Bloodlines and Belonging: Time to Abandon Ius Sanguinis?

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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

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

R. Bauböck (ed.), *Debating Transformations of National Citizenship*,
IMISCOE Research Series,
https://doi.org/10.1007/978-3-319-92719-0_16

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.

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

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

3 Hailbronner, K. & A. Farahat (2015), *Country Report On Citizenship Law: Germany*. Florence: EUDO Citizenship Observatory, Robert Schuman Centre of Advanced Studies, European University Institute, available at http://cadmus.eui.eu/bitstream/handle/1814/34478/EUDO_CIT_2015_02-Germany.pdf?sequence=1

it only if they relinquish any other citizenship before their 23rd birthday. In 2011 the Greek Council of State halted an attempt to introduce ius soli citizenship in Greece[4] by claiming that ius sanguinis is a superior constitutional principle whose transgression would lead to the 'decay of the nation'.[5]

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.[6] 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.

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4 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*, available at http://globalcit.eu/greek-state-council-strikes-down-ius-soli-and-local-voting-rights-for-third-country-nationals-an-alarming-postscript-to-the-greek-citizenship-reform/

5 The Greek parliament has recently pushed forward another proposal regarding ius soli in an attempt to overcome the deadlock. See Christopoulos, D. (2015), *The 2015 reform of the Greek Nationality Code in brief*, Florence: EUDO Citizenship Observatory, Robert Schuman Centre of Advanced Studies, European University Institute, available at http://globalcit.eu/wp-content/plugins/rscas-database-eudo-gcit/?p=file&appl=countryProfiles&f=The%202015%20reform%20of%20the%20Greek%20Nationality%20Code%20in%20brief.pdf

6 European Parliament (2013), *A comparative study on the regime of surrogacy in EU Member States*. Directorate-General of Internal Affairs, Policy Department: Citizen's Rights and Constitutional Affairs, available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2013)474403.

In 2007 Ikufumi and Yuki, a married Japanese couple, travelled to India and hired Mehta as surrogate mother for their planned child.[7] 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 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

[7] Points, K. (undated), *Commercial surrogacy and fertility tourism in India: The case of Baby Manji*. Durham: The Kenan Institute for Ethics at Duke University, available at https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf

Genovese v Malta,[8] 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 per cent of total births in 1990 to 40 per cent in 2013.[9]

One of the biggest challenges to ius sanguinis citizenship comes from the spread of assisted reproduction technologies (ART). About 7 million babies worldwide have been born through ART since the birth of Louise Brown, the first 'test-tube baby', in 1978.[10] 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'.[11]

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

[9] 'Two in five EU babies born out of wedlock', BBC News, 26 March 2013, available at http://www.bbc.com/news/world-europe-21940895

[10] This number has been updated to the most recent figure. See: The European Society of Human Reproduction and Embryology (2017), *ESHRE fact sheets 1, available at* https://www.eshre.eu/~/media/sitecore-files/Press-room/Resources/1-CBRC.pdf?la=en

[11] Re: X & Y (Foreign Surrogacy), [2008] *EWHC (Fam) 3030 (U.K.)*, available at 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.[12] 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.[13]

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

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[12] Deomampo, D. (2014), 'Defining Parents, Making Citizens: Nationality and Citizenship in Transnational Surrogacy', *Review of Medical anthropology* 34 (3): 210–225, https://doi.org/10.1080/01459740.2014.890195.

[13] Brandt, R. (2015), 'Medical intervention should not define legal parenthood', *Bionews*, 11 May 2015, available at http://www.bionews.org.uk/page.asp?obj_id=523229&PPID=523190&sid=282.

woman from the UK gave birth to 'her' daughter's child.[14] 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,[15] 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 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

[14] Smajdor, A. (2015), 'Can I be my grandchild's mother?', *BioNews,* 9 March 2015, available at http://www.bionews.org.uk/page_504476.asp.

[15] Shanks, P. (2015), 'Babies from Two Bio-Dads.' *Biopolitical Times,* 3 April 2015, *Center for Genetics and Society*, available at http://www.biopolitical-times.org/article.php?id=8418.

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.