

Law by Blood or Blood by Law?

David Armand Jacques Gérard 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 nation-

ality 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*.

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 in the Chamber judgment 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. In 2017 in its Grand Chamber judgment the Court overruled this considering that in cases where there are no biological ties there must have been a longer period of cohabitation in order to establish family life with the child compared to cases where there is a biological tie. However, one should consider that if the parents had not moved to Italy, but to another Member State where the Russian birth certificate is recognised, the child might have been stateless, but family life would have been assured. After some years of family life, Italy would have no choice but to recognise this parentage and consequently grant the nationality. Therefore, slightly paradoxically, it would be in the best interest of the child if Italy would grant the nationality immediately if the parents reside in another Member State, while it is under no such obligation if they reside in Italy. 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.

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