests of individuals, the realization of the common good within states and the conditions of cooperation between states.

A plausible response to these requirements is a general principle that Ayelet Shachar calls '*ius nexi*' which highlights the importance of a genuine connection between persons and the state of which they are citizens.[1] The notion of 'genuine connection' can be glossed in terms of Bauböck's 'stakeholder' view which proposes that those and only those individuals have a claim to membership of a polity whose individual autonomy and wellbeing is linked to the collective self-government and flourishing of that polity.[2] It seems to me that we should see ius soli, ius sanguinis and *ius domicilii* under the general principle of *ius nexi* as denoting different routes through which a genuine connection is presumptively established: through parental citizenship, through place of birth and through residence.

Seeing each of these rules under this more general principle, rather than seeing each as a single free-standing norm, makes clear two points that are salient to this discussion. First, that in adopting any of these rules we are not reifying 'blood' or 'territory' or 'residence'. We regard them instead simply as acknowledgments of the diverse ways in which *ius nexi* may be given expression – and we need each of them if we are to do justice to the relations of persons to states. Second, that each of the ius soli, ius sanguinis and *ius domicilii* rules should be qualified by the general principle of *ius nexi* that they serve. So, for example, an unlimited ius sanguinis rule or a ius soli rule that included a child born to visiting tourists or a *ius domicilii* rule that granted citizenship after three months residence would be incompatible with the overarching *ius nexi* principle.

Still it would be in line with Dumbrava's argument for him to object that the 'birthright' rules of ius soli and ius sanguinis can only operate on the basis of the general presumption that parental citizenship and place of birth establish a genuine connection, so why not wait until the children reach their majority? Here I concur with the view advanced by Bauböck that the adequate protection of children's rights implies that 'children need not only human rights, they also need their parent's

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1 Shachar, A. (2009). *The Birthright Lottery*. Cambridge:Harvard University Press.

2 Bauböck, R. (2015). Morphing the Demos into the Right Shape. Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens. *Democratization 22(5)*: 820-839, DOI:http://dx.doi.org/10.1080/13510347.2014.988146.

citizenship'. Titshaw's example of the serially mobile Indian family and my own peripatetic family history suffice to make this point. Contra Harder, I don't think that 'birthright' rules disguise the political character of membership norms, rather they acknowledge important interests of children, parents and states. Harder's stress on the relationship of those entitled to citizenship of a given state and those not so entitled doesn't provide reasons to drop either ius soli or ius sanguinis, what it does is provide reasons for relatively generous *ius domicilii* rules, of rights to dual/plural nationality and of a more equitable distribution of transnational mobility rights.

And perhaps there may be a clue here to an unstated background commitment of Dumbrava's critique. If we ask under what, if any, circumstances in a world of plural states, it could make sense to abolish ius sanguinis rules, then I think that the only answer that has any plausibility is a world of open borders characterised by rapid access to citizenship through *ius domicilii* rules. It may even be plausible that the abolition of ius sanguinis rules would generate political support for more open borders given the problems liable to be posed for sustaining the human right to a family life after the removal of such rules. Whether this is a prudent way of seeking to realise such a world and whether such a world is desirable are, of course, further questions.

No more blood

Kerry Abrams*

Problems have plagued the ius sanguinis principle—the transmission of citizenship from parent to child— for as long as it has existed. Costica Dumbrava is surely correct that the time has come to ask whether ius sanguinis is still necessary. But the core problem with ius sanguinis, I would argue, is not that it uses the parent-child relationship to determine membership but that it overemphasizes the importance of the genetic tie to this relationship.

The very term ius sanguinis —'right of blood'—makes the genetic tie the sine qua non of belonging. It is this obsession with genetic purity that has linked ius sanguinis to tribalism, xenophobia, and even genocide. This problem, I believe, is distinct from the very real need to ensure children's access to the same geographic territory and legal system as that of their parents. Rainer Bauböck's proposal for a '*ius filiationis*' based on family association rather than genetic ties would excise many of the problems caused by a focus on blood while protecting the parent-child relationship and the stability for children that flows from it.

Let me explain in more detail why I think that retaining recognition of parent-child relationships while abandoning the other features of ius sanguinis is sensible. At first glance, protecting the tying of children's citizenship to that of their parents may appear problematic because of that relationship's historical ties to property ownership. But a closer look shows that children really do deserve different legal treatment than adults, and *ius filiationis* is one critical way the law can recognise that difference.

Ius sanguinis feels retrograde today because it developed during a time in which relationships between parents and children, as well as relationships between husbands and wives and masters and servants, were much more akin to property-chattel relationships than we understand them to be today. Today's family law was yesterday's law of the household, which set forth entitlements and obligations based on reciprocal legal statuses – parent and child, husband and wife, master and servant, master and apprentice (and sometimes master and slave). Each of these relationships was hierarchical, involving responsibilities on the part of the superior party in the hierarchy (father, husband, or master) and obligations of service on the part of the inferior party (child, wife, servant, apprentice, or slave).[1] The inferior party derived identity from the superior: a wife or a child's nominal citizenship often followed that of the husband or father, but this identity did not confer the same rights enjoyed by the superior party. In early America, for example, male citizens were often entitled to the right to vote, right to contract, and right to own property (in fact, ownership of property was often a prerequisite for voting) but their wives – also technically citizens – were not entitled to any of these rights. Their political participation took the form of providing moral guidance to their husbands and raising virtuous sons who could themselves exercise political power. [2]

Today, we no longer think of citizenship in this way. The rights conferred by citizenship are understood in Western democracies as universal. If, for example, I become a naturalised U.S. citizen, the same neutral voting laws apply to me that apply to any other citizen, regardless of my gender, marital status, race, or national origin. Likewise, laws that imposed derivative citizenship on wives, and even laws that expatriated women upon marriage – both of which used to be widespread – are no longer the norm. In many parts of the world, women are no longer understood as intellectually and financially dependent on their husbands but instead as autonomous adults, capable of making their own economic, moral, and legal decisions, including the decision to consent to citizenship or renounce it. And even more dramatically, we no longer think of servants as deriving legal identity from their

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1 Halley, J. (2011). What is Family Law?: A Genealogy, Part I. *Yale Journal of Law & Humanities 23(1)*: 2.

2 Kerber, L. (1980). Women of the Republic: Intellect & Ideology in Revolutionary America. Chapel Hill: UNC Press.

masters; instead, workers are free to participate in free, if regulated, labour markets and their citizenship status is independent of their employee status. [3]

The one legal distinction, however, that all countries still maintain in determining the capacity to exercise the rights associated with citizenship is age. Children are generally considered to be incapable of giving legal consent and in need of legal protection. The particular age at which they become capable of reasoning is contested, but it is incontestable that a newborn cannot care for himself nor meaningfully choose a nationality. In many circumstances, the law provides the protection children need by requiring children's parents to provide for them, care of them, and make decisions for them; in some instances, the state takes on this responsibility (foster care and universal public education are both examples). Children occupy a very different legal space than women or workers, one that makes them vulnerable when their ties to their parents are weakened. Providing children with a citizenship that they can exercise simultaneously with that of at least one of their parents is a critical protection for their wellbeing. We can believe this to be so while simultaneously rejecting the traditional hierarchies of parent-child, husband-wife, and master-slave. The United Kingdom's move away from conceptualizing parent-child relationships as 'custodial', property-like relationships and instead describing them as involving 'parental responsibility' is a good example of this shift. The emphasis has changed from ownership and control to care and protection.

If, then, we still need a form of parent-to-child citizenship transmission, is ius sanguinis as traditionally understood what we need? Scholars, courts, and government agencies often take ius sanguinis literally, as the 'rule of blood'. But I think that rigidity is misplaced. Even centuries ago the notion of ius sanguinis meant something distinct from a pure genetic tie. For men, who could never be certain of their child's paternity, transmission 'through blood' often really meant transmission through choice. A man chose to acknowledge his children by marrying, or already being married to, their mother. Children born to unmarried mothers generally took on the citizenship of their mothers, not their fathers, regardless of whether the father was known. The notion of 'blood', then, was complicated by the requirement of marriage for citizenship transmission through the father and the man's unique ability to embrace or repudiate his offspring based on his marital relationship to their mother. Presumably, many children, prior to blood and DNA testing, acquired citizenship iure sanguinis when there was actually no blood tie, sometimes in circumstances where the father was ignorant of this fact and sometimes where he knew full well no blood relationship existed.[4] Ius sanguinis has always been about more and less than simply blood.

Thus, Bauböck's notion of *ius filiationis* seems to me both the most appropriate form today for citizenship transmission from parent to child to take, and a more accurate description of what really occurred historically. As I see it, the most challenging obstacle to implementing a *ius filiationis* system is that birthright citizenship is fixed in time. Courts are not in a position to predict on the date of a child's birth the adult who will ultimately assume parental responsibility for a child, but they can determine who the genetic or marital parent is. Shifting to a *ius filiationis* system, then, requires a multifaceted response. First, statutes outlining the requirements for citizenship transmission at birth should be amended to identify the intended parents. In most circumstances, the intended parents will be the genetic parents, but in some instances they might be someone else – for example, a non-genetic parent who contracts with a gestational surrogate or the spouse or partner of a genetic parent. Various pieces of evidence, from birth certificates to contracts to court judgments, would be necessary to determine parentage. In cases involving ART, this solution would solve many of the current problems. A genetic tie would be but one piece of evidence in determining citizenship at birth.

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[3] In contrast to the independent citizenship status of workers, employer-sponsored immigration provisions may represent the vestiges of the ancient master-servant status relationship. See Raghunath, R. (2014). *A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State*. C.U.N.Y. L. Rev. 18: 47.

[4] Kerry Abrams, K and K. Piacenti (2014.) Immigration's Family Values. *Va. L. Rev. 100*: 629, 660, 663, 692.

In addition to reforming ius sanguinis statutes, however, I believe we must also broaden the other available pathways to citizenship outside of birthright citizenship and traditional forms of naturalisation. There could be a deadline – perhaps by a specified birthday – by when a functional parent could request a declaration of citizenship for the child he or she has parented since birth. This alternative means of citizenship transmission should not substitute for birthright citizenship; as Kristin Collins points out, making citizenship determinations using only functional tests would put children at the mercy of officials seeking to deny citizenship and could disadvantage genetic or intentional fathers who may be unable to demonstrate that their care has been substantial enough to be 'functional But combined with a robust recognition of genetic and intentional parentage at birth, recognition of functional parentage later on could serve a supplemental purpose, ensuring that children will ultimately have access to citizenship rights in the country in which their functional parents reside. Full recognition of parent-child relationships requires going beyond the moment of birth so that we can recognise the individuals who actually take on parental responsibility.

It is premature to forsake the recognition of parent-child relationships in citizenship law, not when citizenship is still the mechanism for ensuring that every human being has membership in at least one state and providing access to basic human rights. But it is time that we abandoned the idea that 'blood' is the sole basis of these relationships.

Law by blood or blood by law?

David de Groot*

I agree to certain extent with Costica Dumbrava that ius sanguinis encompasses certain problematic issues, especially where it concerns newer forms of procreation, like IVF for lesbian couples and surrogacy. However, the origin of the problem cannot be attributed to ius sanguinis, but to non-solidarity of states that overuse the *ordre public* exemption for the denial of the recognition of parentage. But before delving into family relations and private international law conflicts, I would like to first argue that ius sanguinis is still the most suitable option for the main purposes of nationality law where it concerns children.

The main purposes of nationality

The commonly accepted main purposes of nationality are, first of all, that there is a territory to which an individual can always return and from which he cannot be deported, as was already pointed out by Bauböck and Titshaw; secondly, diplomatic and consular protection while being abroad; thirdly, national political participation in the state of nationality; and lastly, for EU citizens, free movement rights within the EU.

An abandonment of ius sanguinis in favour of ius soli might lead to the situation described by Titshaw, where within the same family the children might have different nationalities, which could, for example, lead to the situation that they would have to move to different countries in case of their parents' death while they are minor or that they might need to seek diplomatic protection from different foreign representations. Such a break-up of the family unit due to differing nationalities would certainly conflict with the right to family life. Therefore, for the purpose of preserving the unity and protection of the family, ius sanguinis is the most suitable option. If, when having attained majority the children feel that they have a closer bond with another nationality, they could still apply for naturalisation in that state.

This bond of attachment brings me to the national political participation purpose of nationality which is connected to Dumbrava's argument concerning the reproduction of the political community. Having the nationality of a certain state does not automatically mean integration into its society. This problem, depending on the mobility of the persons involved, does, however, not only occur with ius sanguinis and ius soli, but also with every other form of nationality transmission that one could think of. It should therefore be decided whom national political participation concerns most. If the definition of a 'state' refers primarily to a permanent population within its borders, long-term (non-national) residents should have national political participation rights and long-term absent nationals should not (except if they are working abroad in service of the state). National political participation rights should then be detached from nationality and therefore actually not be seen as a purpose of nationality (but that is a different discussion).

It should however be noted that for purpose of inclusion of long-term resident families, who for some reason have not acquired the nationality by naturalisation, into the national population, a third generation ius soli or even a second generation ius soli, in cases where the first generation migrant has entered the country at a young age, would be appropriate. However, this should not come with an option requirement for dual nationals at reaching majority, as in Germany, in order to avoid a conflict of identity if one is forced to make a choice between the nationality acquired iure soli and another nationality acquired iure sanguinis.

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Non-Solidarity of States

The problems that arise when a state does not grant its nationality to a child due to non-recognition of parentage can only occur in cases where parentage has been established by another state in accordance with its national family law. In surrogacy cases this means a non-recognition of a foreign judgement or birth certificate and in cases of dual motherhood of married or registered lesbian couples a non-recognition of the extended *pater est quem nuptiae demonstrant* principle. The *pater est* principle means that the husband of the woman that gives birth to the child is automatically considered to be the father and therefore directly at birth has a parentage link to the child. Increasingly, states have extended this principle to stable non-marital relationships and to same-sex marriages.

If the child is born in the state of the discussed nationality the national family law (mostly) applies to the establishment of parentage. It would therefore not make any sense that parentage ties to a national could be established at birth by the state in question, without also granting the nationality (if ius sanguinis is applied). The problems that arise are thus nearly always recognition issues between states.

There is a general principle of recognition of a civil status which was legally established abroad. Recognition can only be refused in cases of overriding reasons of *ordre public*. This *ordre public* principle should be limited by the best interest of the child and the right to family life. It can never be considered to be in the best interest of the child to have no parents at all instead of having parents with whom (s)he has no blood ties who want to care for her or him. This has also been stated by the European Court of Human Rights in the *Paradiso and Campanelli v. Italy case*. In that case an Italian couple had gotten a child through a surrogacy arrangement in Russia. When they brought the child to Italy the state refused to recognise the parentage ties, took the child away and placed him under guardianship. The Court stated that Italy had failed to take the best interest of the child sufficiently into consideration when weighting it against *ordre public*. It had especially failed to recognise the de facto family ties and imposed a measure reserved only for circumstances where the child is in danger. Another example where the best interest of the child should prevail is when the child from a second (polygamist) marriage is put in a worse position than a child born out of wedlock.

The problem is thus a lack of solidarity between states that do not recognise family ties legally established in another state. The parentage for the purpose of acquisition of nationality should thus be based on family law, including a more lenient approach in the private international law rules to recognition of a civil status acquired abroad.

I therefore like Bauböck's proposal of a *ius filiationis*. I see it, however, more as a change from 'law by blood', meaning parentage ties based on blood relationship, to a 'blood by law' relationship, meaning that parentage ties are seen to be established by the law. This thus means only an extension of the 'blood' definition. Bauböck's fear that this could create a situation where the child could not acquire a nationality at birth, due to the complex determination of parenthood, could technically be avoided by a pre-birth determination of parentage.

Limiting the transmission of family advantage: ius sanguinis with an expiration date

Iseult Honohan*

Costica Dumbrava has done a great service in stimulating us to reconsider the justification of ius sanguinis and to disaggregate its different forms.

I am sympathetic to critiques of ius sanguinis as a dominant mode of citizenship acquisition. Yet I acknowledge that the significance of family life for parents and children seems to offer some grounds for ius sanguinis citizenship – at least in a world of migration controls where citizenship is the only firm guarantee of right of entry to a country. I will argue here that to limit the extension of inherited privilege in this domain, however, this form of citizenship should be awarded provisionally.

Others here have shown convincingly that there is nothing inherently ethnically exclusive about ius sanguinis. Furthermore, it does not have to be understood in terms of bare genetic descent; so sorting out the deficiencies of current ius sanguinis provision does not depend on resolving all the issues of biological parenthood raised by the new reproductive technologies. If ius sanguinis can be detached from the strict genetic interpretation, it no longer provides a warrant for indefinite transmission across successive generations on the basis of biological descent. Thus two of the sharpest criticisms of ius sanguinis seem to have been defused.

It remains to consider in what way ius sanguinis might be necessary. On the one hand, various forms of ius soli can be seen as giving continuity of membership for the state and security for children born in the country. For those born in the country of their parents' citizenship there is little material difference between ius soli and ius sanguinis. But ius sanguinis citizenship may be seen as necessary when a child is born to parents living outside the state of their citizenship. Even if the child gains ius soli citizenship in the country in which she is born, this does not guarantee the security of the family. Focusing on what have been termed 'social parenthood', or functional parenting relationships of care, rather than simply biological descent, others here (Bauböck, Owen and Collins) have pointed to the way in which common citizenship best secures family life in allowing parents and children to stay together or move back to the country of their parent's citizenship.

What I want to address here is the further question: what forms or extent of ius sanguinis citizenship are warranted on the basis of this account?

Protecting families but not privilege

We may start from the consideration that those in the position of parents have an interest in and a particular responsibility to care for their children when young, implying a clear and fundamental interest in living together and being able to move together. These can be seen as necessary conditions for realising many of the intrinsic and non-substitutable goods of family life, or what have been called 'familial relationship goods', which include child-rearing and asymmetric intimacy.[1] These involve agent-specific obligations that can be realised only within family relationships of care and throughout childhood.[2] Thus this fundamental interest should be protected. Brighouse and Swift emphasise however, that we should not, in protecting these intrinsic goods, fail to distinguish them from other

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1 Brighouse, H., and Swift, A. (2014). *Family Values: The Ethics of Parent-Child Relationships*. Princeton University Press.

2 Honohan, I. (2009). Rethinking the claim to family re-unification. *Political Studies 57 (4)*: 765-87.

advantages external to familial relationship goods that parents can confer on their children, such as private education or concentrated wealth, which do not warrant protection. [3]

Can ius sanguinis citizenship, even if not based solely on genetic descent, support such unwarranted transmission of privilege? Citizenship grants more than the opportunity to live with and be cared for by your parents when you are a child. It provides membership of a political community and the benefits at least of entry and residence in that state, the right to participate in national elections and sometimes access to other rights. Under a regime of ius sanguinis, even understood as grounded in the rights of parents and children to share citizenship, the transmission of citizenship to children born to citizens abroad can mean that people with no connection to the country retain the benefits of citizenship, and, at the very least, can lead to a mismatch between the citizen body and the community of those who live in, and are particularly subject to, the state. Thus, life-long citizenship in the absence of real connections could well be seen as falling into the category of advantages that parents should not necessarily be able to convey to their children.

This is not to suggest that ius sanguinis citizenship is just a form of property or unearned privilege.[4] But there are still concerns about how to secure the legitimate interests of parents to care for their children, and of children to be protected, without justifying the transmission of privilege. My focus here is on considering how to guarantee the security of children to live and move with their parents through shared citizenship without supporting the unwarranted extension of privilege in the domain of citizenship.

This suggests the following limited justification for birthright ius sanguinis citizenship - rather than the universal child status and deferred, or provisional, ius soli citizenship that Dumbrava recommends.

Provisional ius sanguinis

First, birthright citizenship per se is justified because people need the protection of citizenship from birth.[5] Note that this is not mainly because they are children and thus innocent or particularly vulnerable (pace Harder), nor despite the fact that they are children and thus (arguably) not capable of consenting or participating politically, but while they are children, and like others, are both subject to the power of a state and in need of protection by a state. Dumbrava's proposal that children might gain a universal status of childhood and that citizenship should depend on their being able to choose, have established a connection, and developed capacities and virtues of citizenship overlooks the centrality of the legal status of citizenship to security, and the fact that this security should not be conditional on the qualities or practices of citizens.

The specific justification of ius sanguinis citizenship then derives from the way in which common citizenship between parents and children is the most secure way of guaranteeing their ability to live and move together. This can be in addition to the citizenship the child may acquire by ius soli; dual citizenship of the state of birth and that of parents' is not in itself problematic if a person has connections in both countries.

Because children need citizenship from birth, there is an argument for birthright citizenship; because young children need to be able to live with (and be cared for by) their parents, there is an argument for ius sanguinis citizenship at the time where this is most needed. Both of these concerns support an award of citizenship that is not deferred, but that is also not always retained indefinitely.

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[3] Brighouse, H., and Swift, A. (2014). *Family Values: The Ethics of Parent-Child Relationships*. Princeton University Press.

[4] Shachar, A. (2010). The Birthright Lottery. Cambridge MA: Harvard University Press.

[5] Of course, not all birthright provisions apply from birth, rather than on the basis of birth, but they generally apply from the establishment of the fact of birth, whether in the country or to a citizen.

It may be objected that the withdrawal of citizenship should not be lightly recommended. Indeed this is true. But the strongest ground for withdrawal is the absence of any genuine link between a person and the state of citizenship. Thus, writing on birthright citizenship, Vink and De Groot offer a similar suggestion:[6] 'an alternative to limiting the transmission of citizenship at birth is the provision for the loss of citizenship if a citizen habitually resides abroad and no longer has a sufficient genuine link with the state involved'.[7] Indeed they go on to say that '[f]rom our perspective, a provision on the loss of citizenship due to the lack of a sufficient link is to be preferred to limiting the transmission of citizenship in case of birth abroad', on the grounds that this gives the child herself the opportunity to decide whether to establish that link, which thus should remain available until after majority, at the point when the child is better placed to make an independent decision.[8]

Thus, the parsimonious account of ius sanguinis defended here suggests that it should be awarded only provisionally – held through childhood, but requiring the establishment of connections of certain kinds, most clearly by a period of residence in the country of that citizenship by, or soon after, majority.[9] Confirmation would not depend on abjuring any other citizenship, as the aim would not be to avoid or reduce dual citizenship, but rather to reduce the numbers of citizens whose connections to a country are minimal or non-existent.

Such a conditional citizenship could take seriously the justifiable claims of families without leading to the unwarranted extension of family advantage.

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6 Vink, M. P, and De Groot, G.R. (2010). Birthright citizenship: trends and regulations in Europe. *EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, RSCAS/EUDO-CIT-Comp. 2010/8*. Badia Fiesolana, San Domenico di Fiesole (FI), Italy.

7 Such provisions already exist in Belgium, Denmark, Finland, France, Iceland, the Netherlands, Norway, Sweden and Switzerland (see Vink and de Groot (2010)). In many of these cases, however, loss of citizenship can be pre-empted by submitting a request to retain it.

8 Vink, M. P, and De Groot, G.R. (2010). Birthright citizenship: trends and regulations in Europe. *EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, RSCAS/EUDO-CIT-Comp. 2010/8*. Badia Fiesolana, San Domenico di Fiesole (FI), Italy, 12.

9 This would not necessarily be the only basis for retaining citizenship. If, for example, the parent(s) had returned to the country of their citizenship, this also could create a connection of their potential care in old age by adult children, which might justify their retaining citizenship.

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.

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 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.

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

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.

As Costica Dumbrava rightly anticipated, 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 caring parents without blood ties. David de Groot refers to the 2015 judgment of European

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[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.

[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

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.

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.

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5 Case of *Paradiso and Campanelli v. Italy*, judgment of 27 January 2015 http://hudoc.echr.coe.int/eng#{'itemid':['001-150770']}

6 Case of *Mennesson v. France*, judgment of 26 September 2014 (Final) http://hudoc.echr.coe.int/eng#{'fulltext':['mennesson'],'documentcollectionid2':['GRANDCHAMBER','CHAMBER'],'itemid':['001-145389']}

7 Case of *Genovese v. Malta*, judgment of 11 October 2011. http://hudoc.echr.coe.int/eng#{'fulltext':['genovese'],'documentcollectionid2':['GRANDCHAMBER','CHAMBER'],'itemid':['001-106785']}

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. 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.

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

Distributing Some, but Not All, Rights of Citizenship According to Ius Sanguinis

Ana Tanasoca*

In an article published in 1987 Joseph Carens famously remarked that '[c]itizenship in Western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely'.[1] Some 30 years after, he himself offers a justification of birthright citizenship, a change of heart and mind that he partly explains by the following: 'I thought that my open borders arguments was getting at an important truth. At the same time, I recognized that it was not a practical proposal and that it did not provide much guidance for actual policy issues…'; 'In thinking about what to do in a particular situation, we have to consider questions of priority and questions of political feasibility, among other factors. One cannot move always from principles to a plan of action'. [2] Yet succumbing too much to such feasibility constraints, to use a popular term in the field, is dangerous. Moral (political) theorizing should not be too tightly hemmed in by empirical facts. Rather it should be the other way around, insofar as our moral and political theory aims to tell us what existing empirical facts we should strive to change or overcome.

That is why Costica Dumbrava's critique of the ius sanguinis principle of citizenship ascription is, in a way, a much-needed intervention.[3] While I overall agree with Dumbrava's argument that ius sanguinis is unable to cope with the diversification of family structures and not that morally appealing to begin with, I disagree with him on the details. I disagree especially with his background assumption that family ties (although not exclusively genetic, as it is presently the case) must play a salient role in the distribution of citizenship – although in the second part of this contribution I do offer a potential defence of his view against what is probably the strongest objection to his argument, which is that the abolishment of ius sanguinis would split families apart.

The main question is: Why should we insist on ius sanguinis except because it would ensure that nobody is stateless, that is, that everyone's human right to citizenship is satisfied? And insofar as statelessness can be equally avoided via ius soli, why should blood ties create an entitlement to citizenship?

The problem of making citizenship dependent on family ties

Dumbrava notices that ius sanguinis is unable to cope with the increased diversification of family structures made possible by the assisted reproduction technologies (ART). Yet there are solutions to that problem.

One would be, as Scott Titshaw notices, to reform family laws as to recognise diverse forms of parentage. Another one would be to replace ius sanguinis with *ius filiationis*, as Rainer Bauböck proposes. If the purpose of upholding ius sanguinis citizenship is to recognise and protect the family, we should replace it with more reliable indicator(s) of parenthood in the case where parenthood is no longer uniquely a matter of biology. As Kerry Abrams argues, the recognition of parenthood now requires 'going beyond the moment of birth'.

Notice, however, were multiple indicators of parenthood to be accepted, those individuals born via ART might be entitled to multiple citizenships. They might, for example, be entitled to the citizenship

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1 Carens, J. (1987). Aliens and citizens: the case for open borders. Review of Politics 49: 251–73.

2 Carens, J. (2013). The Ethics of Immigration. Oxford: Oxford University Press, x, 3.

3 I say 'in a way' because he also relies heavily on empirical facts when arguing against ius sanguinis.

of the egg donor or the sperm donor or the surrogate mother, as well as to the citizenship of those who intend to raise the child. Such a situation may be deemed problematic in various respects: first because it would create great inequalities; second, because it would end up trivializing citizenship if all types of parenthood (e.g., the relationships the surrogate mother, the egg donor or the sperm donor, and the intended parents have with the child) would be treated as equally morally relevant and therefore worthy of state recognition.

Dumbrava also bemoans ius sanguinis as failing to capture the political function of citizenship. If we grant citizenship to the children of citizens because we expect such children to develop the attitudes and skills required for political participation in their parents' state, why not wait to confer citizenship until these attitudes and skill are actually confirmed? And what would happen if they never develop these skills and attitudes? Should people be deprived of their birthright citizenship altogether, or perhaps only of their political rights? Besides, while we might have a clear idea of what skills (e.g., reading and writing to enable voting) citizenship requires, what can we say of the attitudes citizens should display? Should apathetic voters be stripped of their political rights for failing to display the right attitude towards their right to vote? According to Dumbrava's reasoning, perhaps we should.

But the main problem both with Dumbrava's critique and the other contributors' accounts is that they conceive of citizenship as primarily reflecting a bond (genetic or affective or intentional) between two individuals—the parent and the child – and not as a bond between an individual and a state, or an individual and a community. As such, it overlooks the political nature and function of citizenship. It is also likely to leave us with a very limited, rigid, and exclusionary conception of the demos, one that is at the same time unjust and inefficient. As Rainer Bauböck put it elsewhere, '[n]ormative principles for membership must instead lead to boundaries that avoid both under- und over- inclusiveness',[4] particularly in the context of increased global mobility.

In his contribution to this forum, however, Bauböck argues that birthright citizenship creates a 'quasi-natural equality of status' among those entitled to it. He represents it as avoiding divisions, by making citizenship part of people's unchosen and permanent personal features, namely, where and to whom one is born.[5] Yet as such it creates exclusion and inequality between those entitled and those unentitled that can be hard to justify or overcome, as Lois Harder rightly notices. Why should the son of a citizen of state A be entitled to citizenship in that state, but not a regular immigrant residing for years in state A, paying taxes there and having virtually all of his interests deeply affected by the institutions of state A? While the first has unconditional and automatic access to citizenship – a right to citizenship in virtue of his blood ties to another citizen – the second has to apply for naturalisation, which is subject to the state's discretionary powers. That is, his residence in that state, contributions to the community or his interests being affected by that state's institutions, do not automatically ground any right to citizenship for him in the same way blood ties do for the citizens' progeny.

Why should the boundaries of the demos be defined by family ties, rather than social or political kinship? By ascribing citizenship on the basis of blood ties we conceive of political communities as big extended families rather than communities gathered around common interests, values, and goals. Such a conception of the demos is disrespectful of individual consent (no one consents to being born, to having these parents rather than others or to the colour of their passport). It attaches too much value to contingencies and too little value to individual choices. A political community based on ancestry is, after all, just an overinflated dynasty.

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4 Bauböck, R. (2015). Morphing the demos into its right shape. Normative principles for enfranchising resident aliens and expatriate citizens. *Democratization 22*: 820–39.

5 This last bit is problematic in itself. Tying citizenship – that has an immense influence on individuals' life opportunities and welfare – to underserved and permanent personal features like ancestry is after all morally problematic even if practically convenient for states.

Limiting the scope of ius sanguinis

While abolishing ius sanguinis might be a good idea, we could nonetheless be worried that the transition costs would outweigh potential benefits. After all, most families today are still founded on blood ties. Abolishing ius sanguinis altogether could create situations where parents and children are not citizens of the same state. Such policy, it is argued by several contributors, would have the disruptive effect of potentially separating families, preventing parents from discharging their parental duties and leaving children deprived of the care they are entitled to. (Of course, nothing prevents parents from applying for a visa or for citizenship if they wish to reside or share a citizenship with their progeny; but let us assume that the parents do not have the means to do that, or that even doing that would not guarantee that they can be reunited with their child immediately as we would wish.) This is, I think, the strongest argument against Dumbrava's proposal.

One solution would be, of course, to replace ius sanguinis with another principle for citizenship allocation, perhaps affected interests or perhaps *ius domicilii*. As children's and parents' interests are interdependent, the affected interests principle would ensure that children and parents are members of the same state. So would *ius domicilii*, at least in cases where parents and children are currently domiciled in the same state (although it would provide no citizenship-based grounds for family reunion, in cases where they are not).

My proposal, however, takes a different tack. Notice that in a world with genuinely open borders we need not be worried that parents and children would be separated if they are citizens of different states. The solution I propose would therefore be to limit the scope of ius sanguinis – that is distribute some, but not all rights traditionally associated with citizenship, on the basis of ius sanguinis. This would be an appealing compromise, insofar as some of us may think citizenship should not be distributed on the basis of blood ties, while nonetheless accepting that blood ties are one (albeit not the only) relevant ground for the distribution of some categories of rights.

As Bauböck notices in his contribution, immigrant minors who are EU citizens have a 'right to stay' that protects their primary caregivers from deportation. Yet, most likely, this policy is a recognition of an entitlement to care that the child has – not a recognition of a right the parents have to stay strictly in virtue of their blood ties to the child. Blood ties may simply serve as the operational indicator of the primary caregivers.

My preferred solution, however, would entitle a person to the limited enjoyment of some rights in a state, on the basis of having blood ties to someone who is already a citizen of that state. I primarily have in view, among that limited subset of rights, the right to enter and leave the state and the right of residence. By 'limited' I also mean that the enjoyment of these rights, purely on the basis of ius sanguinis, should be time-constrained. [6]

Take the case of minors having a different citizenship from their parents. My proposal would be: either the parents should be granted extensive residence rights, until the minor reaches adulthood as in the case above; or else the minor should be granted these rights, provided the parents wish to remain in their country of citizenship. Consider the case of a couple, both citizens of state A, who move to state B and give birth there to a child, who becomes via ius soli citizen of B. Under my proposal, the parents would be automatically entitled to residence in state B until the child is 18, provided the family decides to reside in state B; equally, the child would be automatically entitled to reside in state A until 18 if the family decides to reside there.

[6] In the same vein, Iseult Honohan proposes in her contribution to this debate that minors born in another states other than that of their parents should be also entitled to their parents' citizenship but only until they reach adulthood; from then on, they can lose this citizenship if they do not continue residing in the country of parental citizenship. This would be another way of limiting ius sanguinis entitlements.

Things would be different in the case of adults. Say my mother and I are citizens of different countries, she of state A and I of state B. Under my proposal, I as an adult would not be entitled to all the current rights of citizenship in state A on the basis of ius sanguinis. Still, I may nonetheless be automatically entitled on the same ground to a right to freely enter state A and reside there for a limited period of time (for example, 1 month). That would allow me to visit and spend time with my mother, preserving my family ties intact and allowing me to discharge whatever ordinary duties I have towards family members. But what if my mother becomes frail or ill, and I become her caregiver and need to spend more than one month in state A? If the circumstances require it, I should be able to petition for my right to remain to be extended, and that petition should be automatically granted so long as authorities are satisfied that the requisite circumstances really do prevail. The period for which one can enjoy such rights, and the categories of rights one enjoys, might be extendable in this way. Alternatively, of course, I could bring my mother to reside with me in state B on a (elderly) dependent visa.

Under my proposal, there would thus be a limit to what one is entitled to under ius sanguinis alone. We should not think of the distribution of citizenship rights as an all-or-nothing affair. Among the many component rights currently associated with citizenship, different rights can and should be distributed separately according to different criteria. By the same token, many different criteria can serve as a legitimate ground for the distribution of any one of those constituent rights.

Learning from naturalisation debates: the right to an appropriate citizenship at birth

Katja Swider[*] and Caia Vlieks[♣]

Citizenship has a political and a legal dimension. In his opening contribution, Costica Dumbrava only marginally addresses the legal dimension of citizenship, acknowledging its importance, but suggesting that it is replaceable with alternative arrangements, such as a universal status for children. Maybe he is right in his priorities; maybe citizenship status should primarily be reserved for the purpose of fostering a political community. But in reality much legal baggage is attached to citizenship, and one cannot simply shake it off, even if this appears normatively attractive. In a way, the whole human rights movement can be seen as an effort to separate access to legal rights from possessing a status of political membership, and this attempt has not reached its goal (yet). As Jannis Panagiotidis points out, 'most so-called human rights are in fact citizens' rights'. Citizenship is still the 'right to have rights'. Avoidance of statelessness is therefore not just a legal whim; it is a human rights failsafe mechanism.

In our contribution we start from the assumption that leaving anyone, including (and especially) children, without a citizenship for any significant period of time is not an option due to the essential legal rights that are attached to the status of national citizenship. The question therefore is not whether children should acquire a citizenship at birth, but which citizenship they should acquire at birth. Should it be the citizenship of their parents? And if not, what alternatives to birthright citizenship arrangements are adequate?

While we consider attribution of citizenship at birth to be necessary, we also maintain that it is inherently unfair, regardless of what mechanisms of attribution are relied upon. There is nothing fair about attaching the fate of a child to one state, when states differ so tremendously in their ability (and willingness) to provide access to basic rights, such as education, healthcare, physical safety and pursuit of happiness for their minor citizens. Rainer Bauböck shifts attention from this unfairness by suggesting that 'we have to address the causes of global inequality directly' instead of criticising the contingencies of birthright citizenship. However, we should not forget that this discussion takes place largely among the privileged 'winners' of the 'birthright lottery'.[1] There is no doubt that global inequalities need to be addressed, but is it morally justifiable to suggest to the 'losers' of the birthright lottery to wait for global equality?

If fairness in birthright citizenship cannot be achieved and leaving children without any citizenship is unacceptable, what is the normative ideal that we could strive towards in attributing citizenship at birth? As Lois Harder correctly argues here, rules about birthright attribution of citizenship are as politically charged as rules about acquiring and losing a nationality during adulthood, even though the former are not as much part of the public debate. According to Harder, '[t]he magical power of birthright citizenship is that it makes it possible for us to know and rehearse [politically charged] rules while simultaneously making birthright seem straightforward, static and apolitical'. Can we reverse this logic, and perhaps also learn from the extensively politicised discourse on migrants' rights to naturalisation in order to improve birthright citizenship rules?

In particular, we suggest applying the concept of appropriate citizenship to strengthen the normative foundation of birthright citizenship attribution. This notion is based on the ideas of Ernst Hirsch Ballin, who advocates '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: a natural right to be recognized

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[1] Shachar, A. (2009). The Birthright Lottery. Citizenship and Global Inequality. Cambridge, MA: Harvard University Press.

as a citizen, born free'. [2] He believes that this type of citizenship and citizens' rights can overcome the existing gap between 'the universality of human rights' and 'the changing political and social settings of people's lives'. [3] Drawing on that, we feel that appropriate citizenship, even when acquired at birth, could do the same. Appropriate citizenship is of course a highly subjective concept, the interpretation of which would be dependent on numerous cultural and specific national legal factors. Ensuring that birthright citizenship is appropriate would imply a case-by-case evaluation of the individual situation of each newborn, a process which in most cases would be as simple as the registration of birth, but in some cases would require a complex investigation to be conducted in a very brief period of time.

While perhaps logistically counter-intuitive, introducing the normative standard of appropriateness into the attribution of citizenship at birth is not more complex than trying to solve ad hoc 'hard cases' of citizenship within the traditional logic of ius sanguinis versus ius soli. This complexity of some birthright citizenship cases has been extensively discussed in the contributions by Dumbrava and Scott Titshaw. Requiring that birthright citizenship is appropriate emphasises the importance of (meaningful) ties[4] of a person (including a child) to a country, and thus incorporates the idea of *ius nexi* discussed by David Owen. With the criterion of appropriateness we accept that birthright citizenship is a political issue, not a contingent biological fact of life, and therefore should be based in a reasoned decision-making process and subjected to normative criticism.

The requirement that citizenship acquired at birth needs to be appropriate is far from being precise. However, we believe that a certain amount of flexibility is necessary in order to ensure that attribution of citizenship at birth has a normative foundation in each individual case. The exact modes of implementation of the criterion of appropriateness would need to be developed within the individual legal systems, but important factors to be considered include the ones that have been discussed elaborately in this forum discussion:

- the nationalities of the persons that are expected to care for the child (biological, social or functional parents or otherwise, thus including and reinforcing the *ius filiationis* proposal put forward by Bauböck);
- the country where the child is born;
- the country where the child is expected to build his or her future, receive education and effectuate his or her rights as a citizen;
- the necessity of ensuring that at least one nationality is acquired and that the best interests of the child are safeguarded (in line with the almost universally ratified Convention on the Rights of the Child).[5]

It is not always easy to determine all the relevant criteria for establishing appropriateness of citizenship with a high degree of certainty. Kerry Abrams, for example, identifies some possible obstacles when discussing Bauböck's *ius filiationis* proposal, namely that courts sometimes cannot determine who will ultimately be the parent that is truly (legally) responsible for the child. However, since the proposal of appropriate nationality is based on multiple relevant factors rather than a single one, the risks associated with the inability to assess some of the factors are ameliorated by the availability of other factors that can compensate for uncertainties.

Finally, we would like to emphasize that Hirsch Ballin's ideas and the concept of appropriate nationality that we have introduced are compatible with having multiple nationalities, as well as changing one's nationality over the course of one's life. It is appropriate to enable children, as well as

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2 Hirsch Ballin, E. (2014). Citizens' Rights and the Right to Be a Citizen. *Developments in International Law 66*. Nijhoff: Brill, 145.

3 ibid. 144.

4 Or 'genuine connection(s)', see also *Nottebohm (Liechtenstein v Guatemala) ICJ Reports* 1955, p 4; General List, No 18.

5 See Articles 3(1) and 7 of the Convention on the Rights of the Child.

adults, to acquire a new nationality to reflect the changes in their personal circumstances. When attributing an appropriate nationality at birth to a child, states therefore do not need to embark on the impossible task of predicting the future.

Don't put the baby in the dirty bathwater! A Rejoinder

Costica Dumbrava*

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 ethnonationalist 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.

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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' 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 new-borns 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 no 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 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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