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GROUP OF SPECIALISTS ON NATIONALITY

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**COMPENDIUM OF TEXTS ON THE
3rd EUROPEAN CONERENCE ON
"THE NATIONALITY AND THE CHILD"**

(Strasbourg, 11 - 12 October 2004)

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Table of contents

<u>Introduction</u>	3
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Reports prepared by the Rapporteurs

Is the child's acquisition of the nationality of his or her country of immigration a means of integration? by Ms Mimount BOUSAKLA (Parliamentary Assembly of the Council of Europe)	7
Reflections on nationality and integration: the example of the city of Basel by Ms Christin ACHERMANN.....	13
Acquisition of the nationality of the country of immigration for first and second generation migrant children (principles of <i>ius soli</i> and double <i>ius soli</i>) by Mr Patrick WEIL.....	27
The position of children in respect of decisions made by their parents regarding their nationality by Mr Gerard-René DE GROOT and Mr Erik VRINDS.....	39
Nationality and the protection of children across frontiers. The case of intercountry adoption by Mr William DUNCAN (Hague Conference on Private International Law)	53
Registration of children – from a continental law and a common law perspective by Ms Alenka MESOJEDEC PERVINŠEK	63
and by Mr Andrew WALMSLEY.....	71
Birth registration: Statelessness and other repercussions for unregistered children by Mr Michael MILLER (UNICEF Innocenti Research Centre).....	77
European convention on nationality – best practices for children by Ms Waltraud FUCHS-MAIR and Ms Michaela STAUDIGL.....	89

Written contributions submitted by participants

Should newly born children become citizens automatically? by Mr Juris CIBULS	103
Birthright citizenship as nationality of convenience by Mr Andrew GROSSMAN	109
Children's right to citizenship – the Swedish case by Ms Elena DINGU-KYRKLUND.....	123

<u>Conclusions of the Conference</u>	131
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Introduction

During its 21st meeting (Strasbourg, 13-15 October 2004), the Committee of Experts on Nationality (CJ-NA) considered the conclusions and proposals for follow-up to the 3rd European Conference on Nationality on the theme 'Nationality and the Child' which took place in Strasbourg on 11-12 October 2004. This consideration resulted in the following:

- the Conference on 'Nationality and the Child' had been extremely fruitful, and the report adopted by the CJ-NA in 2002 on 'Conditions for the acquisition and loss of nationality' prepared on the basis of a draft by Mr Walmsley, and which dealt inter alia with the nationality of children, has been recalled. The report identified a number of shortcomings in the European Convention on Nationality and showed the need for further co-ordination and harmonisation of nationality legislation in the Council of Europe member States.

- the conclusions and proposals for follow-up to the Conference (see document CJ-S-NAT (2008) 7), together with the report on 'Conditions for the acquisition and loss of nationality', as well as Parliamentary Assembly Recommendation 1654 (2004) on nationality rights and equal opportunities should be taken into account in the future work on preparing one or more international instruments on conditions for the acquisition and loss of nationality.

This document gathers the reports; the written contributions as well as the conclusions of this 3rd Conference.

REPORTS

IS THE CHILD'S ACQUISITION OF THE NATIONALITY OF HIS OR HER COUNTRY OF IMMIGRATION A MEANS OF INTEGRATION?

Report prepared by Ms Mimount BOUSAKLA¹

SUMMARY

Europe is a multinational continent: in 2000, 7.7 % of its population did not have the nationality of the country where they lived. Most of these foreigners are long-term immigrants and a great proportion of them are children and young people who were born in Europe.

As the multinational character of our societies increases, however, their social cohesion comes under pressure. Immigrants face difficulties in finding adequate legal employment, tend to live in housing which is of lower standards than citizens' and in areas with poorer services; they are victims of racism and discrimination. Immigrant communities risk closing themselves and nurture a feeling of separation from the rest of the society of the country where they live. This closure creates fertile grounds for extremism and violence.

This scenario does not concern only first-generation immigrants who have just arrived in Europe. Very often the most dissatisfied with society are young people, so-called second or even third generation immigrants, who were born in European countries to foreign nationals.

Facilitating the acquisition of the nationality of the country where children were born is one of the measures that the Parliamentary Assembly recommends to improve the social cohesion of our countries. This instrument, however, should be used with flexibility.

Nationality is a matter of personal identity, and the children of immigrants do belong to two cultures and two communities. The formal recognition by the State of one identity – one nationality – or two identities – two nationalities – should be based as much as possible on the choice of the person concerned.

Moreover, the acquisition of nationality should not be forced on immigrants as the only way to participate in society. In a truly democratic country, immigrants should be accepted as immigrants, provided that they respect its law and values.

Again, the possibility of acquiring the nationality of the country where the children of immigrants were born is only a starting point for their integration: equality of rights on paper does not only correspond to equality of rights in reality. Nationality law, therefore, can be a useful instrument for social cohesion only if it is used in the context of a comprehensive strategy to fight against discrimination and eradicate racism. Above all, mentalities should be changed: the public opinion should be adequately informed on immigration and integration issues, without false alarmism; Europeans need to acknowledge the multinational character of Europe.

It is often said: 'the Council of Europe, 800 million Europeans'. In fact, the Council of Europe is more than that: Europe is a continent of Europeans living as immigrants in other European countries; it is a continent receiving immigrants and refugees of non-European origin. In brief, Europe is a multinational continent of more than 800 million people. The main challenge of the Council of Europe is to ensure that its core values – commitment to human rights, democracy and the rule of law – are shared by all of them. If recourse to nationality law can help respond to such a challenge why miss this opportunity?

¹ Member of the Belgian Senate, Member of the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe

REPORT

Is the child's acquisition of the nationality of his or her country of immigration a means of integration?

Chair, Ladies and Gentlemen,

My name is Mimount Bousakla and I am a member of the Belgian Senate. I am a Belgian national but come from a Moroccan family. More often than not I feel Belgian but sometimes I feel Moroccan.

I was born in Louvain in Belgium but acquired Belgian nationality at only the age of 18, as children in Belgium keep their parents' nationality up to this age. Because my parents were not Belgian nationals, I had to apply for Belgian nationality. Even though I was born in Belgium, I had to sit a kind of examination to acquire it. I was asked for example if I could prepare a quite specific Belgian dish and although, of course, I managed to do so, it did not prevent me from asking what this had to do with my integration.

After three months I was told that I could acquire Belgian nationality.

I have been asked here today to say whether I think that children who acquire the nationality of their country of immigration find it easier to integrate. This may come as a surprise to you, but my reply is both yes and no.

Yes, because the acquisition of nationality by the child is a means of integration, and a very powerful one. I am personally convinced of this, and so is the Parliamentary Assembly of the Council of Europe, which I represent here today and which has dealt with this topic in two recent recommendations; one on the situation of young migrants in Europe², and the other on integration policies in Council of Europe member states³.

No, because integration has to come from both sides. Even if you have the nationality of the host country, the colour of your skin does not change and discrimination may persist. Having the nationality of the host country does not change your name or your origins, and so when you send off your CV, people will too often stop at your name. Laws may be adapted but unfortunately they do not always change mentalities.

1. Facts

European states are multinational societies. This statement reflects a reality:

In 2000, 7.7 % of the population of Europe did not have the nationality of the country where they lived. Before the last enlargement, 5.1 % of the total population of the European Union were non-EU nationals⁴.

Many of these foreigners are long-term immigrants: to take a prominent national example, at the end of 2000, the number of foreign nationals living in Germany was approximately 7.3 million, approximately 64 % of whom had been there for more than eight years, 48 % for more than ten years and 32 % for more than twenty years. Over two-thirds of the foreign children and young people living in Germany were born in Germany⁵.

As the International Organisation for Migration says, 'Europe has difficulty in seeing itself as a continent of immigration and a number of European countries are concerned about their national identity'. And yet it is difficult to predict that this positive immigration trend will be reversed in the foreseeable future. Europe has to take stock of its role as a continent of immigration and acknowledge its multinational character.

² Recommendation 1596 (2003)

³ Recommendation 1625 (2003) on Policies for the integration of immigrants in Council of Europe member states.

⁴ IOM, World Migration 2003, pages 29, 44 and 45

⁵ Independent Commission on Migration to Germany, Structuring Immigration – Fostering Integration, July 2001, p. 241.

2. Lack of social cohesion and immigrants' participation in society

It is a fact, however, that as the multinational character of our societies increases, their social cohesion comes under pressure.

Immigrants face difficulties in finding adequate legal employment, tend to live in housing which is of lower standards than citizens' and in areas with poorer services, including education. They are sometimes victims of discrimination and racism, coming from all sectors of society as well as from providers of public services. Furthermore, our legal systems are constructed so as to bestow different rights on citizens and on non-citizens, in all fields (social, cultural, economic, civil and political).

Immigrant communities risk closing themselves and nurture a feeling of separation from the rest of the society of the country where they live. Needless to say, this closure creates fertile grounds for extremism and violence.

It is worrying to realise that this scenario does not concern only first-generation immigrants who have just arrived in Europe. Very often the most dissatisfied with society are young people, so-called second or even third generation immigrants, who were born in European countries to foreign nationals. I say 'so-called second or third generation immigrants' because it has always struck me as surprising that people who may never have seen the country of origin of their parents are considered to be 'really' from that country rather than the country where they were born, raised, went to school and made their life.

3. Why it is a political imperative to address integration

Our language, like our legal systems, does not keep up with reality. The reality is that foreigners represent 7.7 % of the European population, and most of them are young people or children who are European-born.

Do we still believe in representative democracy? Do we still praise social cohesion as one of our main goals? If so, then we must adapt our legal systems to the new reality.

If we fail to do so we will be unable to stem violence, extremism and mistrust of diversity. We will betray our own values and fall short of our commitments.

4. The role of nationality law in the context of integration policies

Facilitating acquisition of the nationality of the country where children were born is one of the measures that the Parliamentary Assembly recommends.

It does not matter whether nationality is granted immediately, as a starting point for integration and participation in society, or after a certain period of time, in recognition of the existence of a significant link with the host country. What matters is that European countries make it possible for those 'foreign' children who feel themselves to be citizens to be recognised as such. This is in the interests of the persons concerned as well as in the interests of European countries, if they want to achieve effective social cohesion and integration.

In Council of Europe member states only citizenship gives full political rights, including the right to vote and stand in general elections. Only citizenship gives the right to reside indefinitely in a country and the consequent right not to be expelled; the right to apply for positions in the administration (ministries, diplomatic career, judiciary) or to exercise certain professions (doctors in State hospitals, military), including in the private sector⁶. This state of affairs is in stark contrast with all the efforts that States claim to put into improving the cohesion of society and the integration of immigrants.

Only by acquiring citizenship can immigrants participate fully in the society where they live. Even more so, when we consider that young 'second or third generation immigrants', who were born and raised in the host

⁶ See, for France, the study "L'insertion des jeunes d'origine étrangère", prepared by Mrs Mouna Viprey for the Economic and Social Committee, 2002

country, are likely to be the category of immigrants with the best chances of integration. Why should they be deprived of this opportunity?

The European Convention on Nationality says that each State Party shall facilitate in its internal law the acquisition of its nationality for children who were born on its territory and reside there lawfully and habitually and for persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of 18.

The Parliamentary Assembly has reiterated this position in a number of instruments.

It is time for the Council of Europe to take a stronger action: member States should be asked to modify their legislation to enable children of migrants to acquire the nationality of the country where they were born or live.

5. Some examples

I would like to mention the case of Germany, which is probably well known by many of you. Germany has recently introduced an important change of legislation. Before 2000, German nationality was essentially acquired as a consequence of descent from a German parent; since 1 January 2000, children of foreign parents automatically acquire German nationality at birth, if one of the parents has been legally and habitually residing in Germany for eight years and has the right to unlimited residence or has held an unlimited residence permit for three years. Children who have acquired German nationality on the basis of the *ius soli* principle have to choose between German nationality and the foreign nationality of their parents once they reach the age of 18. If they opt for German nationality they are required to renounce their foreign nationality.

In Belgium, the legislation has been modified and children born in Belgium can now choose their nationality at the age of 18 without sitting an examination.

6. Nationality law: an instrument to be used with flexibility

The acquisition of nationality can play a considerable role in improving the cohesion of a society, but this instrument should be used with flexibility.

Nationality is a matter of personal identity, and the children of immigrants do belong to two cultures and two communities. The reconciliation of these two identities is not always easy and in the end it depends on each individual. The formal recognition by the State of one identity – one nationality – or two identities – two nationalities – should be based as much as possible on the choice of the person concerned.

Let me mention briefly something obvious but very important at personal level: the acquisition of the nationality of the host country may have unwanted implications. As not all countries admit dual nationality, by acquiring the citizenship of the country where they live, many migrants lose the nationality of their country of origin, or the country of origin of their parents, together with its attached rights. For this reason the Parliamentary Assembly has encouraged member states to amend their legislation so as to allow dual nationality.

Besides, at the emotional level, the acquisition of another nationality may provoke a painful feeling of separation from the country of origin, with its culture and its family ties.

This is why the acquisition of nationality should not be imposed.

I will go further: the acquisition of nationality should not be forced on immigrants as the only way to participate in society. In a truly democratic country, immigrants should be accepted as immigrants, provided that they respect its law and values.

Should they not wish to acquire the nationality of the country where they live, they may still be willing to integrate and participate in society. This is why the Council of Europe and the European Union have

repeatedly advocated an approximation of the rights of legal immigrants with the rights of citizens⁷. Some EU institutions, such as the Commission and the European Economic and Social Committee have called for increased rights for migrants, in support of the concepts of 'civic integration' and 'civic citizenship'⁸; the Council of Europe has affirmed the principle of equality of rights and opportunities for equality of obligations⁹.

7. Nationality law as an instrument to be used in conjunction with other policy measures

The possibility of acquiring the nationality of the country where the children of immigrants were born is only a starting point for their integration: equality of rights on paper does not only correspond to equality of rights in reality.

Nationality law can be a useful instrument for integration only if it is used in the context of a comprehensive strategy to ensure effective equality. The legal framework to fight against discrimination and eradicate racism should also be strengthened. Above all, mentalities should be changed: public opinion should be adequately informed on immigration and integration issues, without false alarmism; Europeans need to acknowledge the multinational character of their society; immigrants need to be encouraged to participate in the life of the host country.

8. The role of the Council of Europe and this Conference

There is much work ahead for the Council of Europe in this field.

First of all, it should take action to promote a change in the legislation of member states to make it more flexible and adequate to the needs of immigrants and foreign residents. The Council of Europe is in a position to assist member states in this process through its great expertise in nationality law. I would like to highlight that this expertise is unique in the panorama of international organisations, since the Committee of Experts on Nationality is the only intergovernmental committee with a mandate specifically addressing nationality law.

Secondly, the European Convention on Nationality should be amended, or complemented, so as to include specific provisions on the acquisition of nationality by children of immigrants, and in particular children born to foreign parents lawfully and habitually resident in a Council of Europe member state.

I hope that this Conference will be an opportunity to start this important work. The Parliamentary Assembly, for its part, expresses its full support.

9. Conclusions: 800 million Europeans?

Chair, Ladies and Gentlemen,

It is often said: 'the Council of Europe, 800 million Europeans'. In fact, the Council of Europe is more than that.

Europe is a continent of Europeans living as immigrants in other European countries; it is a continent receiving immigrants and refugees of non-European origin. In brief, Europe is a multinational continent of 800 million people. The main challenge of the Council of Europe is to ensure that its core values –

⁷ See the above mentioned Assembly Recommendation 1625 (2003) on Policies for the integration of immigrants in Council of Europe member states. For the European Union, it is worth mentioning the Conclusions of the European Council of Tampere: '18. The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens'.

⁸ See the Conclusions of the European Conference on the integration of immigrants, organised by the European Economic and Social Committee in September 2002 at www.esc.eu.int; see also Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, 3.6.2003, COM (2003) 336 final.

⁹ Final Declaration of the 7th Conference of Ministers responsible for Migration 'Migrants in our societies: policy choices in the 21st Century' (Helsinki, 16-17 September 2002), paragraph 24; Assembly Recommendation 1625 (2003), paragraphs 5 and 6.

commitment to human rights, democracy and the rule of law – are shared by all of them. If recourse to nationality law can help respond to such a challenge why miss this opportunity?

REFLECTIONS ON NATIONALITY AND INTEGRATION: THE EXAMPLE OF THE CITY OF BASEL (SWITZERLAND)

report prepared by Ms Christin ACHERMANN¹⁰

SUMMARY

My report begins with a few theoretical ideas about integration and citizenship/nationality as one part of the machinery which enables a social order to be created. Taking as an example the process of naturalisation applied in Basle, I shall examine thematically the link between nationality and integration. A concluding discussion will cover the challenges that the process of integration into society has to meet in a context characterised by growing heterogeneity.

Social cohesion and integration

Several levels of integration can be identified in any society: the level of rules and regulations, the structural level and the level of individual social activity. Where *rules and regulations* are concerned, the integration of any society is based on a framework of shared values and standards which are applied to individuals' action. The integration process is thus a coming together of individuals and/or groups on the basis of a consensus about binding standards and values. The result is a stable and balanced society.

At the *structural* level, the main emphasis is on the unity of a social system based on a definition of the position of the various components of the system and their interrelationships. There is also a focus on the aspect of participation in the structure of a social system, with the degree of integration then being defined in terms of access to social goods such as employment, education or housing.

Participation as a *social activity* by individuals constitutes the third level. It is through the interaction and participation of all the individual members of society that integration is achieved.

What is more, integration can be viewed from two angles: first comes the integration *of* society, followed by integration *into* society. From the first angle, society is regarded as a whole constantly needing to establish and maintain a stable order and balance. Citizenship, and, to be more precise, naturalisation, are mechanisms which make this possible. Integration *into* society, in contrast, is a process whereby new members of a society become integrated into the system as a whole.

Citizenship or nationality as mechanisms of social inclusion/exclusion

Citizenship is a status which defines membership of a national state, a legal delimitation between "us" and "them" (ie others), between citizens and "foreigners". Citizens who hold this status thereby enjoy wide-ranging civic, political and social rights, but also have duties to the state. Citizenship also attributes to them an official legal identity, and governs the relationship between the individual and the state.

In relation to the question of social integration, citizenship (or nationality) is a mechanism regulating the integration of a national society through inclusion and exclusion. It is a powerful instrument for granting or denying opportunities to participate on an equal footing in the political, social and economic life of a national state. It is upon citizenship that a shared national identity is based, as well as legal equality between all citizens. Thus the naturalisation procedure constitutes the stage during which a person's transition from the status of an excluded element to that of a member of the community of citizens is determined.

¹⁰ Institute of Ethnology, University of Berne; Swiss Forum for Migration and Population Studies (sfm) in Neuchâtel, Switzerland

The naturalisation process in the City of Basle as an example

A study of the naturalisation process in Basle shows how the interests which arise in relation to citizenship differ between the two groups involved: the authorities attach most importance to the identity-related aspect of nationality and to the aim of achieving national unity. This can be observed from the importance attached to the scrutiny of "assimilation" and to whether a person has become "accustomed to the Swiss lifestyle and customs", as required by the legislation. The main interest for applicants for naturalisation, in contrast, is that of equal rights, providing them with security and "social dignity". This interest arises from the internal exclusion which restricts the rights of foreigners who live in Switzerland. The effects of this are mainly felt in terms of personal freedom and independence, as well as access to political participation. The relationship between the individual and the state is differently regulated according to whether individuals hold Swiss citizenship or not. Under current legislation, legal equality can be achieved by foreigners solely through the acquisition of Swiss nationality. Second-generation foreigners are also motivated to request naturalisation by a desire for legal and societal recognition that they belong to the country.

This difference between the interests involved in the naturalisation process - on the one hand the cultural adaptation to a nation regarded as homogeneous, on the other hand equality of opportunities and rights, security and recognition - shows a lack of balance in the state which may weaken societal order and stability. It is clear that existing institutions and guidelines intended to create order – citizenship amongst them - are no longer appropriate to the current societal situation. This raises questions which cast doubt on the system for granting nationality.

Challenges to integration and the naturalisation policy

The economic, political and social developments known as "globalisation" and "transnationalism" have accelerated the transformation of national societies into plural groups. As a result, citizens collectively in many countries are not exactly the same people as the established residents. It is their unequal rights which differentiate between them. The unifying factors for all permanent or established inhabitants of a country or a city are the interests they share because of their place of residence, their concern about the same issues, and their contribution through their work, taxes and welfare contributions to the prosperity and stability of the country. On the assumption that the stability and order of a society are created through the integration of all its component elements, or by all who live permanently together in a specific place, it is clear that the exclusion from citizens' rights of a large portion of inhabitants constitutes a challenge where the integration of these present-day plural societies is concerned. Consequently, a new definition is needed of the criteria for belonging, or even of the criteria for naturalisation.

Where *rules and regulations* are concerned, the question that arises is that of the basis of the values which are shared. In our modern states, the main values of each society are laid down in its constitution. The basis for a new social cohesion would be a "constitutional patriotism" which gives rise to a political nation, a concept which would supersede the idea of a homogeneous national identity based on common descent and culture. Where *structural* integration is concerned, equality of rights is the precondition for equal life opportunities and equality of opportunity in respect of community participation, and this can be achieved only through the granting of all the rights of citizens. And in the field of *individual social activity*, recognition of the various lifestyles practised in small integrated groups – subject to compliance with the common regulatory basis (the Constitution) – becomes an important precondition for coexistence.

In conclusion, it seems inevitable that the idea of a culturally and ethnically homogeneous nation is one which needs to be dropped. It seems more old-fashioned than ever to expect applicants for naturalisation to achieve assimilation. Such a concept of citizenship is incapable of establishing a stable social order encompassing all established residents, ie all who are de facto members. Taking an altered view of nationality, the concept of "us" is no longer based on an idea of shared ancestry and cultural identity, but on membership of the same state, support for its constitution and enjoyment of the same rights. Where naturalisation policy and the granting of nationality are concerned, this means uncoupling the two component elements: identity and rights. Thus citizenship would be merely a legal status, no longer encompassing the aspect of cultural identity.

REPORT

Reflections on nationality and integration: the example of the city of Basel (Switzerland)¹¹

From their inception, the social sciences have discussed and pondered the bases for stable social cohesion. How is it possible to integrate the members of a society, and what criteria determine to which particular group an individual belongs? The world has changed a great deal since the ideas and concepts expounded in the late 19th century by the likes of the sociologist Emile Durkheim, and numerous scientists have examined these same issues in the current historical and political context.

In this report, I shall outline briefly some of the “classic” theories of integration and social cohesion, before linking them to citizenship (or nationality) regarded as one of the mechanisms for establishing a social order. In the second, more empirical, section, the process of naturalisation will be described from the point of view of both the applicants for naturalisation and the competent authorities, with the focus on the relationship between integration and naturalisation. In conclusion, I shall discuss, on the basis of that example, the challenges attendant upon societal integration against a background of increasing heterogeneity resulting from the trends generally encompassed under the heading of “globalisation”, including global migration trends. I shall endeavour to provide some pointers as to how naturalisation policy might be adapted to the current situation.

1. Integration and citizenship: the theoretical basis

(a) Social cohesion and integration

Every social group needs a certain internal order, a shared foundation providing order and stability. That order is made up of fundamental ideas concerning life in society and the principles underpinning individual social action. Defining the membership of a group, in other words the criteria which determine whether an individual is included or excluded, is one of the core issues in these theoretical discussions. The definitions of integration are many and varied. I shall use the term in the abstract sense to mean the joining of different elements into a whole which itself is marked by the unification process.

Looking more specifically at the integration of societies, we can distinguish a number of levels: the normative level, the structural level and the level of individual social action. From the *normative* viewpoint, integration of a society is based on set of common values and norms which guide individuals’ actions.¹² Hence, the process of integration is the coming together of persons and/or groups on the basis of consensus around binding norms and values. The result is a stable and balanced society. Emile Durkheim (1858-1917) expounded several key concepts linked to this idea. According to Durkheim, “solidarity”, as he calls it, is at the root of cohesion and social order. This is based on a “collective consciousness”, a system of shared values and feelings. Each type of society is characterised by a specific collective consciousness and form of solidarity. In modern societies, Durkheim identified the division of labour as fundamental to the social order. The result is a kind of “organic solidarity”: each individual has a distinct job or function and, accordingly, is dependent on the others, as in an organism (Durkheim, 1893).

At the *structural* level, the emphasis is on the unity of a social system based on defining the position of the various elements in the system and their reciprocal relations (Epskamp 1994, p. 303). Some authors focus on participation in the structure of a social system, with the degree of integration being defined by access to social goods such as work, education and housing (Hoffmann-Nowotny in Stienen and Wolf, 1991, p. 195). Structural access to participation is just one aspect; participation at the level of *individual activity* is another. Dominique Schnapper, for example, highlights this aspect, taking the specific example of the integration of migrants, a process in which the forms of participation in society as a whole through work,

¹¹ I am very grateful to Joëlle Moret, Ana Neubauer, Stefanie Gass and Lukas Lehmann for their comments and corrections during finalisation of the report.

¹² See for instance the work of Talcott Parsons (1977, 1985).

familiarisation with the norms of material consumption and the gradual adaptation of family and cultural behaviour are all important elements (Schnapper, 1992, p. 88). She stresses that the integration of immigrants should not be reduced to the internalisation of norms imposed from outside. Like others, they retain some room for manoeuvre, some scope for reinterpreting the norms and participating in the joint invention of collective models (Schnapper 1992, p. 18).¹³ Hence, integration is achieved through the interaction and participation of the different members of society. These passages echo the structural and normative levels described earlier, demonstrating that all three aspects (normative, structural and individual action) are inseparable and simply represent different analytical viewpoints.

Furthermore, integration can be viewed from two perspectives: either as the integration *of* a society or as integration *into* a society (Schnapper, 1992, p. 96). The first approach conceptualises society as an ensemble which needs constantly to establish and maintain order and a stable equilibrium. Citizenship and, more specifically, naturalisation, which I shall discuss below, are mechanisms for achieving that. Integration *into* a society, on the other hand, has more to do with new members and the processes whereby they become an integral part of the overall system. What is important to note in this process is that integration into society can occur only provided both parties – the host society and the new arrivals – participate (level of individual action) in order to establish a new structure and a new consensus surrounding the norms and ways of life within society (normative level). The other prerequisite for an integrated society is equal opportunities for participation for all members (structural level), which in turn calls for equal rights.

(b) Citizenship or nationality as a mechanism for social inclusion/exclusion¹⁴

The Council of Europe Convention on Nationality defines nationality – and citizenship, which is taken to be a synonym – as follows: “‘nationality’ means the legal bond between a person and a State and does not indicate the person’s ethnic origin” (Article 2(a)). Hence, the emphasis is on the legal aspect, whilst the ethnic dimension, linked to identity and the notion of culture, is implicitly denied. As will become clear at the end of this report, this definition strikes me as crucial and appropriate to the current social context. But I would add that it contains a programmatic element, setting out a political objective of the Convention.

As it is clear to my mind – a finding borne out, moreover, by scientific studies – that the concept of nationality is intimately bound up with that of national identity¹⁵, the definition of citizenship¹⁶ which I shall use in this report is a different one, one that is focused less on an ideal future and draws more on the observation of reality and is intended as a scientific tool.

In our research¹⁷ and in this report, citizenship is defined – in the tradition of the studies conducted by Brubaker (1994) and Mackert (1999) – as a powerful instrument for social inclusion/exclusion. The concept of “soziale Schliessung” (social inclusion/exclusion) was devised by the German sociologist Max Weber, who defined it as a process granting exclusive access to certain opportunities and assets on the basis of conditions such as origin, language and place of residence (Weber, 1956, p. 23).

Citizenship is a status which defines who belongs to a nation-State and establishes a legal distinction between “us”, the citizens, and “them”, the “foreigners”. Citizen status confers a wide range of civic, political and social rights¹⁸ as well as duties linked to the State. In addition, it confers legal and formal identity and regulates the relationship between the individual and the State.

¹³ In this passage, Schnapper draws a clear distinction between integration and assimilation. Assimilation is the wholesale adoption of attitudes, behaviours, lifestyles, values, etc. by new members, with no scope for divergence. We will see below that, while assimilation is rarely mentioned nowadays, in practice it is frequently demanded of migrants.

¹⁴ I will not discuss here “classic” citizenship theories such as those advanced by Marshall (1950), Brubaker (1993, 1994) or Turner (1993), but will concentrate on describing the essential bases for understanding the empirical section and the analytical epilogue. Key references will be mentioned.

¹⁵ On the formation of nation-States and the construction of national identity see Gellner (1995), Anderson (1993) and Hobsbawm (1991, 1996).

¹⁶ I will tend to use the term “citizenship”, which I see as a translation of the German term “Staatsbürgerschaft”, while making no fundamental distinction between “citizenship” and “nationality”.

¹⁷ See footnote 13 and Achermann and Gass (2003).

¹⁸ See Marshall (1950) on the three generations of citizens’ rights: civic rights (established in the 18th century), political rights (19th century) and social rights (20th century). In Marshall’s view, the importance of modern citizenship derives among other

In terms of social integration, citizenship or nationality is a mechanism governing the integration of a national society by means of inclusion and exclusion. While it tells us nothing about the inclusion of the individual in terms of social interaction or interaction within a community, citizenship is a powerful instrument for granting or refusing opportunities for equal participation in the political, social and economic life of the nation-State. Nowadays, a large proportion of the rights which were once granted exclusively to citizens of a country are also granted to foreigners who reside there permanently. In Switzerland, for example, social rights apply to anyone working or living in the country. Similarly, human rights are not confined to nationals, but are granted to all human beings. The most important legal distinctions between Swiss citizens and foreign nationals relate to political rights¹⁹ and to freedom of establishment and protection against expulsion, extradition and return (*refoulement*), which come under the heading of civic rights.²⁰ This demonstrates that citizens' rights today are granted on a differential basis to the different population groups²¹: only nationals enjoy the full range of national rights; however, depending on their residence status, foreign nationals may also have access to a large number of rights²².

As regards identity, citizenship represents the mechanism which governs integration of the nation by excluding those who are considered as different and not belonging to the nation defined in terms of a common identity, way of life and ideas: the "others" or non-citizens. As an instrument for establishing and integrating modern societies, citizenship thus establishes a social order which determines who has membership and who has access to which rights and assets, while at the same time creating social cohesion on the basis of a shared identity. The basis for this notion of identity varies according to the national context and is therefore intimately linked to the system for acquiring nationality²³.

2. The naturalisation process in the city of Basel

I shall now provide an empirical example illustrating the link between naturalisation, integration and social cohesion in a Swiss municipality. The research²⁴ on which my observations are based was aimed chiefly at describing and analysing the naturalisation procedure in the municipality of Basel from a dual perspective²⁵: that of the competent authorities and that of foreign nationals who had been naturalised or who had filed an application for naturalisation²⁶.

Why did we choose a municipality for our research? In Switzerland, citizenship (*Bürgerrecht*) comprises three components: municipal, cantonal and federal. All three levels take decisions on the granting of citizenship as part of the "ordinary naturalisation" process and can also lay down their own requirements for new citizens in addition to those contained in federal law, such as the minimum residence of 12 years in

things from the fact that it evens out social disparities between citizens by means of social rights, thus creating a basis for national social cohesion.

¹⁹ A growing minority of Swiss cantons (Appenzell-Outer Rhodes, Fribourg, Jura, Neuchâtel, Vaud) grant foreign nationals who have been resident for a certain length of time (around ten years) the right to vote and to stand for election at cantonal and/or municipal level.

²⁰ See Achermann and Gass (2003), Chapter 3.3, for a description and detailed analysis of differences in terms of political, social, civic and cultural rights.

²¹ Hammar (1990) uses the term "denizens" to describe established foreign nationals who have residence rights and free access to the labour market and who enjoy a large proportion of the rights granted to nationals. Thus, he makes a distinction between citizens on the one hand and foreigners with more restricted rights on the other.

²² Even persons living in the country without a residence permit, i.e. illegally, have a certain number of basic rights. However, whether they are able to assert those rights without being immediately expelled is another matter. In practice, the answer is often in the negative. As regards Switzerland see Achermann and Efnay-Mäder (2003).

²³ For typical examples of *jus soli* and *jus sanguinis*, see Brubaker (1993, 1994) and de Groot (2001).

²⁴ The research was carried out in 2000/2001 by my colleague Stefanie Gass and myself as part of our ethnology dissertation at the University of Bern, Switzerland. It was published in 2003 (see Achermann and Gass, 2003). All the information in this chapter refers to that empirical work.

²⁵ We conducted interviews with representatives of the authorities at each stage of the procedure and sat in on interviews with applicants for naturalisation. We also questioned 17 people who had been naturalised or were awaiting a decision on their naturalisation application when the interview took place. The third source of information consisted of 250 files relating to naturalised persons which we entered in a database and analysed. These were files from the years 1983, 1991, 1995, 1996 and 1999 located in the archives of the Basel municipal authorities (*Bourgeoisie communale*). For the methodology see Achermann and Gass (2003), pp. 20-25.

²⁶ In the interests of simplicity, I shall refer to all the interviewees as "naturalisation applicants", although in reality some of them had already been naturalised for some time when the interviews were conducted.

Switzerland²⁷. We operated on the assumption that decisions to include or exclude persons from Swiss nationality are made essentially at municipal level²⁸, as it is here that the main checks are carried out as to whether the federal requirements of integration into the Swiss community and adoption of Swiss way of life and customs (Article 14 LN) have been met, together with similar requirements laid down by cantonal legislation. In Basel, in examining whether a person is “fit” to become a Swiss citizen and has been “assimilated”, as required by the cantonal legislation, reference is made *inter alia* to the person’s knowledge of German and of the political system (citizenship training); these are assessed in the course of interviews with applicants for naturalisation (see 2(b) below).

(a) The perspective of the foreign applicants²⁹

In line with the overall theme of the Conference, I shall focus primarily on applicants among what are known as second-generation migrants³⁰, without entirely overlooking the first generation, i.e. persons who have not spent their whole life in Switzerland³¹.

As far as identity is concerned, second-generation applicants frequently differ from the first generation: they define themselves neither as “real foreigners” nor as Swiss. However, they have no doubts as to their integration into Swiss society as they have – in most cases – spent their whole lives in the country, have attended school there, are fluent in the local dialect (Swiss German), etc.. Most describe themselves as natives of Basel, members of the municipal community where they have lived all their lives. They themselves make a distinction between their situation and that of, say, their parents or other foreigners who came to Switzerland as adults. They refer to the latter as “real foreigners” or “foreign foreigners”.

Only in certain situations are second-generation applicants made aware that they are not – whatever their own perceptions – Swiss citizens: for instance in their dealings with the authorities, who bring home to them the fact that there is a distinction between Swiss nationals and foreigners by having different administrative departments to deal with them. Several of the applicants we spoke to complained of this categorisation and evidence of differentiation, which run counter to their own perceptions. They see them as indicative of a failure to recognise them as fully fledged members of society. When asked to which country they belong – Switzerland or their country of origin – most reply that they feel ties to both. For some, this feeling of belonging to both but of not being recognised in Switzerland is problematic and a source of confusion. For others, the situation, while not a source of problems, is seen as less than ideal or too one-sided. In both cases, the application for naturalisation was made in a bid to clarify the issue and reconcile two sets of allegiances. However, none of the second-generation interviewees regards going to live in their country of origin as a realistic option or could envisage such a move; they regard life there as too different and feel they are too settled in Switzerland. The ties to the country of origin are felt in large part through their parents: it is out of respect for them and for tradition that applicants who have grown up in Switzerland do not renounce their nationality of origin. The possibility of dual nationality, which has been allowed in Switzerland since 1992, is thus important for these young people, whose parents are not naturalised.

As far as naturalisation applicants are concerned, the degree to which someone is integrated is defined by knowledge of the local language, familiarity with daily life and contacts with Swiss people. In the case of the first-generation interviewees, knowledge of German and citizenship training, both of which are assessed as part of the naturalisation process, constitute major stumbling-blocks. They would like to improve their knowledge in those areas, but lack the time or money to attend courses. In addition, they often have few opportunities to practise their German in their day-to-day and working lives. For young people from migrant backgrounds, on the other hand, knowledge of German and of Swiss life and the Swiss State are not a problem. They are in no doubt that they belong in Switzerland and do not feel like foreigners in the

²⁷ Time spent by applicants in Switzerland between the ages of 10 and 20 counts double. For the detailed conditions, see the Federal Law on acquiring and losing nationality (LN).

²⁸ For examples of other Swiss municipalities and their naturalisation practices, see Steiner and Wicker (2000, 2004).

²⁹ See Achermann and Gass (2003), Chapter 2.2.

³⁰ The interviewees are no longer children, being between 17 and 30 years of age approximately. However, if the Swiss system regarding the granting of nationality to children born in the country were to be changed – as is planned for the third generation under the new legislation on Swiss nationality (see below) – the situation of these young people would be very different.

³¹ As the system for acquiring Swiss nationality is based on the principle of *jus sanguinis*, i.e. nationality is normally acquired via one’s parents, there is a growing band of second, third and probably even fourth-generation foreigners living in Switzerland.

country, as some of the adults do. The fact that they are nonetheless regarded as foreigners by the Swiss and excluded may prompt them to take radical steps to adapt. One young woman born in Switzerland, for instance, told us that, after being naturalised, she intended to change her surname in order to shed this symbol of her Yugoslav origins.

It emerges from applicants' accounts that one of the main reasons for applying for naturalisation is the desire to clarify their nationality and bring it into line with their own perceptions by being granted legal status and recognition by the Swiss. They argue that this is necessary in order to "make things fair". Naturalisation puts something right which was previously a source of some confusion and dissension. But there are also more tangible and practical reasons for applying for naturalisation, for instance the desire to have the same opportunities as Swiss people. One example is the ability to travel to neighbouring countries without a visa. One Turkish woman told us that she would like to be able to get off the bus three stops past her house, i.e. over the French border, without needing a visa. Her daughter would also finally be able, after her naturalisation, to take part in school trips to Germany without being subjected to red tape. Another area where applicants would like to have the same opportunities as Swiss people concerns mobility: with Swiss nationality they would be able to spend two or three years or even longer outside the country and return without any difficulty. With a permanent residence permit, they cannot spend more than two years abroad without losing their permit.

Another important motive can be summed up under the heading of security: even foreigners born in Switzerland who have a permanent residence permit fear that some day, in a time of economic or political difficulties, the Swiss may decide to expel all foreign nationals. Although second-generation foreigners in particular regard this as unlikely, they would like, through naturalisation, to guarantee their "right to remain", i.e. the security of being allowed to remain (or return) indefinitely and to decide for themselves if and when they wish to leave. Social security is less of an issue for young applicants, but older applicants also express fears that they may have to leave Switzerland once they can no longer work.

Applicants for naturalisation are also interested in acquiring Swiss political rights, but for most this is not the main motive for applying. Those who have been naturalised say that it was only after acquiring rights that they began to take an interest in, and find out more about, Swiss politics. However, they stress that they would like, for instance, to have a say in how their taxes are spent.

Second-generation applicants have fewer doubts and fears concerning the naturalisation procedure than other applicants. This is due in part to the fact that they have a good command of German and even speak Swiss German. In addition, those foreigners who grew up in Switzerland – in common with applicants who have lived and worked there for many years – feel they have a right to be naturalised. They regard themselves as fully fledged members of Swiss society, both physically and emotionally, and therefore take the view that they should not be denied naturalisation. Some feel that the Swiss should grant them nationality without their having to apply and in particular without having to go through a long and costly procedure³². One applicant told us that his brother had decided not to apply because he felt that the Swiss authorities should invite him to become a citizen. Those who feel that they have a right to nationality frequently view the procedure as harassment on the part of the authorities. They regard it as an insult that they are obliged to sit the same tests³³ as those whom they regard as "real foreigners". Nevertheless, second-generation applicants take the procedure in their stride, do not need support and are generally more sure of themselves³⁴.

³² The new nationality legislation due to be adopted on 26 September 2004 responds *inter alia* to this criticism, and provides for a facilitated procedure for second-generation applicants and automatic naturalisation for those who are third generation. In some Swiss cantons (Bern, Fribourg, Geneva, Jura, Neuchâtel, Vaud, Zurich), a facilitated procedure has been in place since 1992 for applicants who grew up in Switzerland.

³³ The practice in Basel is that applicants who grew up in Switzerland can follow a fast-track procedure, which means that they do not have to go through all the interviews with the authorities if they are deemed following the first interviews to be integrated, to have a command of German and to be familiar with the State and the political system.

³⁴ The study by Bolzman, Fibbi and Vial (2003) on second-generation immigrants reveals the same trends. It also underlines the fact that the process of acquiring nationality is still socially selective. A majority of applications for naturalisation are made by foreigners from families of above-average educational and socio-professional attainment who are better integrated "vertically" into Swiss society. Foreigners from more modest backgrounds, meanwhile, are more likely to feel that they have encountered various types of social hurdles during their time in Switzerland; it seems likely that the naturalisation procedure represents a further hurdle which they would rather avoid (Bolzman et al. 2003, p. 222).

Following naturalisation, the majority of those interviewed say that their lives have not really changed. But what is important is that they feel at last that their legal status matches their perception of themselves as belonging to Switzerland and – in many cases - also to their parents' country of origin. The clarification of their status and nationality and the security of being able to stay in Switzerland indefinitely come as a relief. Henceforth they define themselves as “naturalised Swiss”.

(b) The perspective of the authorities in Basel³⁵

Let us now take a different perspective and place the spotlight on the authorities responsible for the naturalisation procedure who decide who is granted municipal citizenship³⁶. I shall describe below the expectations and requirements and hence the basis for selecting new Swiss citizens. Analysing the process will give some insight into how the authorities in Basel view the link between naturalisation and integration.

As mentioned in the introduction, federal law and the law of Basel-Town canton on nationality lay down the chief requirements to be met by applicants for naturalisation. During a procedure lasting approximately three to four years, an assessment is made of applicants' police records, their ability to support themselves and above all their “suitability” (for Swiss citizenship), whether they are familiar with Swiss way of life and customs and are “assimilated”. As far as the Basel municipal authorities are concerned, the main object is to assess whether the foreign applicant is “fit” to become a Swiss citizen and is sufficiently assimilated. These concepts are rather vague and open to a variety of interpretations; we therefore focused in our study on the criteria – usually a combination of different aspects – which form the basis for granting or refusing the application for naturalisation³⁷.

What can be termed “imprecise legal concepts” – for instance, assimilation – in cantonal legislation on naturalisation and in the relevant regulations leave the authorities a margin for discretion which causes problems. These concepts are so open-ended that they need to be interpreted and clarified; this inevitably involves a degree of judgment. The requirements for applicants for naturalisation to be “assimilated” and “familiar with Swiss way of life and customs” is central to the procedure in Basel for two reasons: first, the notion of assimilation is the key component in the profile being looked for and second, this is what gives the authorities such a large margin for discretion. There is no exact definition of the notion of assimilation. Even if such a definition existed it would be very difficult, if not impossible, to measure whether or not an applicant was assimilated. As a result the competent authorities, and especially the employees handling naturalisation applications, inevitably fall back in their assessment on subjective images and expectations of what they regard as assimilation. Accordingly, there is a grey area between inclusion and exclusion – or between granting and refusing a naturalisation application – since the interpretation is subjective, imprecise and hence likely to lead to unequal treatment.

We therefore asked the following question: what factors are decisive in determining whether an applicant is included or excluded? Put another way, how do the employees handling applications use their margin of discretion, and how do they interpret these imprecise legal concepts³⁸? We found that the decisions made on applicants were heavily influenced by subjective expectations bound up with an ill-defined sense of what was normal and of morality and law and order, as well as by different images of oneself and of others, of what was Swiss and what was not. The images of naturalisation applicants were reflected in clichés concerning Islam, in the idea of divergent cultural universes, and in prejudices based in many cases on a

³⁵ See Achermann and Gass (2003), Chapter 2.1.

³⁶ For details concerning the municipality of Basel (“*commune bourgeoise*”) and the relationship between the Basel municipal authorities and the canton of Basel-City, see Achermann and Gass (2003) Chapter 1.3.

³⁷ It should be added that very few applications are turned down in Basel. According to the administrative records of the municipal authorities, only five cases were turned down between 1983 and 1999 (there are between 250 and 300 positive decisions each year). That does not mean that Basel grants naturalisation to all who apply. Applicants deemed to be “unfit” for Swiss citizenship tend to be weeded out during the administrative process: for instance, some applicants are asked to withdraw their application, or have their application suspended while they attend German classes or citizenship training. Furthermore, the number of cases pending is not known. These are applications which lie dormant for some time – possibly for years – owing to doubts and reservations on the part of the employee handling the application.

³⁸ The answers to this question are based on quantitative and qualitative analysis of the naturalisation files and a study of the statements made by the authorities.

form of culturalisation. Because of the margin for discretion referred to and the imprecise nature of the concept of assimilation, these images and expectations have a bearing upon the decision and hence contribute to defining the frontier between inclusion in and exclusion from the community of citizens. In other words, imprecise notions may mask a variety of contents which are not expressed clearly and explicitly. To take one example: the contention that someone is not sufficiently familiar with the Swiss way of life reflects the subjective idea on the part of the employee that the foreigner in question lives in a non-Swiss environment, does not have the right pastimes, does not educate his or her children properly and should not be unemployed or depend on social welfare or invalidity benefit. Other judgments as to the personality and character of applicants become caught up in the assessment of their knowledge of the language and civic affairs. For instance, applicants' motives for seeking naturalisation are expected to be of a non-material nature (not related to advantages in the labour market, the chance to travel without a visa, etc.); they are supposed to show gratitude and loyalty when interviewed and demonstrate that they are prepared to make an effort in order to become Swiss citizens. Ultimately, all these elements make up an overall image which may determine whether a person is included or excluded, without it being possible to pinpoint the precise influence of each factor.

These legal criteria and the way they are interpreted by the people in charge show that the main factor assessed during the naturalisation process is the degree of assimilation, the aim being a uniform nation composed of model citizens. Persons included in the community must demonstrate that they will fit in, will behave discreetly, will not cause problems and will not be a (financial) burden on the State. They must also speak the language and be familiar with the State structure: this is regarded as the basis for being able to participate in social and political life. The naturalisation authorities in Basel rarely mention integration in relation to applicants. When asked to define integration, they speak about adaptation, knowledge of the country and the ability to manage independently (for instance in the sphere of communication skills). Some mention the fact that integration is a two-way process, but most would prefer different ways of life to be confined to the private sphere, with religious events, for example, taking place out of the public eye.

We might conclude that from the point of view of the authorities in Basel, naturalisation of foreigners is the culmination of full integration, or rather assimilation, into the ideal Swiss way of life. Anything which deviates from that ideal and seems "un-Swiss" is ruled out, being seen as a threat to the cohesion of a homogeneous nation, or the "imagined community" as Anderson (1993) put it.

(c) Conclusion

In our study in Basel, we defined citizenship as a mechanism for drawing a legal dividing line in the nation-State between "us" and "them". The function of this mechanism for social inclusion and exclusion is to ensure integration of the national community and a stable social order. Citizenship nowadays is the basis for both a shared national identity and for equality of all citizens before the law. The naturalisation procedure hence represents the point of transition from excluded status to the status of member of the community of citizens. The naturalisation procedure in Basel, described from two differing perspectives, demonstrates that the issues linked to citizenship differ between different players.

The representatives of the authorities stress the identity aspect of nationality and the goal of national unity; this is reflected in the emphasis on assimilation and whether or not the applicant is "fit" to be a Swiss citizen. The desire of foreign applicants to be granted equal opportunities is viewed in different ways. Some reject it as wholly inappropriate, while others display some measure of understanding. However, where such understanding exists, there must be no doubt as to the degree of adaptation of the applicant or his or her loyalty in terms of identity. As far as the applicants for naturalisation are concerned, meanwhile, the chief preoccupation is equal rights, giving them security and "social dignity" (D'Amato, 2001, p. 2). This preoccupation results from the internal exclusion which restricts the rights of foreigners living in Switzerland and which has repercussions primarily in terms of their personal freedom and autonomy, and in the opportunities for political participation. In the latter sphere, the relationship between the individual and the State is managed differently depending on whether or not the person is a Swiss citizen. Under current legislation, foreign nationals can achieve equality before the law only by acquiring Swiss nationality. As we have seen, in the case of second-generation foreigners, legal and societal acknowledgement of their belonging to the country is one motive for applying for naturalisation.

This disparity between the interests at stake in the naturalisation process – on the one hand, cultural adaptation to a nation perceived as being homogeneous, and on the other equality of rights and opportunities, security and recognition – reveals an imbalance in the state of affairs which may undermine order and stability within society. The situation becomes more unstable if the foreigners residing permanently in a country account for a large proportion of the overall population, as is the case in Switzerland, where foreigners represent over 20% of the population, and more than 700 000 people, it is estimated, meet the minimum requirements for acquiring nationality in terms of their period of residence in Switzerland (Wanner and D’Amato, 2003, p. 35). We can see that the guiding institutions and models designed to create order – such as citizenship – no longer match social reality. These few observations call into question the system for granting nationality.

Epilogue

The challenges for integration and naturalisation policy

The aim of this final chapter is to provide a platform for discussion of the challenges ahead as regards integration and the granting of nationality in the modern nation-State. Using the example of Basel and the theoretical bases outlined in this paper, I shall examine issues which may be applicable in a variety of national contexts.

Recent migration trends have changed society in many countries. These States have less claim than ever before to be ethnically or culturally uniform. The economic, political and social trends encompassed in the terms “globalisation” and “transnationalism” have speeded the transformation of these national societies into plural groups.

The current population of Switzerland is composed not just of Swiss citizens but also – as the result of policy on naturalisation and foreign nationals in recent decades – of people who are not Swiss nationals, but who may have been born in the country, will most probably spend the rest of their lives there, work there, pay taxes, etc. The group made up of Swiss citizens is not, however, identical to the group of permanent residents. What distinguishes them is unequal rights. What unites them is the fact that, by virtue of their co-existence, they have some common interests, are affected by the same issues and contribute through their work, taxes, and social security contributions to the prosperity and stability of the country.

As pointed out at the beginning of the report, one of the main legal inequalities between citizens and foreign nationals is that the latter are excluded from political decisions, although, as permanent residents, they too are affected by them. From a democratic viewpoint, one might question the legitimacy of excluding a large section of the country’s inhabitants from political decisions and shared responsibility, given that these people contribute, through their work and their taxes, to social prosperity and, what is more, have been integrated for years into the economic, social and cultural system. A further difficulty when permanent foreign residents are excluded from political rights is that they have no means of articulating their ideas and interests in the political arena other than through representatives who are Swiss nationals. This makes it difficult for them to take responsibility for themselves. Assuming that stability and order in a society are achieved through the integration of all its constituent components, or by the permanent inhabitants of a shared living space, we can see that denying civic rights to a large proportion of the population presents a challenge for today’s plural societies.

The questions which arise are as follows: which persons are regarded as being part of the national group? Who will make up the society we are trying to create? Who has sovereignty, and what criteria used to distinguish between citizens and non-citizens are reasonable and appropriate in the new context of a plural population? It seems clear at the very least that the criteria for membership, not to mention the criteria for naturalisation, need to be redefined.

Taking into account the two aspects of the concept of “integration”, we may conclude that while long-term resident foreigners may be integrated *de facto* into society (see the different aspects referred to), the

integration *of* society remains a considerable challenge for cohesion and stability, in view of the (partial) *de jure* exclusion of foreign residents.

In order to demonstrate what holds modern societies together and what forms the basis for social cohesion, I shall reiterate the three aspects of integration outlined in the introduction.

In the *normative* sphere, we need to identify what forms the basis for shared values. In modern States, the main principles underpinning society are laid down in the Constitution. Every individual who respects those principles may be deemed to be integrated from a normative point of view. Each member must also have the opportunity to influence the core values, which are subject to constant change and are the result of political debate. Hence, normative integration implies first that members respect those values, and second that they have the opportunity to change them through exercise of their political rights. The basis for this kind of social cohesion, then, is a kind of “constitutional patriotism” (D’Amato, 2001), giving rise to a political nation³⁹. This would replace the idea of a uniform national identity based on common lineage and culture.

Where *structural* integration is concerned, equal rights are a precondition for equal opportunities in terms of everyday life and participation in the group. This can be achieved only when the full range of citizenship rights is granted.

As regards *individual social action*, the members of a society must accept that they now belong to a society made up of plural groups with different ways of life. That implies that the social integration of each individual through interaction does not take place at the level of national society, but within groups with specific characteristics: a shared neighbourhood, shared leisure pursuits, a shared philosophy or religion, shared origins, similar professional background, shared political views, etc. Each of these communities may be the basis for a different collective identity. Recognition of these differences – provided that the common normative basis (the Constitution) is respected – thus becomes an important prerequisite for co-existence. Such recognition, moreover, should be one of the core constitutional values. Granting citizenship to permanent residents with potentially different lifestyles provides a platform for equal opportunities by creating equality before the law and is a symbol of recognition. However, it does not, of course, guarantee that every individual will be integrated or that nobody will be excluded from social interaction or even discriminated against on the basis of certain characteristics.

What conclusions can be drawn from these observations as regards the granting of nationality and naturalisation policy?

We must leave behind the notion of a culturally and ethnically homogeneous nation. Expecting applicants for naturalisation to assimilate now appears more outdated than ever. Viewing citizenship in this way is no basis for a stable social order which includes all permanent residents, in other words all those who are *de facto* members. In a different approach to nationality, the idea of “us” is no longer based on a supposedly shared lineage and cultural identity, but on the fact of belonging to the same State, supporting its Constitution and having the same rights. As regards naturalisation policy and the granting of nationality, this means that a distinction must be made between the two components: identity and rights. On that basis, citizenship would be simply a legal status and would no longer encompass the aspect of cultural identity. That is why the Council of Europe definition of nationality – which stresses legal status – was said at the beginning of this report to represent a programmatic and conceptual approach.

In the theoretical discussions on the concept of nationality in recent years, different authors have highlighted the importance of separating identity and rights. Yasemin N. Soysal (1994) talks about “*postnational citizenship*” in which all persons have the same rights simply by virtue of being human beings. The role of the nation-State continues to be to guarantee universal rights to each individual residing on its territory. Thomas Hammar (1990) and Rainer Bauböck (1994) apply a similar principle in their notion of “*jus domicilii*”. This principle is characterised – by contrast to the notions of *jus soli* and *jus*

³⁹ See Habermas (2004) for a discussion of citizen solidarity in Europe based on constitutional patriotism.

sanguinis – by a forward-looking approach: the place of permanent residence⁴⁰ rather than the place of birth or family roots would be the decisive factor in granting all fundamental and civic rights⁴¹.

Bibliography

- Achermann, Christin and Denise Efonayi-Mäder (2003). *Leben ohne Bewilligung in der Schweiz: Auswirkungen auf den sozialen Schutz*, (Beiträge zur sozialen Sicherheit. Forschungsbericht ; Nr. 24/03). Bern: Bundesamt für Sozialversicherung.
- Achermann, Christin and Stefanie Gass (2003). *Staatsbürgerschaft und soziale Schliessung: Eine rechtsethnologische Sicht auf die Einbürgerungspraxis in der Stadt Basel*. Zürich: Seismo.
- Anderson, Benedict (1993). *Die Erfindung der Nation: Zur Karriere eines erfolgreichen Konzepts*. Frankfurt a.M. & New York: Campus.
- Bauböck, Rainer (1994). *Transnational Citizenship: Membership and Rights in International Migration*. Aldershot-Brookfield et al.: Edward Elgar.
- Bolzmann, Claudio, Rosita Fibbi, Marie Vial (2003). *Secondas - secondos : le processus d'intégration des jeunes adultes issus de la migration espagnole et italienne en Suisse*. Zürich: Seismo.
- Brubaker, Rogers (1993). « De l'immigré au citoyen : Comment le jus soli s'est imposé en France, à la fin du XIXe siècle. » *Actes de la recherche en sciences sociales* 99 : 3–25.
- Brubaker, Rogers (1994). *Staats-Bürger: Deutschland und Frankreich im historischen Vergleich*. Hamburg: Junius.
- D'Amato, Gianni (2001). *Vom Ausländer zum Bürger: Der Streit um die politische Integration von Einwanderern in Deutschland, Frankreich und der Schweiz*. Münster et al.: Lit.
- de Groot, Gérard René (2001). "Conditions for the acquisition of nationality by operation of law ex lege or by lodging a declaration of option." 2nd *European Conference on Nationality*, Strasbourg, 8 and 9 October 2001.
- Durkheim, Emile (1893). *De la division du travail social*. Paris : PUF.
- Epskamp, Heinz (1994). "Integration" in *Lexikon zur Soziologie*, edited by Werner Fuchs-Heinritz et al.. Opladen: Westdeutscher Verlag: 303.
- Gellner, Ernest (1995). *Nationalismus und Moderne*. Hamburg: Rotbuch Verlag.
- Habermas, Jürgen (2004). "Ein Ruck muss durch Europa gehen." *Weltwoche* 21/04.
- Hammar, Thomas (1990). *Democracy and the Nation-State: Aliens, Denizens and Citizens in a World of International Migration*. Aldershot: Gower.
- Hobsbawm, Eric (1990). *Nations and Nationalism: Programme, Myth, Reality*, Cambridge, Cambridge University Press.
- Hobsbawm, Eric and Terrence Ranger (eds.) (1996). *The invention of tradition*. Cambridge: Cambridge University Press.
- Mackert, Jürgen (1999). *Kampf um Zugehörigkeit: Nationale Staatsbürgerschaft als Modus sozialer Schliessung*. Opladen & Wiesbaden: Westdeutscher Verlag.
- Marshall, Thomas H. (1950). *Citizenship and social class*. Cambridge: University Press.
- Parsons, Talcott (1977). *Social Systems and the Evolution of Action Theory*. New York: The Free Press.
- Parsons, Talcott (1985). *Das System moderner Gesellschaften*. Weinheim : Juventa Verlag.
- Schnapper, Dominique (1992). *L'Europe des immigrants : Essai sur les politiques d'immigration*. Paris: Editions François Bourin.

⁴⁰ The exact length of time which defines permanent residence would be decided at political level. In my view, the maximum period should be less than the ten years currently laid down by the Council of Europe Convention on Nationality (Article 7(3)).

⁴¹ As regards political rights at the local level, this principle is already applied in some countries: these rights are guaranteed to nationals of the member States by the 1992 Convention on the Participation of Foreigners in Public Life at Local Level (ETS 144) and by "citizenship of the Union" as laid down in the 1992 Treaty on European Union.

- Soysal, Yasemin N. (1994). *Limits of citizenship: Migrants and postnational membership in Europe*. Chicago: The University of Chicago.
- Steiner, Pascale and Hans-Rudolf Wicker (2000). *Einbürgerung auf der Ebene der Gemeinden: Pilotstudie zum Forschungsprojekt „Diskriminierung und Einbürgerung“*. Bern: Eidgenössische Kommission gegen Rassismus.
- Steiner, Pascale and Hans-Rudolf Wicker (2004). *Paradoxien im Bürgerrecht: Sozialwissenschaftliche Studien zur Einbürgerungspraxis*. Zürich: Seismo.
- Stienen, Angela and Manuela Wolf (1991). *Integration – Emanzipation: ein Widerspruch: Kritische Analyse sozialwissenschaftlicher Konzepte zur „Flüchtlingsproblematik“*. Saarbrücken et al.: Breitenbach Publ.
- Turner, Bryan S. (ed.) (1993). *Citizenship and Social Theory*, London: Sage Publ.
- Wanner, Philippe et Gianni D'Amato (2003). *Naturalisation en Suisse : le rôle des changements législatifs sur la demande de naturalisation*. Zürich: Avenir suisse.
- Weber, Max (1956). *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, 1. Halbband. Tübingen: J.C.B. Mohr.

**ACQUISITION OF THE NATIONALITY OF THE COUNTRY
OF IMMIGRATION FOR THE FIRST AND SECOND GENERATIONS
OF CHILDREN OF MIGRANTS (PRINCIPLES OF *IUS SOLI*
AND DOUBLE *IUS SOLI*)**

Report prepared by Mr Patrick WEIL⁴²

SUMMARY

A comparison of Council of Europe member states, the geographical and historical situations of which vary widely, reveals first of all how important legal tradition is in the definition of the rules on citizenship relating to aliens' children born on their territory. Legal traditions, based on *ius soli* or *ius sanguinis*, were altered when an inconsistency developed between, on the one hand, the consequences of the application of traditional law and, on the other, the perception of the state's situation in respect of migration. Democratic nation-states' legislation tends to move in the same direction once they become countries of immigration. While many writers have stated that such a link does exist, there is thus no relationship of cause and effect between national identity and nationality laws.

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REPORT

Acquisition of the nationality of the country of immigration for the first and second generations of children of migrants (principles of *ius soli* and double *ius soli*)

The question of the nationality of children born in a country to which their parents have immigrated is often seen as crucial to their integration into that country. How can you have any emotional bond with your country of birth when it does not readily grant you its nationality, so that you permanently feel a foreigner there, in law if not in fact?

A comparative analysis of the law of each of the Council of Europe's member states shows, however, that the rules vary very widely on this subject. This diversity has sometimes been explained as the sign, the direct reflection in nationality law, of opposite national cultures or concepts of nationhood (Brubaker, 1992). The one kind being "foreigner-friendly" and reflected in provisions of *ius soli*, whereby the children of immigrants can easily acquire nationality; the other being based on an ethnic concept of nationhood which says that bloodline must be the predominant if not the only factor determining a person's nationality at birth. My historical and comparative researches demonstrate that this diversity stems from a point where two phenomena intersect (Weil, 2001 and 2002). Firstly, the 19th century saw a split in Europe between two legal traditions, which then spread beyond Europe to the rest of the world; and secondly, chiefly in the 20th century, differing situations and perceptions arose in the whole area of migration.

Importance of the two legal traditions

The two main ways of attributing nationality at birth, then, are: place of birth – or *ius soli*: the fact of having been born on a territory over which the state has, has had, or claims sovereignty; and bloodline – or *ius sanguinis*: citizenship is granted on the basis of the nationality of a parent or more remote ancestor.

In eighteenth-century Europe, *ius soli* was the chief determinant of nationality in the two most powerful kingdoms, France and Britain. Individuals were bound to the lord who owned the land on which they were born, and the state inherited this feudal tradition, which ended with the French Revolution. Since *ius soli* was symbolic of this feudal allegiance, when the new Civil Code was adopted it was decided, against the wishes of Napoleon Bonaparte, that French nationality would only be granted at birth to children born of a French father, regardless of whether they were born in France or abroad⁴³. This break with the tradition of *ius soli* had no ethnic overtones; rather it was an attempt to liberate the individual from the state. Nationality was henceforth a personal attribute, given once and for all at birth, and was no longer conditional on residence in France, a sign under the *ancien régime* of allegiance to the sovereign and later, during the Revolution, of support for the Revolution. It is passed on like other personal rights (names, property), through the bloodline. This break with *ius soli*, this reinvention of Roman law in *ius sanguinis*, on behalf of the nation as a political extension of the family, proved to be a permanent revolution (Weil, 2002, Chapter 1). It ushered in the era of modern nationality law in France and Europe as a whole. This French innovation gradually spread and became law in most countries of mainland Europe through codification and imitation. It was emulated in turn by Austria (1811), Belgium (1831), Spain (1837), Prussia (1842), Italy (1865), Russia (1864), the Netherlands (1888), Norway (1892) and Sweden (1894) (Weiss, 1907).

For its part, the British tradition of *ius soli* was exported unchanged to the colonies in North America (USA and Canada), Europe (Ireland), Africa (South Africa), and Australia (Watson, 1974). It also persisted under British influence in countries such as Portugal and Denmark until the Nordic countries adopted common nationality rules in the 1920s.

⁴³ Part one of the Civil Code, defining eligibility for French citizenship, was promulgated on 18 March 1803.

The impact of migration

If the entire population of a territory was located only within that territory, it would make no difference whether nationality was attributed on the basis of *ius sanguinis* or *ius soli*. Nationality laws based on one of these criteria would apply to the same populations and would have the same legal effects.

Disconnection of core population and territory

When the connection is broken between territory and core population, one can start making a distinction between immigrant/immigration countries and emigrant/emigration countries.

1. “Immigrant countries” are countries “constituted by” immigrants; most of their citizens are immigrants or descended from immigrants. Such countries include the USA, Canada, Australia and until recently South Africa. “Immigration countries” are countries with permanently resident foreign populations. But there is a dominant awareness in these countries of a majority nucleus of the population which has been there since time immemorial and is not descended from immigrants. The immigrant populations are deemed to have joined this “indigenous” nucleus. In western Europe, France has been in this position since the 1880s. But gradually, since World War II, the other countries of western Europe have moved from being emigration countries to being immigration ones. Whilst the underlying premises are different in the Baltic states, the consequences are the same: these states still have significant Russian minorities.

2. “Emigrant countries” are countries where part of the original population is resident outside the country's borders but retains links with the motherland; this was the case with Germany from 1913 to 1933 and 1949 to 1989. Russia post-1989 may be included in this category. Lastly there are “emigration countries” where whole sections of the population have emigrated to build a new life in another country. This applies to most European countries prior to World War II (except France), or Mexico today.

As long as the legal tradition promoted, or at least did not prejudice, these states’ interests as far as their migration status was concerned, the nationality laws were maintained. In immigrant countries such as the USA, Canada or Australia “British” *ius soli* automatically entitled the children of immigrants to Australian, Canadian or US citizenship. In the case of countries of mainland Europe which were emigration countries, “French” *ius sanguinis* allowed ties to be retained with nationals living abroad until such time as their descendants lost contact. The United Kingdom and Ireland were *ius soli* emigration countries; in order to retain links with their nationals settled abroad, they added provisions of *ius sanguinis* to their laws. Automatic *ius soli* could remain in force provided these countries did not receive large-scale immigration.

The impact of migration on nationality law

However, between the end of the 19th century and the end of the 20th century most western European countries – albeit at differing paces – became immigration countries, and this inevitably prompted changes in the way nationality at birth was attributed within the territory.

The impact of immigration on countries with a tradition of *ius soli*

Countries in which the principle of automatic *ius soli* predominated in the nationality laws attracted more immigrants than they wanted, forcing them to be more restrictive. This happened with the United Kingdom, which had an imperial and expansionist concept of territory, with the result that *ius soli* unwittingly encouraged immigration. Before World War II all subjects of the British Empire were equal in their allegiance to the monarch: whether born in India, Canada or Jamaica, they could obtain British citizenship simply by taking up residence in the United Kingdom. The Act of 1948, after Canada created its own nationality, created six different nationalities, the sum of which constituted British nationality. When this extensive approach to *ius soli* produced an unexpected influx of immigrants from the colonies to the United Kingdom, all of whom immediately took British nationality, a revolution by stealth was begun in the 1950s which ultimately did away with the “automatic” *ius soli* open to the whole of the Empire. In an effort to block all new immigration from the Commonwealth, the Commonwealth Immigrants Act 1962 limited immigrant entry to the United Kingdom, and then the Immigration Act of 1971 invented the new legal category of “patrials”. Of all British citizens, only “patrials” had the right of abode in the United Kingdom.

This right was granted to British nationals and people from the colonies who were born, adopted or registered in the United Kingdom or had been resident in the United Kingdom for at least five years. Final stage: 1981 legislation created British "citizenship". The territory to which *ius soli* applied was now exclusively that of the United Kingdom in the strictest sense. British citizenship was granted automatically to children born in the United Kingdom to a British citizen or to a non-British citizen ordinarily resident in the United Kingdom. A child born in the UK to a parent not ordinarily resident could acquire British citizenship at age 10 provided he/she had lived continuously in the United Kingdom. British citizenship is also given automatically by *ius sanguinis* to the first generation born abroad. In the next generation, descendants of a British citizen must live in the United Kingdom, otherwise they lose the right to British nationality (Hansen, 1999).

Up to 2004 Ireland too was a country of automatic *ius soli*: a child born in Ireland was Irish regardless of the parents' status. Ireland, up to ten years ago western Europe's last emigration country, has recently become one with more immigrants than emigrants. The migratory balance has been on the immigration side since 1995 and the number of asylum seekers has risen. In 2003, 22% of babies born in Dublin had foreign parents, nearly two thirds of them very recently arrived in Ireland. On 11 June 2004, the Irish people voted in a referendum for a reform of their Constitution whereby Irish citizenship, previously given automatically to anyone born in Ireland, would henceforth be given only to a child born in Ireland of an Irish-born parent. It will be for a future law to decide the status of a child born in Ireland to foreign parents⁴⁴.

The impact of immigration on countries with a tradition of *ius sanguinis*

But the greatest change occurred in those countries of mainland Europe which had a legal tradition of *ius sanguinis*, once they came to see themselves as countries of permanent immigration rather than emigration.

At the end of the 19th century France was the first country to experience this contradiction between legal tradition and migration status. Remember that *ius sanguinis* (with no ethnic connotations) dominated French nationality law for most of the 19th century (1804-1889). But adoption in 1804 of the Civil Code, which was based on this principle, had brought unforeseen and undesirable consequences: most individuals born in France of foreign parents, although their families had been settled in France for many years, were in no hurry to apply for French nationality, which the code allowed them to do at the age of majority. They thus escaped the military service compulsory for French citizens. This led to an inequality which French people in immigration areas viewed as intolerable. A law was therefore passed on 7 February 1851 which introduced double *ius soli*: an individual born in France to a foreign parent was a French citizen at birth. But this obligation to be French was not absolute. The child could renounce French nationality on reaching the age of majority. This option was removed by the law of 1889, which sought to uphold the principle of equality in respect of responsibilities and duties: the descendants of third-generation immigrants received French nationality at birth once and for all, so could no longer escape military service on reaching their majority. Moreover, French-born children of foreign parents born outside France became French not at birth but on reaching the age of majority: though they were free to retain foreign nationality if they wished (Weil, 1999). Since then, double *ius soli* has been the cornerstone of French nationality law. Not only does it enable French nationality to be extended automatically to these descendants of immigrants, it has also become the simplest way for French citizens to prove their nationality.⁴⁵

In other countries of mainland Europe which remained emigration countries, up to World War II *ius sanguinis* was retained as the prime criterion for attributing nationality at birth. But mass post-war immigration meant that more and more children or grandchildren of immigrants were only able to obtain citizenship through a lengthy naturalisation procedure.

⁴⁴ This restrictive convergence is also apparent in another area, marriage: in the group of 25 countries we studied, all those whose nationality laws used to provide for the automatic acquisition of nationality through marriage have repealed that provision in the last 40 years. Sweden did so in 1950, Denmark in 1951, Portugal in 1959, Italy in 1983, France in 1973, Belgium in 1984, Greece in 1984 and Israel in 1996. The waiting times required before a foreign national can apply for the spouse's nationality have also been increased. The abolition of automatic entitlement and the increase in waiting times were dictated by three factors: gender equality (for a long time it was women who were automatically given their husbands' nationality), the increased rate of marriage breakdown, and the desire to guard against sham marriages, contracted by some foreigners as a fast track to bona fide residence.

⁴⁵ They need only produce their own birth certificate and that of one of their parents

The permanent nature of this mass immigration brought rules which guaranteed a right of permanent abode although settlement had often only been intended as temporary, and opened up access to citizenship. In the 1970s, the highest courts in France and Germany recognised the right of foreign nationals resident on their territory to permanent abode. In 1978-1980 France's Council of state opposed the French Government's attempt to repatriate, against their will, most of the North African immigrants who were legally resident in France (Weil, 1991). The Government was forced to back down in the face of pressure from public opinion and the judiciary. In June 1984, Parliament enacted a law creating a single residence and work permit valid for 10 years and guaranteeing permanent residence for the overwhelming majority of foreign workers and their families. Things developed along similar lines in Germany. In 1972, the *Bundesverfassungsgericht* (Federal Constitutional Court) overturned as unconstitutional the decision of an administrative court in Bavaria that the residence permit of a foreign worker who had been resident in Germany for more than five years should not be renewed on the ground that each renewal might lead to permanent settlement which was "against the interest of the state since Germany is not a country of immigration" (Weil, 1998, 7). In tandem with this right to permanent settlement, the right of access to citizenship (by *ius soli* or simplified naturalisation) for the children and grandchildren of immigrants also developed.

For the second generation of children of migrants, double *ius soli* giving citizenship at birth, part of French law since 1889, was introduced in the Netherlands⁴⁶ in 1953, in Spain (Art. 17) in 1990, and in Belgium (Art. 10) in 1992⁴⁷. The first generation have access subject to their parents being ordinarily or permanently resident in the United Kingdom and Portugal⁴⁸, countries with a tradition of *ius soli*, and since 2000 in Germany. In most other countries of the (15-member) EU, citizenship is given not at birth but later, subject to requirements of residence or voluntary application which supposedly demonstrate social integration (Weil and Hansen, 1999). In Belgium, Denmark, Finland, the Netherlands, Italy and Sweden, someone born in the country to foreign parents can acquire citizenship provided he or she meets certain residence requirements. In Belgium, citizenship is acquired between the ages of 18 and 30⁴⁹; in Denmark, Finland and Sweden between age 21 and 23⁵⁰; in the Netherlands between age 18 and 25⁵¹, and in Italy, in the year after the person reaches their majority⁵². In Spain, parents may apply for a child to be naturalised one year after its birth. In all EU countries, apart from Greece⁵³, Austria and Luxembourg, access to citizenship for the second or third generation has thus been made easier. In the case of Austria, an amendment in June 1998 to the 1985 Nationality Act (Nascumi, 1996) allows two groups of foreign citizens to be naturalised after four or six years' residence in the country instead of the ten years normally required: persons who can demonstrate a "sustainable personal and occupational connection with Austria" and persons born in Austria. For the first time, the fact of being born on Austrian soil makes it easier for a person to acquire citizenship, though it carries no individual entitlement to naturalisation.

To come back to the case of Germany: when Prussia adopted *ius sanguinis* in 1842, it took its inspiration from the leading principle of French law (Weil, 2002, Chapter 7). Like the French Civil Code, Prussia's legislation had no ethnic connotations; it included the Poles and Prussia's Jews, the better to exclude German immigrants from other German states (Fahrmeir, 1997). This *ius sanguinis* was strengthened slightly in 1913 when Germany had become an emigration and emigrant country. In France, this change intensified the view, firmly held since the annexation of Alsace-Lorraine in 1871, that the German empire was built on ethnic thinking. This view was shared by the USA and spread to all the allied countries during World War I (Weil, 2002, Chapter 7). But *ius sanguinis* only acquired ethnic and racist connotations under Nazi rule. Its retention after 1949 was largely in order to preserve legal links with the Germans in the East and the millions of "ethnic Germans" expelled from the Soviet-occupied territories in central and eastern Europe. As in France at the end of the 19th century, the transition to *ius soli* needed one main push: immigrants inside Germany with permanent rights of abode had to have become more of a problem than emigrants outside the country's borders. Two factors also played a part: the need to stabilise Germany's

⁴⁶ In the Netherlands, only through the mother.

⁴⁷ The parent must prove five years of residence during the 10 years preceding the birth.

⁴⁸ If the parents have lived in Portugal for 6 or 10 years prior to the birth.

⁴⁹ Under Article 12a and Articles 13 and 14, the parents may apply for Belgian nationality for their child before the child's 12th birthday if they can prove 10 years' residence in Belgium and if the child has lived in Belgium since birth (Art.11a, 1991).

⁵⁰ Provided the person has lived in the country for 5 years before the age of 16.

⁵¹ Provided the person has lived in the country since birth, Article 6 of the law; introduced in 1984.

⁵² Provided the person has lived in the country since birth (Article 4 of the law).

⁵³ In Greece, account is taken of residence during the naturalisation procedure.

borders and the further need to consolidate democratic values. Since the early 1970s, Germany has been a country of permanent immigration; but it was only post-1990, when the majority of Germans were reunited within stable and recognised frontiers, that giving German nationality to children of immigrants became politically feasible, being approved by Parliament in 1999. As from 1 January 2000, any child born in Germany to a legally resident foreign parent is German. On reaching age 23, however, if they have another nationality through their parents, they must choose between that and German nationality.

But this trend we have highlighted is primarily a feature of the 15 EU member states, all of which have become countries of immigration after, in many cases, being emigration countries. Since it does not as yet affect most of the new EU member states, these retain their traditions of *ius sanguinis* and have no legal provisions on acquisition of their nationality by children born on their territory. The three Baltic states are an interesting case, however. On independence in 1991, they took different routes. Whilst Lithuania and Estonia quickly adopted new nationality laws – Lithuania in 1991 and Estonia in 1992 – Latvia proceeded differently, reviving its former laws and only giving Latvian citizenship to those who held it prior to the Soviet era and to their descendants. A new citizenship law was adopted on 21 June 1994, however. The three countries' laws may be classed as follows: Lithuania combined provisions of *ius domicilii* and *ius sanguinis* in giving citizenship to its residents, and was the most inclusive. Latvia was the most exclusive; it devised an "age window" system, with consideration each year of applications from certain categories of people: in 1996, it was individuals born in Latvia and aged 16 to 20; in 1997, it was individuals aged 25 or under, etc. (Barrington, 2000).

The nationality laws adopted after independence by Latvia and Estonia drew criticism from intergovernmental organisations. They contravened human rights because they denied citizenship to certain sections of their population, notably long-term residents of Russian extraction. Since Latvia and Estonia were potential candidates for membership of the Council of Europe and European Union, it was made very clear to them that if they wanted their case to be taken seriously they would have to implement the measures the intergovernmental organisations advocated. The provisions at issue, on nationality and human rights, were changed and are now almost totally consistent with international custom regarding territorial citizenship. The European Union and the Council of Europe were not the only organisations to urge these countries to be more open; the Organisation for Security and Cooperation in Europe (OSCE) undoubtedly played an important part in bringing about the recent changes to the nationality laws in Estonia and Latvia. On the subject of Latvia the OSCE High Commissioner on National Minorities recommended adding a number of provisions which included the right to citizenship for non-nationals, speeding up the naturalisation process, abolishing the age-window system, granting citizenship to stateless children born in Latvia, a qualifying period of no more than 5 years for naturalisation, reduction of the relevant costs and simplifying the tests on Latvian history and constitution which applicants have to sit. In the law of 22 June 1998, Latvia put these recommendations into effect and the High Commissioner welcomed this positive step the following day⁵⁴. But the convergence process is not yet complete. In December 1998, Estonia amended its law on granting citizenship to second-generation immigrants; the amended provisions came into force on 12 July 1999.

⁵⁴ Declaration of 23 June 1998 by the High Commissioner on National Minorities. Document supplied by the Latvian Embassy in France.

Current legislation

Second-generation immigrants*

	Entitlement to citizenship	to Existence of a specific provision	Residence	Age	Other information
Albania					
Andorra	Yes	Yes	Residence for most of child's life	18	
Armenia	No	No			
Austria	No	Yes	6 or 4 years instead of 10	-	Naturalisation
Azerbaijan					
Belgium	Yes	Yes	Parents residents for 10 years	Before 12, Between 18 and 30	Registration
Bosnia & Herzegovina					
Bulgaria	No	No			
Croatia					
Cyprus	No	No			
Czech Rep.	No	No			
Denmark	Yes	Yes	10 years (continuous residence)	21-23	Declaration
Estonia	Yes	Yes	Parents permanent residents	15	Application by parent
Finland	Yes	Yes	10 years	21-23	Declaration
France	Yes	Yes	5 years (non-continuous)	After 13	With parents' consent at 13; by request at 16; automatic at 18
Georgia					
Germany	Born in Germany	Yes	Parents permanent residents	At birth	At 23: dual citizenship
	Not born in Germany	Yes	8 years, incl. 6 in primary education and 4 in secondary	16-23	Dual citizenship Registration and absence of criminal conviction
Greece	No	No	-	-	-
Hungary	No				
Iceland					
Ireland	Yes	To be redefined		-	-
Italy	Yes	Yes	Continuous since birth	Majority -	-
Latvia	Yes (June 1998)	Yes	-	-	Birth after 1990 and application by the parents
Liechtenstein					
Lithuania	No				-
Luxembourg	No	No		-	-
Macedonia	No	No			
Malta	No				
Moldova					
The Netherlands	Yes	Yes	Continuous since birth	18-25	Declaration
Norway	Yes	Yes			

Poland	No					
Portugal	Yes	Yes	None	Any time	Parents residents 10 years or 6 if from Portuguese-speaking country)	
Romania	No					
Russia	No	No	-	-	-	
San Marino						
Serbia & Montenegro						
Slovakia	No					
Slovenia	No	No				
Spain	Yes	Yes	1 year	18-20	Declaration	
Sweden	Yes	Yes	10 years	21-23	Declaration	
Switzerland	No					
Turkey	No					
Ukraine	No					
United Kingdom	Yes	Yes	None (1981)	-	Parents permanent residents	

The model of convergence and retention of "minor" differences

The process of convergence in the development of a "territorial" citizenship (Orentlicher, 1998) is seen in countries with the following characteristics: democratic values, stable borders, and a view of themselves as immigration rather than emigrant or emigration countries⁵⁵. Where these three conditions are present, two distinct lines of convergence appear, evidenced by the numerous changes which have been made to many nationality laws. Firstly, access to citizenship is restricted once the state gets the impression that the existing citizenship laws make it easier for people to achieve residence and circumvent the immigration laws. Secondly, provisions are put in place to make it easier for the first and second generation of children of migrants to acquire citizenship. Methods of convergence may vary, but they usually entail amendments to existing laws, and for the first generation citizenship is usually granted at birth provided the parents have been legally resident for a minimum period or it is granted a number of years after birth provided the child is legally resident.

It is worth noting, however, that the reasons behind the changes have themselves changed, and so have the kinds of demands emerging from public debate: in France, for example, in the late 19th century, *ius soli* was forced upon the children of immigrants out of a desire to apportion the burden of public responsibility and security equally. After 1945, *ius soli*, an obligation imposed by the state in order to ensure equal performance of duties, was increasingly demanded as a right tied to the fact of having been born on French soil. Previously, the state imposed its nationality. It embraced its sons, but for a purpose. Now the same people were demanding citizenship and obtaining it almost as of right (Weil, 2002, Chapter 7).

The 15 EU member states which have converged have done so not under pressure from the European Union, but in parallel, according to the procedures and domestic political debates peculiar to each of them (Weil and Hansen, 1999). In the three Baltic states the changes came about differently: the international organisations brought pressure to bear to help foreign residents claim and secure their rights.

Countries which are not following this model of convergence are those which do not meet one of the three conditions mentioned earlier; in actual fact, there are just two determining factors since all the countries

⁵⁵ In immigration countries with some of their citizens living abroad, all laws include provisions which allow citizenship to be passed on to children born abroad. This type of *ius sanguinis* often ends at the third generation unless a close connection with the country of origin can be demonstrated at the time of application (USA, 1978; United Kingdom, 1981; Canada, 1999).

studied are democratic or moving towards democracy. The differences lie in these countries' views of themselves and in the stability of their borders.

A link can be made between failure to meet the first condition and migration: even though all the countries mentioned in our study have foreign residents living within their borders and some of their own nationals living outside them, the presence of immigrants in a territory is not in itself enough to produce convergence. When the state, in defence of its own interests, decides to give priority to maintaining ties with its nationals living abroad, when the predominant feeling in the country is that a large section of the population lives abroad and when the state sees these people as more important than the foreign nationals resident on its territory, then there is no legislative convergence.

This is the case with Russia, which has many of its nationals living outside its borders, in the former Soviet republics. The rules on Russian citizenship are set out in the nationality law of 28 November 1991 (which came into force on 6 February 1992), as amended on 17 June 1993 and 6 February 1995. They state that children born of parents with Russian nationality are Russian citizens irrespective of where they are born (Art.14). Thus *ius sanguinis* is the chief factor in determining eligibility for Russian citizenship.

The second major reason for divergence is unstable borders. Territorial disputes or diasporas tend to make it impossible, and even unthinkable, to adopt inclusive systems for immigrants. Unstable borders favour *ius sanguinis*, which is a safer way of keeping control of citizenship than *ius soli*. In numerous similar cases there are citizens living outside the national borders, or sizeable minorities living in the country. The most striking example is Germany. Only after reunification was it possible even to consider citizenship for the children of immigrants; this issue had long been ignored by the politicians.

All in all, a comparison of countries with markedly differing geographical and historical situations shows first of all how important legal tradition is in framing the rules on citizenship. Traditions were altered once an inconsistency developed between the consequences of implementing the traditional law and the state's perception of its status with regard to migration. The laws of the democratic nation states all changed in the same way once they became immigration countries. So despite many authors' arguments to the contrary, there is no relationship of cause and effect between national identity and nationality laws.

What should the priorities be?

Introduce *ius soli* where it does not exist

After more than three years of comparative study, a group of specialists on immigration and nationality issues drawn from the European Union countries, Russia, South Africa, the three countries of North America and Israel concluded that it was necessary to adopt a generational approach. Its proposal was that rights should be increasingly automatic for immigrants' descendants with the passage of time and each succeeding generation born in the country of immigration⁵⁶: thus children born in the country to a parent born there – that is, the grandchildren of immigrants – would automatically qualify for citizenship at birth. For the child born to two immigrant parents⁵⁷, the law would have to allow a right to acquire the nationality of the country of birth, subject to certain residence requirements.

This is the direction which countries with no tradition of *ius soli* should take. It is a priority for those which are already immigrant or immigration countries and it would be a wise move for the others. A country that makes its nationality very difficult for children to obtain creates an integration obstacle and encourages communalism.

We should also remember that the development of *ius soli* derives from the state's concern for its security just as much as from any insistence on equality: children of an immigrant, even those with dual nationality, cannot claim protection from the parents' country of origin once they have been naturalised. Their

⁵⁶ T. Alexander Aleinikoff and Douglas Klusmeyer, *Citizenship Policies for an Age of Migration*, Carnegie Endowment for International Peace, Washington DC, 2002.

⁵⁷ We define an immigrant in a country as a person born abroad as a foreign national who has taken up residence in this country.

naturalisation thus helps to restrict possible interference by emigration or emigrant states in the internal affairs of countries of immigration.

Remedy unfairness to the child brought up in the country of immigration but not born there

There is one legal scenario which we have not so far considered, that of the child brought to the immigrant parents' country of residence at a very young age. What is the difference between the child born in the country and the child who arrives at age 6 months or one year, or just before the age of mandatory school attendance, often 6 years? They receive schooling and socialisation that make them indistinguishable in terms of identity from children – their siblings in some cases – born in the country of immigration. And yet in most European countries, unlike children born in the country, they cannot take advantage of the rules which make it easy for children born in the country to obtain citizenship. Immigrants like their parents, they must wait, usually till the age of majority, before being naturalised, unless the parents have made an application on their behalf. Of the Council of Europe's member states, only Denmark, Finland, Germany, Norway and Sweden have favourable rules for such children. In Denmark, Finland, Norway and Sweden a child who has lived in the country for five years before the age of 16 can apply for citizenship between the ages of 21 and 23⁵⁸. In Germany, the law of 1 January 1991 says that any young foreigner aged 16 to 23 may obtain German nationality by declaration if they have lived in Germany for 8 years and attended school for 6 of them⁵⁹.

Ideally the Council of Europe member states which have no provisions of this kind in their laws would do well to learn from these countries' experience and reform their legislation along the lines of equal rights for all children brought up in our societies⁶⁰. Such children frequently perceive this inequality, in many cases between siblings, as unfair, and it is very important that they should be properly integrated.

Bibliography

Barrington, Lowell W. 2000. "Understanding Citizenship Policy in the Baltic states." in *From Migrants to Citizens*, T. Alexander Aleinikoff and Douglas Klusmeyer (ed.), Carnegie Endowment for International Peace, Washington DC, pp. 253-304.

Brubaker, Rogers. 1992. *Citizenship and Nationhood in France and Germany*. Cambridge: Harvard University Press.

Hansen, Randall. 1999. "From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom" in Randall Hansen and Patrick Weil, *Nationality Law in Europe*. London: Macmillan.

Klaaren, Jonathan. 1999. "Post-Apartheid Citizenship in South Africa", revised version of a paper presented at a meeting of the Carnegie Comparative Citizenship Project, Virginia, USA, June 1998.

Nascimbene, Bruno. (ed.) 1996. *Nationality Laws in the European Union*. Milan: Giuffrè Editore.

⁵⁸ Chapter 1 § 3 of the law on Norwegian nationality: "Foreign nationals who have resided in the realm from the date when they attained 16 years of age and previously for a total of 5 years, acquire Norwegian nationality if, after the attainment of 21 years of age, but prior to the attainment of 23 years of age, they make a written statement before the County Governor of their intention of becoming Norwegian nationals. If they do not have the nationality of any country, they may make such a statement as soon as they have attained 18 years of age, provided that, at the time when they make the statement, they have resided in the realm for at least 5 years and previously resided here for a least another 5 years. The same applies if they prove that they lose the foreign nationality by acquiring Norwegian nationality."

⁵⁹ Simon Green, "Citizenship policy in Germany", in Weil and Hansen, *op. cit.*, pp.29-54. The applicant must satisfy three other conditions: 4 of the 6 years of school attendance must have been in secondary education, he must renounce his original nationality, and he must have no criminal record.

⁶⁰ In France, in a circular of 17 October 2000, the Government decided to simplify and speed up the naturalisation of children brought to France before the age of 6 (Circular DPM/SDN, No.2000/530 of 17 October 2000). The success of the procedure and its priority treatment led to delays in the processing of other cases and doubts at the Interior Ministry about waiving police enquiries. The procedure was revoked by Circular No 2003-418 of 1 September 2003.

- Orentlicher, Diane F. 1998. "Citizenship and National Identity" in *International Law and Ethnic Conflict*, David Wippman (ed.), Ithaca and London: Cornell University Press, pp. 296-325.
- Watson, Alan. 1974. *Legal Transplants*. Edinburgh: Scottish Academic Press; Charlottesville: University Press of Virginia.
- Weil, Patrick. 1996. "Nationalities and Citizenships: The lessons of the French experience for Germany and Europe", in *Citizenship, Nationality & Migration in Europe*, D. Cesarani & Mary Fulbrook (ed.), Routledge, London, pp. 74-87.
- Weil, Patrick. 1998. *The state Matters. Immigration Control in Developed Countries*. New York: United Nations.
- Weil, Patrick. 1999. "L'histoire de la nationalité française: une leçon pour l'Europe", in *Nationalité et citoyenneté en Europe*, pp. 55-70.
- Weil, Patrick. 2001. "Access to Citizenship: A comparison of Twenty-Five Nationality Laws" in "Citizenship Today: Global Perspectives and Practices" in T. Alexander Aleinikoff and Douglas Klusmeyer (ed.), Carnegie Endowment for International Peace, Washington DC, pp.17-35.
- Weil, Patrick. 2002. *Qu'est ce qu'un français? Histoire de la nationalité française depuis la Révolution*, Paris, Grasset.
- Weil, Patrick & Hansen, Randall. 1999. *Nationalité et citoyenneté en Europe*, Paris, La Découverte, Collection "Recherches"
- Weiss, André. 1907. *Traité Théorique et pratique de droit international privé, Tome premier : la nationalité*. Paris: Larose et Tenin.

**THE POSITION OF CHILDREN IN RESPECT OF DECISIONS
MADE BY THEIR PARENTS REGARDING THEIR NATIONALITY**

Report prepared by Mr Gerard-René DE GROOT⁶¹

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SUMMARY

1. Registration of children of a national born abroad as a requirement for the acquisition of the nationality of the parent is not acceptable, if the child involved would otherwise be stateless: in that case the acquisition of nationality *iure sanguinis* should be automatic.
2. The establishment of a family relationship between a child and a man (by recognition, judicial decision, legitimation) during the minority of the child should lead to the immediate acquisition of the nationality of the father without any other condition, at least if the child otherwise would be stateless.
3. The rule '*nasciturus pro iam nato habetur quotiens de commodis eius agitur*' should in principle also apply in nationality matters.
4. The non-observation of the right of a child to be heard in cases of acquisition or loss of nationality, can - under certain circumstances - violate Articles 8 and 12 of the Convention on the Rights of the Child.
5. In case of an application of naturalisation by or on behalf of the minor and in case of a request for extension of a naturalisation of a parent, the naturalisation authorities should hear the child on the application. It is also appropriate to hear the other parent of the child, in particular if the child would lose the nationality of this other parent by the naturalisation or extension.
6. It is desirable that legislators provide for - at least - the right to reacquire a nationality lost during the minority of a child by simple declaration of an option within a certain term after the age of majority. Legislators should also make it possible for a young adult to renounce a nationality acquired by naturalisation, extension, registration or declaration of an option during his/her minority.
7. It is appropriate to require an *ex ante* consent of the court for an application of (an extension of) a naturalisation by or on behalf of a minor, if the acquisition of the new nationality causes the loss of the old one.
8. It is desirable to require as a condition for registration or declaration of option on behalf of a minor the consent of the child involved (if he has already reached a certain age, e.g. 12 years) and the consent of the other parent. It should be possible to replace the required consent by permission of the court in the best interest of the child.
9. If a child loses its nationality because it is adopted by foreigners, this nationality should be reacquired in case of annulment of the adoption involved.
10. In case of loss of nationality by a minor, the minor should always have access to a court – preferably represented by a special guardian *ad litem* – in order to challenge the loss.
11. It is preferable to make loss of nationality by a minor dependent on the prior permission of a court, to be given in the best interest of the minor.

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REPORT

The position of children in respect of decisions made by their parents regarding their nationality⁶³

I. General remarks

This report will try to give an answer to the question of whether children should have the right to remedy a decision made by their parents regarding the child's change of nationality. In order to answer to this question, it will be necessary to make an inventory of the influence which parents have in respect of the nationality of their children. The report will therefore give a general description of the acquisition of a nationality by minors via naturalisation or declaration of an option on the one hand and the loss of nationality by minors on the other. Special attention will be paid to the rules regarding the representation of minors in nationality matters. Of particular importance in this context are the rules regarding the extension of the acquisition of a nationality by a parent via naturalisation or declaration of an option, respectively the extension of the loss of a nationality by a parent to his/her (minor) children. Attention will also be given to the possibilities which children have of renouncing or respectively reacquiring a nationality acquired, respectively lost, during their minority.

However, before dealing with these issues some introductory remarks must be made.

Article 7 of the Convention on the Rights of the Child (New York, 20 November 1989) states that a child 'shall have the right from birth (...) to acquire a nationality'. However, this provision does not indicate to which nationality a child should be entitled. In Europe, almost all states provide for – in principle – an acquisition of their nationality at the moment of birth if the *mother* of a child possesses the nationality involved at that moment. However, in the case of birth abroad some states make an exception to this rule. Some states require registration of the child at the embassy or consulate of the state involved for the acquisition of the nationality⁶⁴. This type of exception is accepted by Article 6 (1) European Convention on Nationality (Strasbourg, 6 November 1997, ETS 166; hereinafter abbreviated as ECN), but sometimes causes difficulties if the mother for various reasons refuses to register her child within the due time. This behaviour of the mother may cause statelessness for her children. Statelessness may also be the consequence if a state does not provide for the possibility for a child of a national born abroad to acquire the nationality by registration, because the parent was already born abroad. These difficulties were noted by the drafters of the ECN. Therefore, the explanatory report (No. 65) on Article 6 already emphasises that any provisions limiting the transmission of the nationality of a parent to a child born abroad should not apply if the child would become stateless. This is also stressed by Recommendation R (99) 18 of the Committee of Ministers of the Council of Europe on avoidance and the reduction of statelessness, adopted on 15 September 1999, in rule II A, sub a. The explanatory report on Article 6 takes another small but important step by underlining: 'It must be added that the acquisition of the nationality of one of the parents at birth on the basis of the *ius sanguinis* principle, by children born abroad should be automatic and not made conditional upon registration or option, the absence of which would make them stateless.' It would be important, if an additional protocol to the ECN should provide that the requirement of registration were not acceptable if the child involved would otherwise be stateless: in that case the acquisition of nationality *iure sanguinis* should be automatic.

In many cases a child will also acquire *iure sanguinis* the nationality of his/her *father*. If the father and mother are married to each other this is – in principle – the case in all European countries, but some states again make an exception in case of birth abroad. If the parents are not married to each other, the situation is

⁶³ In the footnotes to this report references will be made to the following publications: *De Groot, Acquisition*: Gerard-René De Groot, The acquisition of nationality by operation of the law ex lege or by lodging a declaration of option, Report for the 2nd European Conference on Nationality: "Challenges to national and international law on nationality at the beginning of the new millennium", Council of Europe, Strasbourg 2001, 65-93 (see also: Maastricht Journal of European and Comparative Law 2002, 121-160; *De Groot, Loss*: Gerard-René De Groot, Loss of nationality: a critical inventory, in: David Martin/ Kay Hailbronner, Rights and Duties of Dual Nationals: Evolution and Prospects, Kluwer Law International, The Hague/London/Boston 2003, 201-299; *De Groot, Staatsangehörigkeitsrecht*: Gerard-René De Groot, Staatsangehörigkeitsrecht im Wandel, Köln: Heymanns 1989.

⁶⁴ De Groot, Acquisition, 70-73.

different. Recognition by the father, legitimation or judicial establishment of paternity are grounds for acquisition of nationality *ex lege* in many European countries, but exceptions are frequent.⁶⁵ In perspective of Article 7 (1) of the Convention on the Rights of the Child, it must be submitted that the establishment of a family relationship between a child and a man (by recognition, judicial decision, legitimation) during the minority of the child should lead to the immediate acquisition of the nationality of the father without any other condition, at least if the child would otherwise be stateless. It is desirable that this rule also be added to the ECN in an additional protocol.

Problematic is the position of children who can not acquire *iure sanguinis* any nationality of a parent. Special rules are necessary for such cases because no European country applies *ius soli* as a general ground for acquisition of nationality.⁶⁶ Article 6 (1) (b) of the ECN prescribes such a special rule for foundlings found on the territory of a state: such a child must acquire the nationality of the state where he/she was found, if he/she would otherwise be stateless.⁶⁷ Article 6 (2) of the ECN states that each State Party shall provide in its internal law for its nationality to be acquired by other persons born on its territory who would otherwise be stateless. This rule is repeated in Recommendation R (99) 18, in Part II A, sub b. The nationality of the country of birth must be attributed either *ex lege* at birth or subsequently to children who remain stateless upon application. Most European countries opted for the first possibility mentioned, but a remarkable number of countries provide for other solutions.⁶⁸ In respect of these rules for avoiding statelessness, a new development can be observed. Article 9 (4) of the new Finnish Nationality Act 359/2003 is an example: A child acquires Finnish nationality by birth if ‘the child is born in Finland and does not acquire the nationality of any foreign state at birth, and does not even have a secondary right to acquire the nationality of any other foreign state.’⁶⁹

A similar step was taken by the French legislator in 2003.⁷⁰ The reason for both modifications is obvious: sometimes a foreign parent does not make use of the possibility to register a child in the consulate of his state in order to avoid the acquisition of the foreign nationality by the child involved, and does this to activate the rules avoiding statelessness of the country of birth of the child. Finland and France refuse to accept this tactical behaviour by parents of a child born on their territory. That is understandable, but makes it – in perspective of Article 7 (1) of the Convention on the Rights of the Child - even more important to stimulate the creation of international instruments which oblige States to confer the nationality *ex lege* at birth to children of their nationals born abroad if these children would otherwise be stateless.

The problems just mentioned show that parents sometimes have considerable power to determine the nationality position of their children. This is in particular the case if the acquisition of nationality by a child depends on an action to be undertaken by a parent (for example, registration). The desirability of this is questionable. Similar problems will be discussed in further paragraphs of this report.

Another issue must be briefly touched on in relation to Article 7 of the Convention on the Rights of the Child and to Article 6 (1) of the ECN. Children frequently acquire at birth *ex lege iure sanguinis* the nationality of a parent. It is exceptional for a child also to be able to acquire the nationality which was lost by the parent before the birth of the child. Such an exception is observed in the Spanish legislation, where the child of a father or mother who was born in Spain as a Spanish national can acquire Spanish nationality by declaration of option (Article 20 (1) (b) *Código civil*)⁷¹. Until now no international legal instrument has

⁶⁵ The different exceptions were described and criticised in Gerard-René De Groot, Acquisition, para. II b, p. 73-77.

⁶⁶ In 2001 even Ireland abolished *ius soli* as a general ground for acquisition of nationality. The Irish Nationality and Citizenship Act provides that ‘every person born on the island of Ireland is entitled to be an Irish citizen.’

⁶⁷ This provision was analysed in De Groot, Acquisition, para. 4 (p. 80, 81), where critical remarks on the nationality legislation of some countries were also added.

⁶⁸ The different national rules are described in De Groot, Acquisition, para. II 3 (b) (p. 78, 79) and para. III 2.

⁶⁹ Unofficial English translation provided by the Ministry of the Interior of Finland, available on <http://www.uvi.fi/download.asp?id=Nationality+Act;609;{E792540D-5E25-4282-BAF9-13FB9CA64E12}> (last visited on 14 June 2004).

⁷⁰ Article 19-1 Code civil was amended by Act 2003/1119 of 26 November 2003, Journal Officiel Nr. 274 of 27 November 2003 and provides now:

“*Est français :*

1° *L'enfant né en France de parents apatrides ;*

2° *L'enfant né en France de parents étrangers pour lequel les lois étrangères de nationalité ne permettent en aucune façon qu'il se voie transmettre la nationalité de l'un ou l'autre de ses parents.”*

⁷¹ As modified by Act 36 of 8 October 2002, BOE of 9 October 2002, pp. 35638-35640, in force since 9 January 2003.

paid attention to the position of a child whose parent lost a certain nationality after the conception of the child involved but before its birth. Does the principle '*nasciturus pro iam nato habetur quotiens de commodis eius agitur*' (the unborn child is deemed to be already born in all circumstances in which this is to his/her advantage), recognised as a general principle of law in numerous legal systems, also apply for the acquisition of a nationality *iure sanguinis*? Several countries expressly ruled that a child of a national who died before the birth of the child acquires the nationality of the parent. But the position of the *nasciturus* in case of loss of nationality is uncertain. We would like to submit that there is in principle no reason not to apply the *nasciturus* rule in nationality matters.

Not to regulate the nationality position of a *nasciturus* may be understandable where under the national law of the country of the parent, the child would have lost the nationality involved as a consequence of the loss of nationality by the parent if he/she had already been born. In this case the *nasciturus*-status is exclusively interesting if the nationality legislation of the state involved provides for a facilitated reacquisition of the nationality lost during minority. The *nasciturus*-issue is really important in those countries where a child during his/her minority can only lose his/her nationality in exceptional circumstances (e.g. with the consent of a court).

Article 8 of the Convention on the Rights of the Child has consequences for nationality regulations as well. States have to respect 'the rights of the child to preserve his or her identity, including nationality, (...), without unlawful interference.' From the second paragraph of this provision it can be concluded, that 'where a child is illegally deprived of [his or her nationality], States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her nationality.'

Of course, it will often prove difficult to decide whether the loss of nationality happened with unlawful interference, or was illegal. This question certainly has to be answered in the affirmative if the deprivation of nationality can also be classified as arbitrary (in the sense of Article 15 (2) of the Universal Declaration of Human Rights). However, we would submit that there are more cases where the loss of nationality by a minor is unlawful or illegal. Article 12 of the Convention on the Rights of the Child provides:

'1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

It is arguable that the non-observation of the right of a child to be heard in cases of acquisition or loss of nationality could lead to the conclusion that Article 8 of the Convention is also violated. Hereinafter we will analyse this problem in more detail.

In the following paragraphs references to the legislation of the different jurisdictions are made by using abbreviations. For example '15 (1) (b) NET' means 'Article 15 paragraph 1, lit. b of the Nationality Act⁷² of the Netherlands'. The abbreviations correspond with those used in the European Bulletin on Nationality (English edition).

II. The acquisition of a nationality by minors

1. Introductory remarks

This part of the report will deal with the question of whether children should have the right to challenge a decision made by their parents regarding the acquisition of a nationality by the child. Special attention will be given to the position of children in respect of the extension of the acquisition of the nationality of a state by a parent to minor children. It is necessary to study also briefly whether children can acquire another

⁷² This abbreviation is also used for countries where the nationality provisions are included in the civil code, such as France and Spain.

nationality independently of their parents in order to demonstrate the ability and powers parents have to influence acquisition of nationality by their children.

2. Acquisition by naturalisation, registration or declaration of option

In many states one of the conditions for naturalisation is to be of full age.⁷³

But in spite of this condition an independent naturalisation in these countries is often nevertheless possible by the application of special provisions. In the Netherlands for example a minor can be naturalised via the application of Article 10 NET, which allows the Minister to waive most of the normal conditions for naturalisation after having requested the Opinion of the Council of State. Moreover, under specified circumstances Article 11 (4 and 5) NET also allows naturalisation of a minor. In the United Kingdom minors can be registered as British citizens at the discretion of the Secretary of State (3 (1) UK), which makes a provision regarding naturalisation of minors superfluous.

In certain other countries no provisions are found on the exclusion of minors in respect of naturalisation. Obviously naturalisation of a minor is possible in those countries (if it is understood correctly, this is the case in, for example, Hungary, Italy and Latvia).

In comparison, some other countries provide expressly for the possibility of naturalisation of minors.

In Spain Article 21 of the SPA allows the naturalisation of a minor aged 14 years or older represented by his/her legal representative.

In Germany minors can apply for naturalisation (§ 8 GER; 68 (1) *Ausländergesetz*⁷⁴). Although, if the minor has not yet reached the age of 16 years⁷⁵, an application must be lodged by a legal representative. Minors of 16 or 17 years can make the application themselves with the consent of their legal representative.

Switzerland also allows for the naturalisation of minors (Article 34 SWI), but the application must be made by a legal representative. Even if the minor is under custody (*Vormundschaft*) it is not necessary to request the consent of the custody court for the application of naturalisation. Article 34 (2) SWI provides that minors of 16 and 17 years must submit a written declaration that they agree with the application of naturalisation.

Austria has an even more elaborate regulation: § 19 (2) 2 AUS provides that the application of naturalisation for a minor must be made by the legal representative or with the written consent of the legal representative. A minor who has already reached the age of 14 must give his/her consent to the application in a written declaration.⁷⁶ Article 19 (3) AUS provides that the consent of the legal representative or the minor of 14 years or older may be replaced by consent of the court, if the acquisition of nationality is in the interest of the minor on educational, professional or other important grounds (*'aus erzieherischen, beruflichen oder anderen wichtigen Gründen dem Wohl des Fremden dient'*). The same applies if the minor does not have a legal representative or if the legal representative cannot be reached and the appointment of another legal representative would be very difficult. This procedure also applies if the residence of the minor is unknown or the minor cannot be reached for other reasons.

3. Acquisition by extension of the acquisition of nationality by a parent⁷⁷

Most countries provide that - under certain conditions - children of a person who acquires the nationality of the country acquire this nationality as well if they are still minors. An enormous variety of conditions for an extension of acquisition may be observed. The content of the provisions on extension of the acquisition of

⁷³ Gerard-René De Groot, *Staatsangehörigkeitsrecht*, 237. An example is Article 21-22 F: *'nul ne peut être naturalisé s'il n'a atteint l'âge de dix-huit ans.'* Compare furthermore: 9 (1) ALB; 19 (1) BEL; 6 CYP; 7 (1) FYR; 6 (1) GRE; 15 (1) (a) IRL; 6 LUX; 10 (1) MAL; 6 (1) NOR; 8 (1) (a) NET; 6 POR (*maiores ou emancipados*); 9 (c) ROM; 10 (1) SLN; 22 SPA; 6 UK.

⁷⁴ The German Immigration Act.

⁷⁵ Compare 15 MOL.

⁷⁶ Compare 8 (7) POL; 16 UKR.

⁷⁷ See Gerard-René De Groot, *Staatsangehörigkeitsrecht*, 271-273.

nationality depends, inter alia, on the power that a state gives to parents in respect of the determination of the nationality position of their minor children. Some examples are useful.

An unconditioned extension of naturalisation of a parent to the minor children exists in Greece (10 (1) GRE). An extremely wide extension also exists in Italy (if the child lives with the naturalised parent: 14 ITA); in France an extension must be mentioned in the naturalisation decree of the parent and this will normally happen if the child lives with the naturalised parent (22-1 FR). Compare also 6 NOR; 7 (4) SLK (consent of the other parent).

The Belgian and Luxembourg legislation provide for extension on the condition that the naturalised parent exercises parental authority (12 BEL; 2 (3) LUX; compare also 8 POL).

Like France, some countries provide for an extension to minor children unless the contrary is mentioned in the naturalisation decree of the parent involved. This is the case in Denmark (if the parent has parental authority and the child is a resident of Denmark: 5 and 6 (2) DEN), Liechtenstein (6 (2) LIE), Germany (if under parental authority; older children must make a declaration of loyalty ('*Loyalitätserklärung*': 16 (2) GER; 85 (2) *Ausländergesetz*), Iceland (5 ICE).

Some countries make a distinction between cases where only one parent of a minor child is naturalised and cases where both parents are naturalised. This happens in Albania (11 ALB); FYR Macedonia (12 FYR); Latvia (15 LAT: if the child is under 16 years) and Lithuania (24/25 LIT: if child is under 14 years); Moldova (16 MOL; if child is under 16 years); Romania (10 ROM); Slovenia (14 SLN). If both parents are naturalised, the naturalisation is extended to the minor children; otherwise this is not always the case.

A very elaborate regulation on the extension of naturalisation is to be found in the Netherlands: on request of the parent who applies for naturalisation an extension of this naturalisation to a child younger than 16 years will be mentioned in the naturalisation decree if the child has an unlimited residence permit and its main residence in the Netherlands (11 (3) NET). If the child is already 16 or 17 years old, three additional conditions must be fulfilled (11 (4) NET): a) the child must have had his/her main residence in the Netherlands for the period of three years before the lodging of the application for naturalisation by the parent; b) he/she must not constitute a danger to public order, good morals or the safety of the Kingdom; c) he/she must have given his consent to the extension. From Article 2 (4) NET it can be concluded that a child of 12 years or older, the legal representative of the child and the other parent will have the opportunity to give their opinion on the extension *on their request*. If the child and the other parent/legal representative are both against an extension, the naturalisation of the (other) parent will not be extended to the child (compare 17-19 AUS).

Under the legislation of some other countries there is no extension of the naturalisation to the minor children. This is, for instance, the case in Hungary (although naturalisation of a minor is possible), Ireland (but naturalisation is facilitated: 16 (c) IRE), Malta (but registration is possible: 11 (1) MAL), United Kingdom (but registration is possible).

In countries where minor children do not (or not always) acquire the nationality of the country if one of their parents acquires this nationality, they may have a right of option on the nationality involved if certain requirements are met. See e.g. 12bis (1) (2) BEL; 2 POR.⁷⁸

4. A right for the child to remedy the decision of the parent?

After this brief survey, the question must first of all be raised of why so many countries require full age for naturalisation. It is likely that in the countries involved there is a relation with the ease of extension of the naturalisation of a parent to the minor children. Consequently, the need for an independent naturalisation is limited to very special cases. An independent naturalisation of a minor is, for instance, necessary if a parent dies after having applied for naturalisation for himself/herself and his/her minor children. In such cases the children can no longer acquire the nationality by extension of the naturalisation of the parent. A certain need for an independent naturalisation also occurs in cases where certain children were originally excluded from the

⁷⁸ See De Groot, Acquisition, 87.

extension of the naturalisation of a parent and later on - but before the majority of the child - the acquisition of the nationality of the state involved nevertheless seems to be appropriate.

Furthermore, it is obvious that a close relationship exists between the condition of full age and other, alternative ways, of conferring the nationality of a state on minor children. Sect. 3 (1) UK (the Secretary of State may register minors at his discretion) is the most obvious example; option rights which may be used by or on behalf of minor children also reduce the need for naturalisation of minors considerably.⁷⁹

The opinion that acquiring another nationality is such an important act that a person should make his/her own decision could be another ground for requiring full age as a condition for naturalisation. In that view, representation by a legal representative is less desirable in respect of such an important decision. This is particularly true if the acquisition of the new nationality implies the loss of the previous one. However, this argument is not very convincing if several alternative ways (extension, registration or lodging a declaration of option) exist for acquiring the nationality involved on behalf of the minor. It is - of course - completely true that the acquisition of a new nationality is an important act and, in particular, in cases of loss of the previous nationality through the voluntary acquisition of another nationality, it should be ascertained that this loss does not detract from the acquisition of the new nationality. An adult must decide on the attractiveness of the acquisition of a new nationality on his/her own responsibility. For minors the legal representatives must do this and - in line with Article 12 of the Convention on the Rights of the Child - they must pay careful attention to the opinion of the older minor. This is not only the case if an independent naturalisation is requested on behalf of the child, but also if a new nationality is requested for the child in alternative ways (application for extension of the naturalisation of a parent; application for registration of a minor as national; use of an option right). In respect of this issue, there is no relevant difference between either way of acquisition of another nationality by the minor.

Based on the best practices described above, we would like to submit that the following rules should be followed in order to come to a decision in the best interest of a minor, paying due attention to the opinion of the minor himself/herself. At least in cases of an application for naturalisation by or on behalf of the minor and in cases of a request for extension of a naturalisation of a parent, the naturalisation authorities must provide the child with the opportunity to be heard on the application for naturalisation or extension before a decision is taken. In order to obtain a good picture of the interests of the child it is also appropriate to listen to the opinion of the other parent, in particular if the child would lose the nationality of this other parent by the naturalisation or extension. We have seen already that some jurisdictions prescribe giving the other legal representative or parent of the child the right to be heard on the application of naturalisation or extension.

We submit that the child and the other parent should not only be given an opportunity to be heard on their request, but that the child (at least a child older than twelve) and the other parent should be summoned to give their opinion. If a naturalisation or an extension is granted against the will of the child involved, the child will in many legal systems be able to request administrative review, or the right of administrative appeal against the administrative decision involved, because the child is without any doubt an interested party.⁸⁰ The other parent or other legal representative will have the same possibility as an interested party. In that perspective, it is essential for the authorities who decide on the application for naturalisation or extension to hear these interested parties before they take a decision on an application. It must be stressed that the right for the child and the other parent or legal representative to request administrative or judicial review is also a consequence of Article 12 of the ECN:

“Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law.”

At first sight, one would perhaps assume that nobody would appeal against a conferral of a nationality, but the position of a minor child represented by a parent or another legal representative shows that such a child may have well founded reasons to disagree with the acquisition of the nationality involved. And this applies *a fortiori* for the other parent of the child.

⁷⁹ See De Groot, Acquisition, 84-90.

⁸⁰ In some countries this is regulated expressly in the law of nationality, in other jurisdictions this possibility exists pursuant to general administrative law.

The rule of Article 12 of the ECN is in our opinion a strong rule because there is a direct link with Article 6 (1) of the European Convention on Human Rights (ECHR), which guarantees access to a judge. Consequently, if the nationality legislation or the general administrative law of a country does not offer access to a judge for a child who was naturalised against his/her will or acquired a nationality by extension of the naturalisation of a parent against his/her will, this would violate not only Article 12 of the ECN but also Article 6 (1) of the ECHR.

The consequence of this argumentation is that a child should have the right to appeal against a conferral of a nationality against his/her will on application of his/her legal representative and that he/she can enforce this right on the basis of Article 6 (1) of the ECHR, which guarantees his/her *locus standi*. If necessary a special guardian *ad litem* must be appointed in order to represent or to assist the minor in such a procedure.

Another connected question concerns the criteria a judge should use in a procedure in order to decide whether or not the naturalisation, respectively extension, should be annulled. The general criterion should be the best interest of the child. In order to estimate what is in the best interest of the child attention should be paid to - at least⁸¹ - the following aspects:

- a) What are the most important legal consequences of the acquisition of the new nationality?
- b) Why is it unattractive to withhold the application for acquisition of this new nationality until the child has reached the age of majority and can make his/her own decision?
- c) Is loss of the old nationality a consequence of the naturalisation or extension?
- d) If question c) is answered in the affirmative, which rights and duties are lost as a consequence of the loss of the old nationality?
- e) If question d) is answered in the affirmative, does the child involved have the right to reacquire the old nationality by registration or simple declaration of option after he/she reaches the age of majority?
- f) Does the child have an unconditional right to renounce the new nationality after he/she attains the age of majority? If the right of renunciation is conditional, the judge should be attentive to the content of these conditions.⁸²

It is obvious that if the old nationality is not lost and the new nationality can be renounced again after majority the judge can focus completely on the pros and cons of the immediate (i.e. before attaining the age of majority) acquisition of certain rights and duties by the minor which are linked to possession of the nationality involved. To focus on these pros and cons is acceptable also in cases where the old nationality is lost, but can be reacquired by registration or simple declaration of option after majority, provided that the new nationality is either lost by the reacquisition of the old nationality or can unconditionally be renounced after the reacquisition of the old nationality.

In all other cases the judge must make a careful inventory of the advantages and disadvantages of the acquisition of the new nationality and the loss of the old one in order to come to a decision in the best interest of the child. This will not be an easy job for the judge involved. In that respect, it is desirable, that legislators provide for - at least - the right to reacquire a nationality lost during the minority of a child by simple declaration of option within a certain term after the age of majority. On the other hand, legislators should make it possible for a young adult to renounce a nationality acquired by naturalisation, extension, registration or declaration of option during his minority.

It is self-evident that the administrative authorities who must take the decision on the naturalisation or request for extension should pay attention to these consequences in a similar way and that a parent or legal representative acting earlier on behalf of the child should do the same.

⁸¹ It must be stressed that the list is certainly not exhaustive nor is the order of the questions imperative.

⁸² See on the different regulations on renunciation De Groot, Loss, 261-268.

Another point must be raised in this context. Would it not be wiser to replace the possibility of judicial review *ex post* (i.e. after the naturalisation or extension has been granted) by the requirement of judicial consent *ex ante*? In some jurisdictions an obligation to request the *ex ante* consent of a court exists in cases of the alienation of immovable property owned by a minor by his/her legal representatives.⁸³ We submit that the acquisition of a new nationality has at least the same importance as selling a piece of land if, as a consequence of the acquisition of the new nationality, the old one (the other '*patria*') is lost. Consequently it seems to be appropriate to require *ex ante* consent if the acquisition of the new nationality causes the loss of the old one.

The foregoing observations focus on the legal position of a minor in respect of the acquisition of a nationality by naturalisation or extension. The situation is even more complicated in cases of the acquisition of nationality by a minor via registration on request of the legal representative or via a declaration of option lodged by the legal representative. If the competent authorities have a discretion to register or accept the declaration the legal situation is in fact similar to that of a naturalisation or extension on application by the legal representative. But, if the minor is entitled to be registered as a national or possesses an unconditional option right to acquire the nationality involved, it will not be possible to request judicial review of the decision of the authorities to register the child on the application of his/her legal representative or to accept the declaration of option. The same applies if the competent authorities can refuse the registration of the declaration of option only if the conditions for the exercise of the right are not fulfilled or in cases of danger for public order or the security of the country involved. Nevertheless, in view of Article 12 of the ECN we submit that the child and the other parent should also be able in these cases to request administrative or judicial review. A way of guaranteeing that right is to require as a condition for registration or declaration of option on behalf of a minor the consent of the child involved (if he/she has already reached a certain age, for example 12 years) and the consent of the other parent. It should be possible to replace the required consent by permission of the court in the best interest of the child.

III. Loss of nationality by minors

1. Introductory remarks

This part of the report will deal with the question of whether a child should have the right to remedy a decision made by its parent leading to the loss of a nationality by the child. Special attention will be given to the position of children when the loss of the nationality of a state by a parent extends to minor children. However, in order to gain a good picture of the power possessed by parents to influence the nationality of their children, it is also necessary to study other ways in which a child can lose his/her nationality. In respect of these other ways of loss of nationality, two groups can be distinguished: a) grounds for loss only applicable to minors; b) grounds for loss which also apply to adults. Hereinafter we focus on the grounds for loss of nationality which are acceptable under Articles 7 and 8 of the ECN. Different grounds for loss will not be considered.

2. Grounds for loss applicable only to minors

2.1 Loss of family relationship⁸⁴

According to Article 7 (f) of the ECN, nationality may be lost where it is established during the minority of the child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled. The most important example of this category is loss of nationality because the family relationship that led to the acquisition of the nationality *iure sanguinis* no longer exists, for example because of a successful denial of paternity.

Article 7 (f) covers also some cases where a child acquired a conditional nationality. If in such a case the (negative) condition is fulfilled, the nationality is often lost. Examples of an acquisition of a conditional nationality can be observed a) if a foundling acquires the nationality of a country; b) if a person born on the territory of a country acquires the nationality because otherwise he would be stateless. In both cases legislators

⁸³ See for example Par. 1643 and 1821 German Civil Code.

⁸⁴ De Groot, Loss, 252-254; see also De Groot, Staatsangehörigkeitsrecht, 301-303.

tend to provide that the nationality acquired in this way is lost, if it is discovered later that the child possesses another nationality.⁸⁵

In all these cases covered by Article 7 (f) of the ECN the loss of nationality by the minor involved does not have a direct link to acts of representation by the legal representative on behalf of the minor involved. These cases of loss are – therefore – less interesting for this report.

2.2 Adoption⁸⁶

According to Article 7 (g) of the ECN a nationality act may provide that the nationality is lost if an adopted child acquires the nationality of the adopting parents. The interest of the child is in case of adoption normally already controlled by the court which decided on the adoption issue as such. Furthermore, several legal systems provide for the possibility that the adoptive child requests the annulment of the adoption during a certain period after he/she has reached the age of majority.⁸⁷ This possibility can be seen as a correction of the decision of the natural parents to give their consent to the adoption. As a result of such an annulment the previous, lost nationality should be reacquired.

2.3 Extension of the loss of nationality by a parent to minor children

According to Article 7 (2) of the ECN a State Party may provide for the loss of their nationality by children whose parents lose that nationality under paragraph 1 of Article 7, except in cases where the nationality is lost by the parent because of voluntary service in a foreign military force (sub c) or because of conduct seriously prejudicial to the vital interests of the State Party (sub d). However children shall not lose that nationality if one of the parents retains his/her nationality.

The national provisions on the extension of the loss of nationality by parents to their minor children vary considerably. It is again useful to study some examples.

Article 16 NL provides that a minor shall, *inter alia*, lose his Netherlands nationality if his/her father or mother acquires another nationality of his/her own free will and the minor thereby also acquires the foreign nationality or already possesses it. The same applies if the father or mother loses his/her Netherlands nationality pursuant to renunciation, permanent residence abroad or revocation of the naturalisation decree.

The Belgian and Luxembourg provisions (Article 22 (3), (4) and (6) B and 25 (3) L) follow the same approach, but add as a condition that the relevant parent(s) must exercise the parental authority in respect to the child.

In contrast with the Netherlands and Belgian regulations, the child of a Luxembourg national does not lose Luxembourg nationality, if his Luxembourg parents lose this nationality because of permanent residence abroad.

In the Scandinavian countries, children also lose in principle their nationality, if their parents do so. In Denmark, for example, Article 7 (3) states, that Danish citizenship is forfeited by an unmarried child under the age of eighteen years who acquires foreign citizenship because one of its parents, who has custody or any part thereof, acquires a foreign nationality, unless the other parent remains Danish and also has custody. Comparable regulations can be found in 7 IS, 7 N.⁸⁸ Compare also Article 44 (1) SWIT; 13 (3) POL (if the other parent is a Polish citizen and has parental authority, that parent has to give consent, which can be replaced by the permission of the court; children of 16 years and older have to express their consent to the extension); 7 (4) SLK; 22 SLN (children older than 14 years have to give their consent).

In Austria para. 29 provides that the loss of nationality by a national because of voluntary acquisition of another nationality, also extends to his/her children born in wedlock and his/her adopted children, if they are

⁸⁵ De Groot, Loss, 272-274.

⁸⁶ De Groot, Loss, 254-257.

⁸⁷ See e.g. Article 1: 231 Netherlands Civil Code.

⁸⁸ Compare also 8 (2) DK, 8 IS, 8 N and 9 A (3) DK, 9 IS, 9 A N.

minors and unmarried and they also acquire the foreign nationality by law or would acquire it if they did not already possess that nationality, except in the case that the other parent remains an Austrian national. A minor who has already reached the age of fourteen years only loses Austrian nationality in that case if he/she has given his/her consent in respect of the acquisition of the foreign nationality. The loss of nationality also extends to the national's minor children if they are unmarried and born out of wedlock and would acquire the foreign nationality by law if their legal representative has explicitly given his/her consent to the acquisition of the foreign nationality in advance. This applies to children of a man only if his paternity has been established or recognized and he is in charge of care and custody of the children.

In this context one also has to pay attention to the provision of para. 27 (2) and (3) AUS according to which a national not enjoying full legal capacity loses the nationality only if the declaration of will intended to acquire a foreign nationality was expressed on his behalf either by his/her legal representative or, with the legal representative's consent, by himself/herself or a third person. The consent of the legal representative has to be given before the foreign nationality can be acquired. If neither the parents nor the foster parents are the legal representative, the loss of nationality only occurs if the court competent in guardianship or custody matters approves the declaration of will (consent) of the legal representative before the foreign nationality is acquired. Furthermore, a minor national over the age of fourteen shall lose the nationality only under the condition that he/she has expressly consented to the declaration of will of his/her legal representative or a third person before the acquisition of the foreign nationality.

For Germany para. 19 determines that a legal representative may only apply for release (*'Entlassung'*) from citizenship of a person under parental authority or guardianship with the consent of the guardianship court (*"Vormundschaftsgericht"*). In addition to the applicants, the State attorney's office is also entitled to appeal against the decision of the court; the decision of the court of appeals is not subject to further appeals. The consent of the guardianship court is not necessary if the father or the mother applies for dismissal for himself/herself and simultaneously applies for the dismissal of the child by virtue of his/her parental authority and if the applicant is responsible for the custody of the child. If the duties of a special advisor (*"Beistand"*) to the mother extend to the care of the child (*"Sorge für die Person des Kindes"*), the application of the mother for the child's dismissal requires the consent of the special advisor.

A completely different approach can be noticed in some other countries, where loss of nationality by a parent does not have consequences for the nationality of his/her children. This is the case in Ireland, where Sect. 22 (2) provides:

" 2. Loss of Irish citizenship by a person shall not of itself affect the citizenship of his or her spouse or children."

3. Grounds for loss which also apply to adults

Of the grounds of loss of nationality accepted by Articles 7 and 8 of the ECN, Article 7 (1) (f and g) of the ECN only apply to minors. Article 7 (1) (a-e) and 8 (1) of the ECN can apply to both adults and minors. In respect of these grounds for loss one can distinguish between a) voluntary acts which cause the loss of nationality and b) other acts or facts which cause loss of nationality.

3.1 Voluntary acts

Article 7 of the ECN does not prohibit that a minor loses his nationality because of a voluntary acquisition of another nationality⁸⁹. This is for example the case, according to Article 16 (1) (f) NET, which provides for the loss of nationality by a minor who acquires the same nationality as his/her father or mother in his/her own right. For the application of this provision it does not seem to make a difference whether the acquisition involved happened on application of the legal representative or on application of the minor (with or without the consent of the legal representative). The loss does not depend on consent of the minor, even in cases where the minor is already able to form his/her own views on his/her nationality position.

⁸⁹ De Groot, Loss, 205-215.

An other ground for loss that could apply to minors is voluntary service in a foreign military force.⁹⁰ In order to protect minors against a loss of nationality on this ground some jurisdictions require in that case the consent of the legal representative or consent of the court. This is for example the case in Austria, where para. 32 provides that a minor only loses Austrian nationality, if he enters the foreign military with the previous consent of his/her legal representative. If the legal representative is not the minor's parent previous permission of the court is necessary (see also para. 27 (2) A). In the Netherlands for instance the corresponding ground for loss (Article 15 (1) (e) NET) does not apply to minors.

Article 8 of the ECN does not exclude a declaration of renunciation of nationality⁹¹ by or on behalf of a minor. In such a case the minor should be represented by his/her legal representative or should act with his legal representative's consent. Since 2003, Article 16 (1) (b) NET provides for the possibility of renunciation of Netherlands nationality by or on behalf of the minor, if the minor involved also possesses another nationality. It is remarkable that the Netherlands nationality act does not require that the minor involved - if he/she is already able to form his/her own views on his nationality position - has to give his/her consent for a renunciation. Furthermore, the competent Netherlands authorities do not have any discretion to refuse a declaration of renunciation made by a legal representative on behalf of a minor who also possesses another nationality. In such a case the loss of nationality can occur without or even against the will of the minor involved. If the minor involved is already capable of forming his/her own views this might violate Article 12 of the Convention on the Rights of the Child. The loss in question may be qualified as 'arbitrary' in the sense of Article 15 (2) of the Universal Declaration of Human Rights and Article 4 (c) of the ECN.

3.2 Other acts and facts

Article 7 (1) (e) of the ECN allows for a nationality to be lost where a genuine link is lacking between the State and a national habitually residing abroad. As far as we can see, nearly all States which apply this ground for loss exclusively apply it to adults.⁹²

Furthermore, Article 7 (1) (b) of the ECN allows for loss of nationality in case of acquisition of the nationality of the State by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant⁹³ and Article 7 (1) (d) of the ECN makes loss possible because of conduct seriously prejudicial to the vital interests of the State⁹⁴. In both cases the decision to deprive a person of the nationality has to be taken by a judge or judicial review of the decision taken by a competent authorities must be possible. In such a procedure the child is beyond any doubt an interested party and has therefore as such access to the judge.

4. A right for the child to remedy the decision of the parent?

We saw above, that some grounds for loss of nationality by minors do not have a direct link to the representation of children by their parents or other legal representatives. This is in particular the case if a nationality is lost because of loss of a family relationship or in case of loss of a conditional nationality granted in order to avoid statelessness. In respect of loss of nationality because of adoption, we refer to the remarks already made above.

In respect of the other grounds for loss three categories have to be distinguished:

Loss resulting from voluntary acts by or on behalf of the minor (in particular voluntary acquisition of a foreign nationality or renunciation of nationality). It is in our opinion difficult to accept the loss of nationality as a consequence of acts of a legal representative. In any case, due attention has to be paid to the view of the minor involved. One should realise, that abuse of the power of representation is possible. In view of Article 12 of the ECN the minor involved should in respect of these ground for loss always have access to a judge, and preferably be represented by a special guardian *ad litem*. It is desirable to make the loss of nationality on these

⁹⁰ De Groot, 225-228.

⁹¹ De Groot, Loss, 261-268.

⁹² De Groot, Loss, 240-246; an exception is Article 23-6 F

⁹³ De Groot, Loss, 215-225.

⁹⁴ De Groot, Loss, 233-240.

ground depend on the prior consent of a court, which has to use as criteria the best interest of the child involved.

Loss as a result of extension of the loss of nationality by the parents because of voluntary acts of those parents (voluntary acquisition of another nationality; renunciation) to the child. This loss of nationality by children is sometimes defended with the argument, that children will not build up a genuine link with the country, the nationality of which has already been lost by the parent. Often, this may be true, but it is not difficult to imagine cases where a child maintains a serious link with a State in spite of the fact that a parent has lost this link. Moreover, the construction of the extension implies directly or indirectly a dimension of representation of the children by the parents. There is, therefore, no serious difference with the cases mentioned above under a). Thus again, the child should at least have access to a judge. But it is preferable to make an extension dependent on the prior permission of the court which is to be given in the best interest of the child.

Loss as a result of extension of the loss of nationality by the parents because of other facts (lack of a genuine link; fraud) to the child. Article 7 (2) of the ECN allows this extension in those cases, but one should realise that such an extension also implies that the child's nationality position is dependent on the behaviour of the parents. This is not always justified. If a parent loses his nationality because of lack of a genuine link, a child may still maintain relevant ties with the country involved, e.g. if the child lives in that country. Again, access to a judge has to be given. If a parent loses a nationality because this status is acquired by fraud, misrepresentation or concealment of relevant facts, it may be problematic to extend this loss to children if no fraud etc. was committed in respect of the information relating to the children. This is in particular true, if a child acquired the nationality involved at a very young age and the fraud involved was only discovered after a very long period. Once again, the child involved should have access to a court, which has to take into account the best interest of the child (in particular the period which the child possessed the nationality involved) and the seriousness of the fraud before deciding that the loss of nationality by the parent due to his/her fraudulent behaviour also has as consequence that the nationality is lost by the child.

NATIONALITY AND THE PROTECTION OF CHILDREN ACROSS FRONTIERS

THE CASE OF INTERCOUNTRY ADOPTION

Report prepared by Mr William DUNCAN⁹⁵

SUMMARY

Within private international law, and particularly the Hague Conventions, the last century has witnessed a gradual reduction in the role of nationality as the predominant connecting factor in matters of child protection. From the dominant position occupied by nationality at the beginning of the 20th Century we have now reached the stage where, with the three modern Hague children's Conventions, nationality occupies at best a subsidiary position.

The reasons behind this move from nationality to habitual residence may be summarised as follows:

- (a) the child may have never had, or may have lost, any real connection with the country of nationality;
- (b) complications arise where the child has more than one nationality;
- (c) the authorities of the country where the child has his / her habitual residence are usually better placed to make decisions concerning the welfare of the child. This has to do with the likely availability of relevant evidence, as well as convenience for the child and his family. Relevant here is the child's right to be provided with an opportunity to be heard in judicial or administrative proceedings affecting the child.
- (d) The application of the nationality principle in matters of child protection may lead to differences in the levels of protection afforded to children who are living in similar circumstances in the same country and who may be equally vulnerable.

What is also interesting is that the shift from nationality to habitual residence as a connecting factor within private international law implies certain changes in ideas about state responsibilities towards children. Where the protection of children and their basic rights is concerned, it has now become difficult for states to justify discrimination in favour of their own nationals. It may be argued - and the *Convention on the Rights of the Child* provides support - that a state's responsibilities towards children, at least with respect to their fundamental rights, now encompass all children living within its territories.

The 1993 Convention, which now has 62 States Parties and a further 6 signatory States applies where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin. Nationality, either of the child or the adopters, plays no part in defining the scope of the Convention. Thus, even if a child is moved or is to be moved for the purpose of adoption to a country of which the child is a national (probably a rare event), the Convention procedures and safeguards must still be applied.

With regard to the acquisition of citizenship through intercountry adoption, the clear trend among States which are Parties to the Hague Convention of 1993 is in favour of according automatically to the adopted child the nationality of the receiving State, provided that the adopter or one of them has the nationality of that State.

⁹⁵ Deputy Secretary General of the Hague Conference on Private International Law

REPORT

Nationality and the protection of children across frontiers The case of intercountry adoption

Introduction

Within private international law, and particularly the Hague Conventions, the last century has witnessed a gradual reduction in the role of nationality as the predominant connecting factor in matters of child protection. From the dominant position occupied by nationality at the beginning of the 20th Century we have now reached the stage where, with the three modern Hague children's Conventions,⁹⁶ nationality occupies at best a subsidiary position.

The story begins with the 1902 Hague Convention on the Guardianship of Minors.⁹⁷ As with the other family law Conventions of that time⁹⁸ the theories of Mancini prevailed and the *lex patriae* occupied the centre of the stage both with regard to jurisdiction and applicable law. The *lex patriae* determined the authorities having jurisdiction to appoint a child's guardian,⁹⁹ as well as the law regulating the guardianship regime.¹⁰⁰ The authorities and the law of the country where the child was resident played a subsidiary role. For example, if the *lex patriae* made no provision for the appointment of a guardian of a child abroad the authorities of the child's place of residence could make an appointment,¹⁰¹ and they could also take any necessary interim measures.¹⁰² But any measures taken by the child's national authorities in the end took precedence.

However, there have always been problems inherent in the *lex patriae* approach to child protection. One is that the child and her / his immediate family may have lost, or may never have had, real connections with the country of the nationality. At the same time, the claim by the country which constitutes the child's current social environment to exercise jurisdiction to protect the child is a strong one, based as it is on practicality and convenience for family members as well on a sense of responsibility which States have developed in relation to children of living within their territories.

This tension between nationality and the child's actual social environment was at the root of the *Boll Case*¹⁰³ decided by the International Court of Justice in 1958. The case was brought by the Netherlands against Sweden – both Parties to the Hague Convention of 1902. It concerned protective arrangements made for Elizabeth Boll, a child of Dutch nationality who had been living in Sweden with her mother before the mother's death. The Dutch authorities assigned a guardian, but the Swedish authorities placed the girl under a public care order maintaining her residence in Sweden with her maternal grandparents. The I.C.J. supported the Swedish authorities by interpreting narrowly the concept of guardianship under the 1902 Convention and deciding that the Convention did not preclude the operation of a public care order.

The response by the Hague Conference was to draw up the Convention of 1961 concerning the power of authorities and the law applied in respect of the protection of minors.¹⁰⁴ This Convention, whose scope extended to both private and public measures of protection of children, represented a compromise between the advocates of nationality and those who, through the concept of "habitual residence", preferred to

⁹⁶ The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

⁹⁷ Convention pour régler la tutelle des mineurs.

⁹⁸ See K. Lipstein, "One Hundred Years of Hague Conferences on Private International Law", 42 Int. and Comp. Law Quarterly (1993), pp. 553-653.

⁹⁹ Article 2.

¹⁰⁰ Article 5.

¹⁰¹ Article 3.

¹⁰² Article 6.

¹⁰³ I.C.J. Rep. 1959, p. 55.

¹⁰⁴ Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.

emphasise the child's actual social environment. In fact the basic connecting factor under the 1961 Convention is habitual residence. The authorities in the States in which the child has his / her habitual residence have jurisdiction to take measures of protection,¹⁰⁵ and in doing so they apply their internal law.¹⁰⁶ However, the right of national authorities to take overriding measures to protect the child, under their own laws, if they consider that the child's interests so require, is retained.¹⁰⁷ The national law also controls any relationship of authority over the child which arises by operation of law.¹⁰⁸

Some of the problems created by this uneasy compromise between nationality and habitual residence, combined with problems arising from dual nationality, are summarised by Professor Paul Lagarde in the Explanatory Report on the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*.¹⁰⁹

*“On one hand, the national authorities sometimes have taken decisions which were difficult to accept on the part of the authorities of the child's habitual residence, who are by hypothesis closer to the child and frequently better able to assess his or her situation and needs; on the other hand, in the hypothesis that the minor has dual nationalities, which is very frequent, the conflict between the authorities of the two States of which the child has the nationality brought on the paralysis of the Convention.”*¹¹⁰

Another difficulty came from the uncertain meaning of Article 3 on the relationship subjecting the child to authority by operation of law (conflicts rule or rule of recognition?) and of the problematical articulation between the national law applicable to this relationship and the law of the habitual residence applicable in principle to measures of protection.

Another reason for the decline of nationality as a connecting factor in child protection is the problem of discrimination. Where children are living in equivalent circumstances in the same country the idea that the level of protection given them should be conditional on nationality is difficult to justify. Indeed Article 2 of the Convention on the Rights of the Child¹¹¹ now requires States Parties to respect and ensure the Convention rights to each child irrespective of the child's national, social or ethnic origin. It was partly for this reason also that nationality has not featured as a primary connecting factor in the various treaties dealing with the recovery of child support across frontiers. For example, under the Hague Conventions, which deal with the law applicable to maintenance obligations and the recognition and enforcement of foreign maintenance decisions, it is the habitual residence of the creditor which is the primary connecting factor. Under the UN Convention of 1956 on the Recovery Abroad of Maintenance,¹¹² nationality plays no role. The Convention facilitates the recovery of maintenance whenever a person “who is in the territory of one of the Contracting Parties” claims to be entitled from another person “who is subject to the jurisdiction of another Contracting Party”.¹¹³

The problems surrounding international child abduction emerged during the 1970's and led to the conclusion of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*,¹¹⁴ as well as the Council of Europe “Luxembourg” Convention of 1980.¹¹⁵ Because of an

¹⁰⁵ Article 1.

¹⁰⁶ Article 2.

¹⁰⁷ Article 4.

¹⁰⁸ Article 6.

¹⁰⁹ Proceedings of the Eighteenth Session (1996) Tome II – Protection of Children, para. 5.

¹¹⁰ See in France, Court of Cassation, 1st Civil Chamber, 16 Dec. 1986, *Rev. crit. dr. internat. privé* 1987, p. 401, note by Lagarde; cf. P. Lagarde, La protection du mineur double national, talon d'Achille de la Convention de La Haye du 5 octobre 1961', in: *L'unificazione del diritto internazionale privato e processuale, Studi in memoria di Mario Giuliano*, 1989, p. 529.

¹¹¹ Adopted by the General Assembly of the United Nations on 20 November 1989.

¹¹² *Convention de La Haye du 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants; Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaire envers les enfants; Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations; Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.*

¹¹³ Article 1.

¹¹⁴ *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

unwillingness among the proponents of nationality to accept that the removal of a child from the country of habitual residence to that of the nationality could constitute a wrongful act, it had proved impossible at The Hague to address this issue in the *Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors*. By 1980, opinion had shifted to such an extent that nationality was not even referred to in the Hague Convention of that year. A wrongful removal or retention of a child under that Convention occurs where there is a breach of custody rights established under the law of the State where the child was habitually resident immediately before the removal or retention,¹¹⁶ and the Preamble refers to the prompt return of the child, not to the State of nationality, but rather to the State of habitual residence. It is rather ironic that the typical abduction currently being dealt with under the Convention is one where the abducting parent (in sixty percent of cases, the mother) has removed the child to the country of which that parent is a national.¹¹⁷

The dominance of habitual residence over nationality is now fully realised as is evident in the Hague Convention of 1996 on the Protection of Children, which is also the model for the European Union Regulation on parental responsibility.¹¹⁸ The authorities having pre-eminent jurisdiction to take measures of protection in respect of a child are those of the child's habitual residence.¹¹⁹ Even in the case of refugee or internationally displaced children, primary jurisdiction is not with the child's national authorities, but rather with those of the country where the child is present.¹²⁰ The law to be applied in exercising jurisdiction to take protective measures is normally that of the forum (*i.e.* in most cases the law of the child's habitual residence)¹²¹ and the law governing the attribution of parental responsibility by operation of the law is that of the child's habitual residence.¹²² Thus the hold which nationality had over the question of guardianship, which lay at the heart of the 1902 Hague Convention, has now yielded to a policy which vests responsibility for child protection primarily in the country which is *defacto* the centre of the child's life. The role of nationality has been reduced to exceptional circumstances, determined by the authorities of the habitual residence, in which a transfer of jurisdiction to the national authorities may occur where this is in the child's best interests.¹²³ It is also possible in exceptional cases for an authority exercising general jurisdiction under the Convention to apply or take into consideration the law of the child's nationality. In this rare event, national law would be applied or considered, not as such but by virtue of being "the law of another State with which the situation has a substantial connection."¹²⁴

The reasons behind this move from nationality to habitual residence may be summarised as follows:

- (e) the child may have never had, or may have lost, any real connection with the country of nationality;
- (f) complications arise where the child has more than one nationality;
- (g) the authorities of the country where the child has his / her habitual residence are usually better placed to make decisions concerning the welfare of the child. This has to do with the likely availability of relevant evidence, as well as convenience for the child and his family. Relevant here is the child's right to be provided with an opportunity to be heard in judicial or administrative proceedings affecting the child.¹²⁵
- (h) The application of the nationality principle in matters of child protection may lead to differences in the levels of protection afforded to children who are living in similar circumstances in the same country and who may be equally vulnerable.

Of course the use of the child's habitual residence as the usual connecting factor is not without its own problems. The international case law on the meaning of habitual residence is becoming extensive and there

¹¹⁵ *European Convention of May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children*.

¹¹⁶ Article 3.

¹¹⁷ See ..?.

¹¹⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. The Regulation comes into effect on 1 March 2005.

¹¹⁹ Hague Convention, Article 5. EC Regulation, Article 8.

¹²⁰ Hague Convention, Article 6.1. EC Regulation, Article 13.2.

¹²¹ Hague Convention, Article 15.1.

¹²² Hague Convention, Article 16.

¹²³ Hague Convention, Articles 8 and 9. EC Regulation, Article 15.

¹²⁴ Hague Convention, Article 15. National law is not mentioned in Article 15.

¹²⁵ See *UN Convention on the Rights of the Child*, Article 12.2.

are points of divergence between the developing jurisprudence in different countries. Particular difficulties arise where frequent changes occur in a child's residence. There are different views as to the extent to which the intentions of the parents, or any agreements reached between them with regard to the child's residence, should be taken into account. Nevertheless, the shared idea behind habitual residence is that it is a factual concept designed to identify as best as possible that country which at any given time constitutes the main focus of the child's life.

What is also interesting is that the shift from nationality to habitual residence as a connecting factor within private international law implies certain changes in ideas about state responsibilities towards children. Where the protection of children and their basic rights is concerned, it has now become difficult for states to justify discrimination in favour of their own nationals. It may be argued - and the *Convention on the Rights of the Child* provides support - that a state's responsibilities towards children, at least with respect to their fundamental rights, now encompass all children living within its territories. This concept has also had important consequences in the context of intercountry adoption, which is the subject matter of Part II of this paper.

Intercountry Adoption

The first effort at The Hague to deal with international adoptions resulted in a traditional private international law Convention¹²⁶ establishing common provisions on jurisdiction, applicable law and recognition of decrees relating to adoption. Jurisdiction to grant an adoption under the 1965 Hague Convention is vested equally in the authorities of the adopters' habitual residence and those of their nationality,¹²⁷ and an authority having jurisdiction, with one exception, is to apply its internal law to the conditions governing an adoption.¹²⁸ The exception concerns certain consent and consultation requirements (e.g. those applying to biological parents or to the child), which are governed by the national law of the child.¹²⁹ In passing, it may be said that one of the reasons why this Convention has not attracted many ratifications is the complications which arise from the attempt to find a compromise between nationality and habitual residence, not so much in the basic rules of jurisdiction, but in defining the scope of the Convention¹³⁰ and the circumstances in which the Convention is not to apply.¹³¹

When next the Hague Conference visited international adoptions, the product was very different - a Convention¹³² on co-operation between countries of origin and receiving countries whose objects are to ensure that intercountry adoptions take place in the best interests of the child, to establish safeguards and thus prevent the abduction, the sale of, or traffic in children and finally - the one traditional private international law objective - to secure the recognition of adoptions made in accordance with the Convention.¹³³

The 1993 Convention, which now has 62 States Parties and a further 6 signatory States applies where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.¹³⁴ Nationality, either of the child or the adopters, plays no part in defining the scope of the Convention. Thus, even if a child is moved or is to be moved for the purpose of adoption to a country of which the child is a national (probably a rare event), the Convention procedures and safeguards must still be applied.

Interestingly also the so-called "subsidiarity" principle, as defined both in the Hague Convention¹³⁵ and the *UN Convention on the Rights of the Child*,¹³⁶ gives priority, when considering an appropriate placement for

¹²⁶ *Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions.*

¹²⁷ Article 3.

¹²⁸ Article 4.

¹²⁹ Article 5.

¹³⁰ Article 1.

¹³¹ Article 2.

¹³² *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.*

¹³³ Article 1.

¹³⁴ Article 2.1.

¹³⁵ Article 4 b).

a child, to options available in the child's country of origin, rather than the country of nationality. It is true that the country of origin is usually also the country of which the child is a national. There is also a general principle that, when considering forms of alternative care for a child, due regard should be paid to the child's ethnic, religious, cultural and linguistic background.¹³⁷ Nevertheless, it remains significant that it is the child's actual country of origin, and not that of the nationality, which remains the key concept used in both Conventions.

The approach of the Hague Convention to the question of jurisdiction to make an adoption also illustrates the point. In fact the Convention contains no common rules on the exercise of such jurisdiction. Certain States of origin took the view in negotiations on the Convention, that, in order to secure the child's new adopted status, it is right that the adoption be made in the country of origin before the child is removed to the receiving country. Certain receiving States, on the other hand, felt that adoption in the receiving State, following a "probationary" period there, was the preferable alternative. In the end, the matter is left open by the Convention, which is drafted to accommodate the two alternatives. It is therefore a matter for the two States concerned to decide whether co-operation is possible in the light of their respective views on jurisdiction. However, the right of the State of origin to insist that the adoption takes place on its territory before the transfer of the child to the receiving State is expressly confirmed.¹³⁸ Note that it is again the State of origin, and not that of the child's nationality, for whom this guarantee is provided.

There are other matters in respect of which the Hague Convention acknowledges a special protective role for the authorities of the child's country of origin. For example, it is the authorities of the child's country of origin that must ensure that free and informed consents are given by those whose consents are necessary.¹³⁹ There is no requirement, like that in the 1965 Convention, to apply national law to any such matters.¹⁴⁰ To take another example, where an adoption is to take place in the receiving country, but the placement breaks down before the adoption occurs, it is the Central Authority of the State of origin that must be consulted in relation to a new placement for the child.¹⁴¹

Effects of intercountry adoption on the nationality of the child

In what circumstances does the intercountry adoption of a child lead to the acquisition of a new nationality for the child or the loss of an existing nationality? As a matter of principle, the answer to these questions should above all avoid a situation in which the child becomes stateless. Article 7 of the *United Nations Convention on the Rights of the Child* provides:

1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*
2. *States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

More particularly, the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*,¹⁴² in Article 17, provides that loss of nationality through adoption shall be conditional upon the acquisition by the adopted person of the nationality of the adopter. The same principle is to be found in Article 11(2) of the *European Convention on the Adoption of Children*.¹⁴³

¹³⁶ CRC Article 21 (b). See also the Hague Convention of 1993, Article 16(1)(b).

¹³⁷ CRC Article 20.3.

¹³⁸ Hague Convention of 1993, Article 28.

¹³⁹ Article 4 c).

¹⁴⁰ However, there is nothing in the Convention to prevent the application of national law.

¹⁴¹ Article 21.

¹⁴² Signed at The Hague 12 April 1930.

¹⁴³ Opened for signature in Strasbourg 24 April 1967.

A second important consideration is the integration of the child into the adoptive family. This is assisted by allowing the child to acquire the nationality of the adopter. Article 11(1) of the European Convention embodies this idea:

Where the adopted child does not have, in the case of an adoption by one person, the same nationality as the adopter, or in the case of an adoption by a married couple, their common nationality, the Contracting Party of which the adopter or adopters are nationals shall facilitate acquisition of its nationality by the child.

A third principle is that of non-discrimination. The *United Nations Convention on the Rights of the Child*, in Article 21(c), requires States Parties to ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoptions. In other words, if the effect of a national adoption is to confer on the child the nationality of the adoptive parent, the same principle should apply within the receiving State to an intercountry adoption. The Hague Convention embodies this principle, in the case of a full adoption, by providing, *inter alia*, that the child should enjoy in the receiving State rights equivalent to those which result from similar adoptions within that State.¹⁴⁴

Bearing in mind these general principles, what is the current practice? With regard first to loss of nationality, the current position is still broadly that described by Hans van Loon in his Hague lectures on intercountry adoption:

Few countries have expressly regulated the question of loss of nationality as a result of adoption by a foreigner. In the absence of an express rule, the conclusion must be that no loss of nationality occurs. Some countries have a procedure for dismissal of nationality (e.g. Greece). A number of States provide that adoption abroad automatically leads to loss of nationality (e.g. Korea).¹⁴⁵

In fact some countries provide expressly for the retention by the child of that country's nationality. An example is Bolivia where Article 105 of the Minor's Code provides that a minor adopted by foreigners maintains his / her nationality, without prejudice to acquiring that of the adopters. Colombia, whose Constitution allows for dual nationality, permits a child born in Colombia to maintain Colombian nationality, unless it is expressly waived.¹⁴⁶ The same is true in Costa Rica and Ecuador. In India, the same approach is adopted, but voluntary renunciation of Indian citizenship is possible under Section 8 of the Indian Citizenships Act 1955. Under the Romanian Law of 1991 concerning Romanian Citizenship,¹⁴⁷ a child who has Romanian citizenship and is adopted by foreigners loses Romanian citizenship only if the adopters expressly so request. In the event of an adoption being nullified, the child is considered as never having lost Romanian citizenship.

With regard to the acquisition of citizenship through intercountry adoption, the clear trend among States which are Parties to the Hague Convention of 1993 is in favour of according automatically to the adopted child the nationality of the receiving State, provided that the adopter or one of them has the nationality of that State. The following is a summary of the discussion on this matter which took place at the Special Commission on the practical operation of the 1993 Convention which took place in The Hague in 2000:

80 *Discussion in the Special Commission revealed a clear trend in favour of according automatically to the adopted child the nationality of the receiving State. Several experts described the systems operating in their countries. In many countries the acquisition of the nationality of the receiving State depended on one of the adoptive parents also having that nationality. In one case (Norway) the consent of a child above the age of twelve was needed. The type of adoption involved may also be relevant.*

81 *It was also pointed out that the acquisition of the nationality of the receiving State was regarded by certain States of origin (for example, Paraguay and China) as a precondition to*

¹⁴⁴ Article 26(2).

¹⁴⁵ International Co-operation and Protection of Children with regard to Intercountry Adoption, Hague Academy of International Law, *Recueil des cours*, Vol. 244 (1993), 195, at 298.

¹⁴⁶ See National Constitution, Article 96.

¹⁴⁷ Law No 21 of 1 March 1991.

intercountry adoption. Indeed, this could cause a problem where the adoptive parents are habitually resident in, but do not have the nationality of, the receiving State. In a case of this kind the country of origin might allow the adoption to proceed if the child obtains the nationality of the prospective adopters. It was pointed out that some systems do allow, in the case of certain categories of parents living abroad, the assumption by the adopted child of the parent's nationality.

82 *Discussion revealed differences as to the actual moment of the acquisition of the new nationality by the child. Either the child was deemed to have acquired the new nationality once the adoption was pronounced in the State of origin, or upon the child arriving in the receiving State.*¹⁴⁸

A fairly typical example is the British Adoption (Intercountry Aspects) Act 1999 which provides for a child adopted under the Hague Convention to have British citizenship conferred on him / her, provided that all the requirements of the Convention have been met and at least one adoptive parent is a British citizen at the time the adoption order is made and both (in the case of a joint application) are habitually resident in the UK.

¹⁴⁸ Report and Conclusions of the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, 28 November-1 December 2000, paragraphs 80-82.

REGISTRATION OF CHILDREN – FROM A CONTINENTAL LAW PERSPECTIVE

Report prepared by Ms Alenka MESOJEDEC PERVINŠEK¹⁴⁹

SUMMARY

The international community consists of states and, consequently, of their nationals. The states are bound by the duties, deriving from international law, to recognise as their nationals all natural persons who have a legal bond with the state based on the law of the respective state.

Despite the fact that nationality, because of its important legal consequences for each human being, seems to be a priority on the list of basic human rights, this right is not self-executing and does not always enable automatic access to the rights relevant to each individual. Even in cases where respective legislation on nationality is based on principles and rules that are internationally recognised, this does not guarantee enjoyment of the rights derived from nationality to all persons who are entitled to them, either adults or children.

The European Convention on Nationality of the Council of Europe (hereinafter ‘the Convention’) stipulates in its Article 5 the principle of the right to nationality.

If states exercised this obligation as it is laid down in their internal law, there would be fewer cases of statelessness and fewer cases of persons who cannot prove who they are.

Nationality is part of the individual’s civil status; together with other legally relevant facts, it establishes the legal identity of natural persons, the means by which the individual exercises his or her rights and duties derived from personal status.

In international law, Article 7 of the United Nations Convention on the Rights of the Child is binding character and obliges states to register children after birth, as well as establishing the right of the child to a name and nationality.

Registration at birth is of great significance for effective access to its rights of the child that will grow up; it is a tool enabling the exercise of the basic social, economic and, later, political rights. The right to education, cultural rights, the rights of minorities are additional rights to enhance the child’s basic rights.

A brief overview of the legislation that deals with the registration of civil status data in Europe demonstrates that European states regulate these data in a more or less similar way, within the scope of their national legislation. There is as yet no harmonised concept, although it is considered that the accelerated development of communication and co-operation between the states has already created the need for this standard.

New technologies in this field, computerised registers, the introduction of biometrics as a new criterion for determination of the identity of each individual, will replace classic birth registration procedures for children; data protection is one of the important legal standards that have been developed recently in European law and it will have to follow the speed of development of technology.

The international community should be aware of the fact that a UNICEF survey of registration of births has demonstrated that every year the births of over 50 million children are not registered.

¹⁴⁹ Secretary, Office for Migration, Migrations and Naturalisation Section, Ministry of the Interior, Slovenia

Many children may, as a result, become victims of smugglers and traffickers who exploit them as slave workers or force them into prostitution; some are sold for organ transplants; some of them become a part of forced migrations, resulting from conflicts.

Even for those children who do not have any such sad perspective, the fact that their birth is not registered reduces their access to their rights to the minimum.

REPORT

Registration of children – from a continental law perspective

1. INTRODUCTION

The aim of my contribution at this conference is most of all to highlight some aspects and dimensions of the fact that nationality based on the law of a given state does not in practice always imply access to the rights of individuals deriving from the nationality, despite the fact that the states are bound through their obligations deriving from international law as well as from their domestic legislations to recognise them as their nationals. In this regard I have no ambition to enter into academic analysis of the existing problems, although an insight into the basic source of international law dealing with these matters is necessary.

The topics of the conference are related to the nationality of children, who under international law enjoy special protection, as established in numerous instruments including the United Nations Convention on the Rights of the Child (hereinafter the CRC) which is of a universal character. This contribution is limited to children and the relevance of their registration at birth.

The correlation between registration at birth and the right to a nationality has not yet been dealt with as a separate topic in the terms of reference of the Committee of Experts on Nationality of the Council of Europe, although the impact of registration on the status of a child is of crucial importance; it is hoped that the outcome of the presentations and the discussions on this subject will perhaps contribute to the conclusion that a thorough insight into this very special branch of law would be of common interest to all the member states of the Council of Europe.

2. LEGAL GROUNDS FOR THE REGISTRATION OF BIRTH

Article 7 of the CRC stipulates that:

The child shall be recognised after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

This norm with its cogent character consists of the rights which are part of the civil status of a child. It constitutes the framework of basic elements which are the precondition for a child to be recognised as a natural person. Each of these rights is significant for the future of a child. The right to registration at birth recognises the birth itself and all consequent rights deriving from this; the right to a name distinguishes the child from other natural persons, and determines his or her belonging to his or her family; the right to a nationality establishes a legal bond with the state of his or her nationality; the right to know his or her parents establishes legal relations with his or her parents or one of them. All these rights amount to the right to identity, which does not exist independently, but definitely has an impact on the dignity of each human being.

These basic rights bind the states party to the Convention to recognise and exercise them in relation to children. The long list of states party, among which we find all European states as well as almost all other non-European states, expresses the commitment of these states to respect of the principles of the CRC in their domestic legislation, and in particular to their implementation in practice.

Although the right of the child to be registered at birth creates for him or her a legal tool that enables access to other fundamental rights, in particular to nationality-related rights, social rights, rights to education, cultural rights, and in some cases minority rights, the European Convention on Human Rights makes no reference to this, either directly or indirectly. In fact, the right to registration at birth as an international standard exists only in the CRC.

The act of registration at birth cannot be exclusive only to those children who are nationals of the state where they were born; the obligation of the state is broader and implies the duty of registration on non-discriminatory grounds of every child born on the national territory, irrespective of whether that child is

born stateless, of unknown nationality and unknown parents, is a child of legal or illegal immigrants, asylum seekers, of recognised refugees under international protection, of internally displaced persons, persons under temporary protection or nationals of the state. In order to ensure the rights of children who, at the time of birth, do not acquire the nationality of the state where they are born, states must co-operate. This co-operation is difficult or impossible in cases where normal communication with the state of the child's nationality is not possible.

As I have spent my entire professional career dealing with questions related to civil status, nationality and migrations, I shall give two examples to illustrate the dimension of legal consequences related to birth registration, although the first case occurred almost sixty years ago, when these standards did not exist.

Ms Mariana was born at the end of 1945 in a refugee camp in Austria to parents who were both nationals of the Democratic Republic of Yugoslavia and of the People's Republic of Slovenia (at that time dual nationality existed, of the State and of the Republic, while only the nationality of the State was relevant in international relations); her birth was registered by the municipality of the place of birth. Before her birth her parents were married in church. On the basis of the marriage, Ms Mariana's mother took her husband's family name; a refugee identity card was issued in her husband's family name. In 1946 the family left for Argentina where they resided on the grounds of a residence permit and later acquired Argentinian nationality.

In 1986 Ms Mariana's father died. In 1992 she and her mother visited Slovenia. They wanted to know if they had become Slovenian citizens.

The legal facts:

Under the principle of continuity of nationality, contained in article 39 of the Law on nationality of the Republic of Slovenia, which came into force at the time of independence in 1991, it was established that the mother and Ms Mariana were nationals of the Republic of Slovenia; the fact that they had also acquired Argentinian nationality had no legal impact on their Slovenian nationality. Ms Mariana presented to the civil registrar the certificate from the Austrian birth register which is, under the Law on civil registration, the basis for registration of births of citizens who are born abroad; on the certificate the space for the name of the child's father was empty, although she was registered with her father's family name. The civil registrar requested from her proof of her parents' marriage and she presented the marriage certificate issued by the priest who married them. The question of the legal effect of religious marriage appeared; the civil registrar made enquiries and was informed that, according to the respective law in Austria, which was in force at the time of her birth, only marriages concluded by the authorities of the state had legal implications for family relations. Because of this, the civil registrar could not accept the proof of the marriage of her parents as valid proof of the marriage.

The legal consequence was that there was no legal ground for entering her father's details in the register of births - according to the law, she was born illegitimate. All the time limits under the Law on family relations for establishment of paternity in court had expired. An additional consequence was that she was not entitled to her family name; according to the law on names that had been in force at the time of her birth (the law on names of the Kingdom of Yugoslavia of 1929), she had the right only to her mother's maiden family name. When she made a claim to inherit from her late father, she could not prove her relationship to her father to the court.

P.S. was born an illegitimate child in 1980 in one of the former Yugoslav republics. Paternity was not recognised and his mother decided on adoption. According to the law on nationality, the child acquired the nationality of the republic of his mother and of the Socialist Federal Republic of Yugoslavia. For the purposes of the adoption, the mother's parental right was removed.

The child arrived in Slovenia; under the law on family relations, a period of one year is prescribed during which the future adoptive parents may renounce the adoption. For this transitional period they were appointed as the child's guardians; they had already applied for the child's name to be changed. Before the expiry of one year, which is a precondition for adoption with the effect of full adoption, it was established that the child was blind. The future adoptive parents decided not to adopt the child, who was put under the guardianship of a social centre. The child was accommodated in an institution for blind children.

According to the 1991 law on nationality, the child did not meet the conditions for acquisition of nationality under the transitional provision of the law, foreseen only for the citizens of other republics. The basic condition for acquisition of nationality for a minor was that at least one of the parents would acquire the nationality. The law did not provide for the legal representative of the child, his guardian, to apply for the child's nationality.

In the consultations with the legal representative the Ministry of the Interior, which was the competent organ for taking a decision on the child's acquisition of nationality, an application was lodged.

The child acquired the nationality in spite of the fact that the law was too narrow with regard to this specific case. When deciding on nationality, the Ministry of the Interior used as a source of law Article 3 of the CRC, stipulating the best interest of the child, as the guiding principle for the state authorities when dealing with the child's rights. According to Article 8 of the Constitution of the Republic of Slovenia, international conventions take primacy over internal legislation. When deciding on nationality in this particular case, we were aware of the risk that interpretation of Article 3 of the CRC, used as a legal ground for nationality, was too broad. On the other hand, the risk that the child would not otherwise have effective access to his rights prevailed.

In 1994 the law was amended, the provision dealing with the naturalisation of minors now enables legal representatives to apply for naturalisation of children who are in their custody, if the child's parents are dead, of unknown residence or deprived of their parental rights.

In Europe the vast majority of legal input on facilitation of international co-operation in civil status matters is carried out by the *Commission Internationale de l'état civil* (hereinafter CIEC).

According to its internet page (<http://www.ciec1.org>), the CIEC is a European intergovernmental organisation, founded in Amsterdam in 1948, which deals with harmonisation of legal questions related to the civil status of individuals. Information is also provided on existing legislation in particular states and is available mostly for those who deal professionally with all questions of civil status. The member states of CIEC are: Austria, Belgium, Croatia, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, Turkey, and the United Kingdom; observer states are: Cyprus, Holy See, Lithuania, Russian Federation, Slovenia and Sweden.

From the perspective of development of the concept of registration of births, there is a need for an historical overview of how this concept has developed. In this regard, the church and its institutions played an important role in the past in continental Europe. With the progress of the present concept of the State and secularisation, the impact of the church in the field of registration of births has been reduced in comparison with its role in past centuries, although in some legal systems the church has preserved the authority to register civil status acts and issue the proofs based on these acts.

A brief overview of the legislation that deals with registration of civil status acts in Europe, which is not limited to the registration of births, demonstrates that European states regulate these acts in a more or less similar way, within the scope of their national legislation and according to their legal tradition, in spite of the fact that the concept of civil status is not legally harmonised

From the point of view of legal tradition, Austria, Slovenia, Croatia, the Czech Republic, Slovakia, and Hungary share the same concepts, deriving from the time when the present territories of these states were under the sovereignty of the Austro-Hungarian monarchy.

The Imperial Decree of 1756, signed by the Emperor Franz Joseph, introduced the first registers and bound the church authorities at first to register marriages and deaths; this was later extended to registration of births as well, for the needs of the State. This decree was the first legal ground for registration on the territory of the former Austro-Hungarian Empire.

From the perspective of present data protection standards, which demand a clear purpose for collecting data on individuals, the purpose of establishing the registration system for the state was the collection of data on taxpayers and for military service .

With the change of sovereignty over the territories, the system remained the same in some states until the end of the First World War, and in others until the end of the Second World War, when secularisation brought the handling of these registers under the authority of the state and its public administration.

It is interesting to note that there is no harmonised concept of registration in Europe yet, although the accelerated development of communications and means of transport, with their impact on migration flows, both legal and illegal, impel governments to co-operate in the development of harmonised standards.

According to the information on its website, the CIEC carried out a study in 2000 on the means whereby an individual can prove his or her civil status, which led to the conclusion that there was a need to attain increased harmonisation and centralisation of civil status information. The working group set up for this purpose is considering computerisation and the use of new technologies and their consequences as regards the drawing up, storage and transmission of records. Of course, such a standard demands relatively high technical support,

The CIEC's Convention on international communication by electronic means, signed in Athens in September 2001, is a useful instrument that will, on the one hand, accelerate legal traffic among different states, where the question of proof for the determination of an individual's identity and the legal consequences deriving from it is necessary for the constitution of a right or duty or, if a question of possible abuse appears.

This convention provides that data may be transmitted electronically from one contracting state to another in order to facilitate the international communication of data relating to the status of persons or to nationality.

In order to understand the meaning of civil status in relation to registration for those who do not deal with these legal questions professionally, the translator's comment on CIEC 's internet page in English in my opinion illustrates its content:

“...*civil status* is the term which is current in international terminology, even though there is no exact equivalent in the internal law of all common law countries. Alternatively, civil registration is used when *état civil* refers to registration systems as such. Again, the more general title *civil registrar* has been used for *officier de l'état civil* rather than titles that might be more familiar, such as *Registrar of Births, Marriages and Deaths*.

The word *act* is more difficult, since its meaning varies from state to state, denoting either the original entry in the registers or, alternatively, a copy or even an extract from the original. While certificate might be an appropriate translation in many cases, the word *record* is of more general character.”

However, new technologies in this field - computerised registers, the introduction of biometrics as a new criterion for determining the identity of individuals - will replace classic registration procedures for newborn children; data protection, one of the important legal standards that have been developed recently in European law as one of the human rights standards, will have to follow the speed of development of technology in order to accomplish the aim of protection of individuals against possible misuse of their personal data for other purposes than those laid down in the respective legislation.

3. NATIONALITY OF A CHILD AND ITS IMPACT ON REGISTRATION OF BIRTH

International law establishes also a right to a nationality. Among other instruments in this field, the European Convention on Nationality of the Council of Europe stipulates in its Article 4:

Everyone has the right to a nationality.

This right is not self-executive; it is limited by the principle of the competence of the state, contained in one of the basic principles of this Convention, according to which each state determines under its own law who are its nationals. This law must however be accepted by other states in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.

Interaction of the above principles must result in the conclusion that states must first of all exercise their obligation to recognise as their citizens all persons who are entitled to the nationality *ex lege*, on the basis of prerogatives contained in national legislation. Properly conducted registration of their births, carried out by a trained administration, contributes to effective exercise of the rule of law in practice.

One may well ask why there are cases of persons, in particular children, who cannot prove either that they exist at all, or that they have a nationality. From the legal point of view these children are *de facto* stateless for as long as their states do not fulfil their legal obligations in relation to them. Those who deal with international protection and with asylum know how difficult it is and how long it takes to prove the identity of children, of adults as well.

Lack of functioning of the institutions, accompanied by poor administration, could be one of the reasons, as well as a lack of awareness of the importance of nationality and registration at birth for the authorities in some states.

The question of birth registration and its relevance for access to their rights for children is outlined in the UNICEF Innocenti Research Centre analysis, "Birth registration - Right from the start" (*Innocenti digest*, No. 9, March 2002). According to this source of information more than 50 million children born each year are not registered, in spite of all human rights standards enshrined in international law. If the child is not registered at birth, he or she will not be able to prove his or her identity or name, his or her relationship with parents or with the state. The reasons for lack of registration lie in poor administration of a state or in circumstances perpetuated by conflicts, wars, and natural disasters.

In such circumstances children more easily become victims of traffickers and smugglers, in particular orphans and abandoned children, who are exploited as slave workers or forced into prostitution, and, in some cases, even sold for organ transplants; some of them become part of forced mass and illegal migration together with their families.

REGISTRATION OF CHILDREN – FROM A COMMON LAW PERSPECTIVE

Report prepared by Mr Andrew WALMSLEY¹⁵⁰

REPORT

The legislation of the United Kingdom is generally regarded as being based upon a common law approach to enactments. That is largely because although the United Kingdom is a European country, it is separated from other nations by sea which has meant that it has never been successfully invaded since 1066. Our approach to legislation has therefore broadly remained the same for most of the United Kingdom. However, it is necessary for me to specify that for some legislation, primarily in Scotland, the approach is more similar to that in continental Europe. England, Wales and Scotland did not become part of the United Kingdom until 1603 when King James VI of Scotland became King James I of England and before then Scotland was in more allegiance with countries in continental Europe than England was. However, the nationality law of the United Kingdom covers the whole of the country and so the approach should be regarded as being more common law than

Before I start to consider the present application of nationality law in the United Kingdom, I think it is necessary to go back to the start of the Twentieth Century to record what our nationality laws said then and to specify how they have changed. This is not something unique to the United Kingdom. Most states have changed their nationality laws and, in most, acquisition of their citizenship has become more restricted. The same is true in the United Kingdom so I would just like to record what our laws were like before our present legislation came into force.

Our first modern law was the British Nationality and Status of Aliens Act 1914 at a time when about one-third of the world was part of the British Empire. Under the Act, a person was deemed to be a natural-born British subject if he or she was born within His Majesty's dominions and allegiance or, if born outside of His Majesty's dominions if his or her father was a British subject at the time of the person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalisation had been granted.

By the start of the Second World War a number of states within the British Empire wanted to become independent and introduce their own nationality laws. This was broadly accepted by the United Kingdom but was not introduced until after the War was over. Then, in the British Nationality Act 1948, which came into force on 1 January 1949, a person born within the British Empire, which by then was known as the British Commonwealth, still became a British subject but now with a specific citizenship status attached to it. Most people became British subjects: citizens of the United Kingdom and Colonies, but in 1949 nine states had their own citizenship status so their nationals became British subjects: citizens of Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon. As other Commonwealth countries became independent, most of their nationals lost their status of being a citizen of the United Kingdom and Colonies and instead became citizens of Jamaica, Sri Lanka and so on.

Under the Act, every person born within the United Kingdom and Colonies after the commencement of the Act became a citizen of the United Kingdom and Colonies. If a person was born outside the United Kingdom and Colonies, he or she would become a British subject: citizen of the United Kingdom and Colonies by descent provided that the father was not himself such a citizen solely by descent. That did not apply to birth in countries where the father was in Crown service under His Majesty's government in the United Kingdom or, if born in a foreign country, the birth was registered at a United Kingdom consulate within one year of its occurrence.

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Under the provisions of these two Acts, most children born within the United Kingdom and Colonies acquired the status of British subject at birth but changes were made to this approach in the present legislation, the British Nationality Act 1981. However, before going into the provisions of the present law, I want to make reference to a relevant international agreement which the United Kingdom ratified.

In 1930, the United Kingdom took part in discussions in the Hague relating to nationality, and ratified the Protocol on 14 January 1932. This was not the Hague Convention on certain questions relating to the conflict of nationality laws which was concluded in 1930 but was the International Protocol relating to a certain Case of Statelessness which was concluded at The Hague on 12 April 1930. The Protocol was concerned with reducing statelessness and began as follows:

The undersigned Plenipotentiaries, on behalf of their respective Governments,
With a view to preventing statelessness arising in certain circumstances,
Have agreed as follows:-

Article 1

In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State.

The Protocol was interesting because Article 1 conveyed citizenship through the child's mother when, at that time, citizenship was often related only to the father's citizenship. It was also fairly easy for some States, including the United Kingdom, to ratify the Protocol because of their application of the principle of *ius soli*.

Before 1 January 1983, when the British Nationality Act 1981 came into force, any child born in the United Kingdom, except those whose parents were in the United Kingdom as diplomats, automatically became a British subject: citizen of the United Kingdom and Colonies. However, in the 1970s it was felt that there were a lot of people wanting to live permanently in the United Kingdom who gave birth to a child there in order to increase their contact with the country. They thought that if they were to be deported, then under our immigration laws it was not legitimate to deport the child and that might therefore make it hard to deport the individual who did not otherwise have a claim to remain here. So with the new British Nationality Act 1981, the United Kingdom's application of *ius soli* changed, and with it other aspects of our nationality law regarding the right of children to become British citizens. This report hopefully explains what conditions now apply.

Nowadays, a child will only become a British citizen automatically, under section 1(1) of the Act if at the time of birth, either the father or mother is a British citizen or settled in the United Kingdom. "Settled" in this respect means that the parent is not subject under the immigration laws to any restriction on the period for which he or she may remain, or is not exempt from the immigration law. Overall, this means that the vast majority of children born in the United Kingdom continue to become British by birth, but not those whose parents are in the United Kingdom under conditions applied under the immigration laws.

The other circumstances in which British citizenship might be acquired by birth is where a new-born infant is found abandoned in the United Kingdom. Under section 1(2) of the Act the child will be deemed to have been born in the United Kingdom and to have been born to a parent who at the time of the birth was a British citizen or settled in the United Kingdom, thereby becoming a British citizen by birth. There is nothing in the Act which specifies whether, after the child is deemed to be a British citizen, that status will be lost if it is learnt that neither of the parents were British or settled. Many countries which are members of the Council of Europe have similar provisions in their nationality laws in accordance with Article 2 of the 1961 Convention on the Reduction of Statelessness which is replicated in article 6, paragraph 1 b of the 1997 European Convention on Nationality. The provision, though, is older than that and goes back to The Hague protocol mentioned above.

Many members of the Council of Europe's Committee of Experts on Nationality (CJ-NA) say that it is extremely rare for a child to be found in these circumstances in their country, and the same is true for the

United Kingdom. My opinion, therefore, is that if such cases are rarer the child should not lose British citizenship if the parents are found after the child has been deemed to have been a British citizen at birth.

If a person is legally resident in the United Kingdom under the immigration laws and has a child born in the country, what happens when the parent or parents become settled there? Under section 1(3) of the Act a child is entitled to be registered as a British citizen if, while still a minor, his or her father or mother becomes a British citizen or settled in the United Kingdom and an application is made for registration. There are no requirements which have to be met other than the change of a parent's status so that means that any application made under this section will be successful.

But what would happen if the child's parents did not become British or settled? Under section 1(4) of the Act, an application for registration of the child can be made after he or she has attained the age of 10 years provided they have lived in the United Kingdom for each of the first 10 years of their life provided that they have not been absent from the country for more than 90 days in each of those years. That could prevent an application for the child's registration being made, which is unfortunate for the child who would have had no influence on travelling in or out of the country. But thankfully, under section 1(7) of the Act, there is an allowance for any excess absences to be ignored in the special circumstances of the case. Hopefully this will mean that every child for whom an application was made would be registered as a British citizen. The residence requirements are larger than those for an adult applying for naturalisation – twice as much – because an adult only needs to be in the United Kingdom for 5 years but granted permanent residence. Hopefully this would mean that when such applications are made, those considering them would be looking for reasons why they should be refused rather than for special circumstances for them to be granted.

When a child who is not a British citizen is adopted by a British citizen within the United Kingdom, the child will become a British citizen from the date of adoption. Should the adoption order cease to have effect, whether through annulment or otherwise, that will not affect the status of the child as a British citizen.

Those are the basic rules for the acquisition of British citizenship by children born or adopted in the United Kingdom. But what applies to children born abroad?

Under section 2(1) of the Act, a child born outside the United Kingdom will be a British citizen at birth if at the time of birth the father or mother was a British citizen serving outside the United Kingdom where recruitment for the service took place in the United Kingdom. The service referred to is restricted to Crown service under the government of the United Kingdom or service under a Community institution or a service which is closely associated with the activities outside the United Kingdom of Her Majesty's government in the United Kingdom. Special rules apply in cases where one of the parents has died.

These are the general rules which apply to the acquisition of British citizenship by children but the best provision of the British Nationality Act 1981 is section 3(1) of the Act. This says:

If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.

Under this part of the Act no reference is made to the citizenship of the parents nor of the child's residence in the United Kingdom so, theoretically, any child for whom an application is made could be registered as a British citizen. That however is not the case as generally it is expected that the child will have some connections with the United Kingdom, but the way the section was accepted means that in special cases normal rules do not have to be applied.

In one case an application was made for a child to be registered as a British citizen. Both his parents had been granted permanent residence in the United Kingdom and normally registration in such cases would not be allowed if neither parent was a British citizen or applying for naturalisation. In this particular case, the child's father was sent to work in the United Kingdom by his company in the United States. His wife could not accompany him immediately because she was 7 or 8 months pregnant and she remained in the United States to give birth to her son and moved to the United Kingdom when he was 6 weeks old. The father had

been given permission to work in the United Kingdom for 4 years and, whilst still subject to immigration control, the family had a second child born in the United Kingdom who did not become a British citizen by birth because neither parent had indefinite leave to remain in the United Kingdom. After 4 years employment in the United Kingdom the father applied for permanent residence for himself and his family and this was granted. About a year later, the couple had a third child born in the United Kingdom who became a British citizen by birth. They therefore applied for their second child to be registered as a British citizen under section 1(3) of the Act and the application was granted. They also applied for their first born child to be registered as a British citizen. Normally, when an application for registration is made for a child born abroad, one of his or her parents is expected to be applying for naturalisation. However, in this case, the father was unable to apply for naturalisation because he was a Vice-President of an American firm working in the city of London. If he acquired British citizenship and any decisions he made for the firm were unsuccessful then that could be regarded as being related to his acquisition of British citizenship. His wife was a citizen of Singapore and if she became a British citizen then she would have lost her rights regarding property ownership in Singapore. So the application for registration would normally have been refused. However, the child in question had lived in the United Kingdom longer than his brother and sister who were both British citizens. It was therefore regarded as being unfair to the child who had lived here longer to refuse the application for registration and he was therefore granted British citizenship.

In another case, an application was made for registration of a 10 year old girl as a British citizen. Her parents were working in the south of Spain but the girl was born in Gibraltar because that was the nearest hospital for the mother to give birth in. The child did not acquire citizenship of Gibraltar (British Dependent Territories citizenship) because neither of her parents was resident there. The father was a British citizen and the mother had a South American citizenship. However, living together for 12 years, the parents were not married. That meant that the girl could not acquire her father's citizenship at that time because British citizenship could only be passed on when the British citizen father was married to the mother of the child, and there was severe doubt whether the girl could acquire her mother's citizenship as she was born outside the country of which the mother was a national because the father was not a national of that country. Both parents were free to marry but chose not to. Their child would have been registered as a British citizen if they decided to marry after making the application for her registration. However, it was decided that, given the length of time they had been living together as a couple and their decision not to marry, it would be wrong to hold that against their daughter, especially as the number of children born in the United Kingdom outside of marriage was increasing every year. So it was decided that the girl should be registered as a British citizen under section 3(1) of the Act.

The latter case draws attention to the birth overseas where the father is the British citizen but is not married to the mother. There were however more cases where the mother was the British citizen but who could not pass on her citizenship to her child. Under the 1981 Act, British citizenship was acquired by children born abroad if their mother or father was a British citizen otherwise than by descent. The father, though, had to be married to the mother if British citizenship was dependent upon him. Thankfully, under the provisions of the Nationality, Immigration and Asylum Act 2002 which made amendments to the British Nationality Act 1981, a child could acquire British citizenship regardless of whether or not the father was married to the mother. The lack of British citizenship through the father because the child was illegitimate had been the subject of many complaints so the amendment to the Act was welcomed, but what about children born abroad who had not been able to acquire British citizenship because, before 1 January 1983, it was the mother who was the British citizen. Section 4 of the Act was amended so that any person born between 7 February 1961 and before 1 January 1983 was entitled to be registered as a British citizen if the person would have become a citizen of the United Kingdom and Colonies before 1 January 1983 had the 1948 Act provided for citizenship by descent from a mother in the same terms as it provided for citizenship by descent from a father, and the applicant would have had the right of abode in the United Kingdom under section 2 of the Immigration Act 1971.

These are the main provisions of the British Nationality Act 1981 regarding the acquisition of British citizenship. But, going back to the Protocol of 1930, what special provisions are there for children born in the United Kingdom who would otherwise be stateless? These are contained in Schedule 2 of the Act which provides for the registration of a person born in the United Kingdom if he or she is and has always been stateless and that the application is made before the individual becomes 22 years of age provided that the applicant meets the basic residence requirements similar to those for naturalisation or, if born abroad to a

parent who was a British citizen but nevertheless became stateless, if he or she has lived in the United Kingdom for 3 years at the time the application for registration is made. These provisions go some way towards reducing cases of statelessness of children born in the United Kingdom but they would be more consistent with the principles behind the protocol of 1930 if the child born in the United Kingdom became a British citizen automatically by birth if otherwise he or she would have become stateless. There are likely to be very few cases where this would apply so the grant of citizenship automatically at birth would not encourage many people to come to the United Kingdom solely for the birth of a child in order that it would acquire British citizenship by birth. However, unfortunately, I suspect that not many people in the United Kingdom who deal with our nationality laws are aware of our ratification of the Protocol. The important thing for children is that at birth they should acquire citizenships of their parents or the country in which they are born in order that they do not become stateless.

BIRTH REGISTRATION: STATELESSNESS AND OTHER REPERCUSSIONS FOR UNREGISTERED CHILDREN

Report prepared by Mr Michael MILLER¹⁵¹

SUMMARY

Registration at birth is a fundamental human right that confers a distinct legal identity on every child. This paper emphasizes that, while a person's name may be their most distinctive "mark" of individuality, additional information - such as age, family ties and nationality - promote the child's right to legal protection by parents and by the state. Without the recognition of identity assigned by birth registration, a child risks statelessness, and a stateless child is in an extremely vulnerable position. The right to registration is laid out under Article 7 of the 1989 UN Convention on the Rights of the Child. This Article also elaborates the obligations of States Parties in this respect and emphasizes that States Parties shall ensure the implementation of these rights "in particular where the child would otherwise be stateless."

Despite the importance of birth registration and the clear commitments of states under international law to ensure this right, it is estimated that around the world some 50 million children go unregistered every year. Generally, unregistered children are more likely to be found in countries where there is little awareness of the value of birth registration, there are no public campaigns, the registration network is inadequate or parents are required to pay for registering children. In 2000, as many as 71 per cent of births in Sub Saharan Africa were unregistered – the highest percentage of unregistered births in any of the main regions of the world. In Central and Eastern Europe and the Commonwealth of Independent States, 10 per cent of births were unregistered, while unregistered births in 'industrialized' countries represented 2 per cent of births in that year.

Unregistered children are generally those who belong to the poorest and most marginalized sectors of a given society. Lack of registration, and the statelessness that generally results, underscore their marginalization still further. Those most at risk include, for example, children from particular ethnic or indigenous groups, especially those that experience discrimination, children of internally displaced persons or refugees, children who have lost their parents, including children orphaned by AIDS, children born to illiterate parents and children of migrants, especially undocumented migrants. Cross-cutting these and many other categories is a clear gender dimension: around the world, a cultural preference for male children means that girls suffer from discrimination and are all too often denied their right to a name and a nationality.

This paper examines some of the implications of non-registration for children.

Denial of citizenship: for children whose births are not registered and who cannot obtain a birth certificate, the door to citizenship remains closed. A birth certificate is normally required to obtain an identity card, a marriage licence or driver's licence. It is a prerequisite for obtaining a passport and is the first step towards ensuring one's democratic rights – to vote and to stand for election.

Vulnerability to exploitation: every child is entitled to State protection against exploitation and abuse. In the case of the unregistered child, however, he or she has no guaranteed protection of a specific national jurisdiction. Proof of age and identity in the form of a birth certificate can act as a significant disincentive to child labour, commercial sexual exploitation, early marriage and military recruitment.

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This paper was prepared with valuable input from Marta Santos Pais, Director and Saudamini Siegrist, Project Officer at UNICEF Innocenti Research Centre, Florence.

Lack of protection in conflict and emergency situations: in situations of war or natural disaster, lack of personal documents among children is a common problem. This can cause difficulties in the investigation of individual cases, the provision of appropriate protection and the process of family tracing and unification.

Promoting the enjoyment of other rights: a range of basic services may be denied unregistered children, including access to education, social protection and even health care. While registration is not, in itself, a guarantee of these rights, its absence can put them beyond the reach of those already on the margins of society.

This paper concludes by affirming that the registration of every child is a practicable possibility and asserts that in today's world, with massive population movements, organized child trafficking, the global crisis of children orphaned by HIV/AIDS, and the impact of armed conflict on children, birth registration and proof of nationality is more essential than ever.

REPORT

Birth Registration: Statelessness and other repercussions for unregistered children

Birth registration is a permanent and official record of a child's existence. It can be generally defined as the official recording of the birth of a child by some administrative level of the state and coordinated by a particular branch of government.¹⁵² Registration at birth is a fundamental human right that confers a distinct legal identity on every child. Article 24 of the 1966 International Covenant on Civil and Political Rights states that,

Every child shall be registered immediately after birth and shall have a name.
[...] Every child has the right to acquire a nationality.

This right is further elaborated under Article 7 of the 1989 Convention on the Rights of the Child, ratified to date by 192 states, including all the states of Europe. Article 7 states that,

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 7 also elaborates the obligations of States Parties in this respect and makes specific reference to statelessness:

States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

In addition, Article 8 of the Convention outlines the obligations of States Parties both to preserve and, where necessary, re-establish the child's identity, including nationality:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations [...] Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Articles 7 and 8 of the Convention on the Rights of the Child recognize the child's right to identity and citizenship as an individual. In other words, this right is not contingent upon the status – including citizenship status - of a child's parents. This is in keeping with the general principle of non-discrimination contained in the Convention, a principle which requires that States Parties respect and ensure the rights set forth in the Convention to each child without discrimination of any kind, irrespective of the status of the child or that of his or her parent(s) or legal guardian(s). Furthermore, taken together Articles 7 and 8 should be understood to encourage States Parties not only to take positive steps to avoid statelessness – including the promotion of birth registration – but also to grant citizenship to children who would otherwise be stateless and to foresee effective remedies for the child to challenge a decision (or lack of decision) by the state in this regard.

Ideally, birth registration is part of an effective civil registration system that acknowledges the existence of a person before the law, establishes his or her family ties and tracks the major events of that individual's life, from birth, to marriage and parenting, to death. A fully functional civil registration system should be

¹⁵² For a more extensive discussion of birth registration, its importance as a human right and initiatives to ensure this right, see UNICEF Innocenti Research Centre, *Birth Registration. Right from the start*, Innocenti Digest no. 9, UNICEF, March 2002.

compulsory, universal, permanent and compulsory. It should collect, transmit and store data in an effective way and guarantee their quality, integrity and confidentiality. Such a system, and its instrumental value in safeguarding human rights, contributes to the normal functioning of any society.

The registration of a child's birth enables that child to obtain a birth certificate. In some cases, the issuing of a certificate automatically follows birth registration, while in others a separate application must be made. In either case, a birth certificate is a personal document issued to an individual by the state. The registration of a birth and the issuing of a birth certificate are, therefore, two distinct yet interlinked events. A birth certificate is the most visible evidence of a government's legal recognition of the existence of a child as a member of society. If a child is not registered at birth and has no birth record, he or she will not have a birth certificate with that all-important proof of their name and their relationship with their parents and the state.

While the information shown in a birth record and on a birth certificate may vary from country to country, the name and gender of the child, the name and nationality of the mother and, ideally, of the father, the attending physician, midwife, birth attendant or other witnesses are generally included, together with the date and place of birth, and the name and signature of the registrar.

Birth Registration and Nationality

While a person's name may be their most distinctive "mark" of individuality, additional information - such as age, family ties and nationality - promote the child's right to legal protection by parents and by the state. Without the recognition of identity assigned by birth registration, a child risks statelessness, and a stateless child is in an extremely vulnerable position.

The question of nationality is one of the most sensitive and complex aspects associated with birth registration. A country's political constitution or founding charter generally determines who is a national, who is an alien, and how nationality can be acquired or lost. Some governments follow the principle of *jus soli*, whereby those born within the country's territory are nationals, even if one or both parents came originally from another country. In this case, birth registration gives the child automatic right to citizenship of the country in which he or she was born. This is the system found in most countries in Central and South America and the Caribbean, except Haiti and some English-speaking areas. A number of countries grant nationality according to the principle of *jus sanguinis*. In this case, a child does not have an automatic right to citizenship of the country of birth if neither parent is a national of that state. This system applies in most of Asia and the majority of countries following Islamic law. In some countries applying *jus sanguinis*, such as Egypt, Jordan and Lebanon, nationality may only be passed on by a father who is a national. In the *jus soli* system, the entry of birth in the civil registry is enough to ensure nationality, but under *jus sanguinis* nationality may depend on documentary evidence – generally a birth certificate – that at least one parent is a national of the country in question.¹⁵³ In a country that follows the *jus sanguinis* system, difficulties may arise for children of parents who are nationals of a country that grants nationality on the *jus soli* principle. In such cases there is a risk that the children remain stateless.¹⁵⁴ Most countries in the industrialized world combine *jus soli* and *jus sanguinis*, with more emphasis on the former in Australia, Canada, France, the Netherlands, United Kingdom and United States, and on the latter in Germany, Japan and Switzerland.

How many unregistered children?

Despite the importance of birth registration and the clear commitments of states under international law to ensure this right, it is estimated that around the world some 50 million children go unregistered every year. In 2000, in Sub Saharan Africa over 70 per cent of births were unregistered, while 63 per cent of births were unregistered in South Asia. In terms of absolute numbers of unregistered children, however, South Asia heads the table with approximately 22.5 million unregistered births in 2000, or over 40 per cent of the world's unregistered births in that year. In Central and Eastern Europe and the CIS, 10 per cent of births – some 650 000 - went unregistered in 2000, while unregistered births in 'industrialized countries'

¹⁵³ United Nations Department of Economic and Social Affairs, Statistics Division, *Handbook on Civil Registration and Vital Statistics Systems. Developing Information, Education and Communication*, United Nations, 1998.

¹⁵⁴ The 1961 Convention on the Reduction of Statelessness offers a legal framework through which future cases of statelessness can be avoided, incorporating approaches of *jus soli* and *jus sanguinis* generally adopted by States to determine nationality.

represented 2 per cent of total births in that year.¹⁵⁵ From a statistical perspective, the registration of 98 per cent of annual births is defined as universal coverage, but from a human rights perspective, universality is only achieved with the registration of each and every child born under a state's jurisdiction.

In addition to the percentage of births registered in any given year, one can also consider the level of birth registration in a specific country or region. This is based on the proportion of children under 60 months whose births have been registered. In all member states of the Council of Europe, with the exception of Turkey, birth registration levels in 2000 were 90 per cent or more, meaning that all but 10 per cent of children under the age of 5 years have had their birth registered.¹⁵⁶

In global terms, by far the largest number of unregistered children is found in developing nations. While a state's economic situation certainly has a bearing on registration levels, GNP alone does not explain discrepancies in registration coverage. For example, a number of countries of the former Soviet Union with per capita GNP in 2000 of under US\$750, including Armenia (\$490), Azerbaijan (\$550), Georgia (\$620), Kyrgyzstan (\$300), Moldova (\$370), and Uzbekistan (\$720) had coverage rates of 90 per cent or more.¹⁵⁷ These figures suggest that once social and administrative structures for birth registration are established, even countries with modest GNPs can achieve consistently high levels of coverage. Generally, unregistered children are more likely to be found in countries where there is little awareness of the value of birth registration, there are no public campaigns, the registration network is inadequate or parents are required to pay for registering their child.

The cases cited above also point to another potentially important factor for registration: in all but Moldova, for which there were no relevant data, over 90 per cent of women who gave birth were attended by trained health personnel. It is likely that countries with high birth registration rates tend to have high rates of births in medical facilities or attended by trained personnel, although more research is required to confirm this. The logic is simple: mothers come into close contact with a branch of the national infrastructure at a critical point in terms of registration – the actual birth of the child. At the same time, the state benefits from the existence of an established structure to provide various social services for children in an integrated and cost-effective manner.

Who are the unregistered children?

Research demonstrates that, around the globe, unregistered children are those who belong to the poorest and most marginalized sectors of a given society. Lack of registration, and the statelessness that generally results, underscore their marginalization still further. Those most at risk include, for example, children from particular ethnic or indigenous groups, especially those that experience discrimination, children of internally displaced persons or refugees, children who have lost their parents, including children orphaned by AIDS, children born to illiterate parents and children of migrants, especially undocumented migrants. Cross-cutting these and many other categories is a clear gender dimension: a cultural preference for male children mean that girls suffer from discrimination and are all too often denied their right to a name and a nationality.

Unaccompanied children constitute another group at significant risk of missing out on registration or having no documents to prove their identity. These are children who are separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. Child labourers and trafficked children may be unaccompanied, as may be young migrants without papers. In the chaos of war, displaced children and children seeking asylum may also be separated from family members. If these children were unregistered at the time of separation, they will have no legal proof of name, age, family ties or nationality. In other cases, children registered at birth may have lost their documents due to

¹⁵⁵ All figures from UNICEF, *Progress since the World Summit for Children*, "Levels of Birth Registration, 2000 Estimates," UNICEF, 2001, see <http://www.childinfo.org/eddb/birthreg/index.htm>

¹⁵⁶ The level of registration of under-fives in Turkey is between 70 and 89 per cent. All figures from UNICEF, *Progress since the World Summit for Children*, "Levels of Birth Registration, 2000 Estimates," UNICEF, 2001, see <http://www.childinfo.org/eddb/birthreg/index.htm>

¹⁵⁷ UNICEF Innocenti Research Centre, *Birth Registration. Right from the start*, Innocenti Digest no. 9, UNICEF, March 2002. All GNP per capita figures are 1999, from UNICEF, *State of the World's Children 2001*, UNICEF, 2000. Birth registration figures from UNICEF, *Progress since the World Summit for Children*, "Levels of Birth Registration, 2000 Estimates," UNICEF, 2001, see <http://www.childinfo.org/eddb/birthreg/index.htm>

displacement or may have purposely destroyed them in order to escape the threat of violence based upon identity, including ethnic or national origin. In post-conflict Guatemala, for example, many altered or destroyed their personal information and registered themselves using false information in an attempt to hide from Government security forces. In the case of trafficked children, traffickers may destroy documents or use false ones. Registration records in the child's country of birth can help facilitate tracing, return and reunification (where this is in the best interests of the child).¹⁵⁸ Until this takes place, however, a child without legal identification is, in practical terms, stateless, having no means to prove her or his nationality, name or family links.

The importance of registration at birth for every child and its significance as regards the enjoyment of the right to nationality is reflected in the attention given to Article 7 of the Convention on the Rights of the Child by the Committee on the Rights of the Child, which monitors and promotes the implementation of the Convention. The Committee has noted, for instance, that,

Syrian-born Kurdish children are considered as foreigners or as “maktoumeen” (unregistered) by the Syrian authorities and face great difficulties in acquiring Syrian nationality, although they have no other nationality at birth.¹⁵⁹

Specifically, under Syrian citizenship laws, Kurdish children acquire unregistered status if one or both of their parents is unregistered, or if their father is a non-citizen Kurd (either unregistered or a “foreigner”) and their mother is a Syrian citizen. The number of *maktoumeen* children in Syria is reported to be increasing rapidly due to population growth. According to Kurdish sources, children assigned this status currently number about 25,000.¹⁶⁰

Some states, while not explicitly excluding certain groups from registering their children, erect significant administrative barriers. In Sri Lanka, for example, Tamils of Indian origin have long faced serious difficulties in registering births, and many are effectively stateless. The Sri Lankan government introduced legislation in 1988 to enable these Tamils to claim citizenship, but every application called for 11 different documents. New legislation passed in October 2003 has reduced the number of documents to eight: the birth certificates of the mother, father, eldest and youngest siblings, the parents' marriage certificate, the child's horoscope, a letter of support from the local government administrator and a letter of support from the medical services¹⁶¹ – still a significant requirement. It is worth adding that an important registration campaign launched in Sri Lanka at the end of 2003 has registered more than 190,000 persons as citizens, demonstrating the potential of law reform to bring an end to legal exclusion.

In several states, especially in the Middle East, women cannot transmit nationality to their children. In Egypt, for example, it is estimated that some one million children born to Egyptian women and non-Egyptian fathers cannot claim Egyptian citizenship.¹⁶² Other states have legislation that confers only limited nationality to certain groups, such as children of parents who are not themselves citizens. Myanmar has three levels of citizenship with corresponding levels of rights – full citizens, associate citizens and naturalized citizens. To become a full citizen, a person has to be able to prove Myanmar ancestry dating back prior to 1824. Officially only full citizens can train to be doctors or engineers, stand for election, or work for a foreign company, UN agency or foreign embassy.¹⁶³ The Committee on the Rights of the Child

¹⁵⁸ “The best interests of the child” is one of the general principles of the Convention on the Rights of the Child (Article 3). In this case, it implies that a state should ascertain whether it is indeed in the child's best interests to be returned to his or her country of origin and reunited with his or her family. This goes hand-in-hand with another of the Convention's general principles: the right of the child to express his or her views freely in all matters affecting the child, such views being given due weight in accordance with the age and maturity of the child (CRC Article 12). Children should therefore be given the opportunity to express their views in all matters relating to the establishment or re-establishment of their identity.

¹⁵⁹ UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Syrian Arab Republic*. 24/01/1997. CRC/C/15/Add.70. 1997.

¹⁶⁰ Human Rights Association in Syria (HRAS), “The Effect of Denial of Nationality on the Syrian Kurds”, November 2003.

¹⁶¹ Communication from UNICEF Country Office, Sri Lanka, July 2004.

¹⁶² Paul Schemm, “Egypt May Soon Permit Women to Confer Citizenship”, Global Policy Forum, *Women's eNews*, November 3, 2003, see:

<http://www.globalpolicy.org/nations/sovereign/citizen/2003/1103egyptwomen.htm>

¹⁶³ Human Rights Watch, Asia, ‘Children's Rights and the Rule of Law’, *Human Rights Watch*, vol. 9, no. 9, 1997.

expressed its concern that as a result of Myanmar's citizenship regulations some categories of children and their parents might be stigmatized or denied certain rights.¹⁶⁴

Challenges associated with statelessness are by no means limited to developing countries, especially as regards the most vulnerable groups of children. In Europe it is reported that citizenship problems have arisen in the Baltic countries after the break-up of the former Soviet Union, where the new states introduced citizenship legislation that appears to be discriminatory towards minorities, primarily Russians and Russian-speakers. Statelessness is reportedly very widespread and it is estimated, for example, that some 170,000 stateless persons are currently living in Estonia.¹⁶⁵ Stateless parents face significant obstacles to registering their children, despite states having important obligations under international law in this respect.

One of the communities in Europe most at risk of statelessness is the Roma, especially in the Czech Republic, Slovenia, Croatia and Macedonia.¹⁶⁶ Even in situations where citizenship is not an issue, a lack of necessary documentation or, in some cases a distrust of state institutions, means that many Romani women do not give birth in hospitals, increasing the risk that their child is not registered. It is also reported that in situations in which Roma have married before the legal age of marriage, young mothers are reluctant to present themselves in hospitals or register their children.¹⁶⁷ In still other cases, young parents may simply be unaware of the requirement to register their child. The Committee on the Rights of the Child has on many occasions drawn attention to the level of birth registration in Roma communities. For example, as regards Romania, the Committee stated in 2003 that it,

[...] remains concerned at the lack of measures to prevent non-registration of children and is concerned at the high number of stateless persons, in particular among the Roma.¹⁶⁸

Regarding Greece, in 2002 the Committee expressed concern that:

[...] the right of some children, and particularly child members of some distinct ethnic, religious, linguistic and cultural groups such as the Roma, to birth registration is not respected as a result of a lack of information on birth registration procedures, a lack of legal representation for particular population groups and the lack of sufficiently decentralised services [...].¹⁶⁹

In commenting on the Former Yugoslav Republic of Macedonia in 2000 the Committee noted its concern that,

[...] in spite of relevant legislation and an increasing number of births in hospitals, there are still children in the State party who are not registered at birth and is further concerned at the fact that a large proportion of unregistered births are of Roma children.¹⁷⁰

Marginalised children who are already at high risk of non-registration in normal circumstances are still less likely to be registered in situations of armed conflict or civil unrest, not least due to the erosion or collapse of state structures and the difficulty of accessing civil registry offices.¹⁷¹ Fear of repercussions can also

¹⁶⁴ UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Myanmar*. 24/01/97. CRC/C/15/Add.69. 1997.

¹⁶⁵ Tatjana Perić, "Personal Documents and Threats to the Exercise of Fundamental Rights of Roma in Europe", European Roma Rights Centre, 2003, see <http://www.errc.org/cikk.php?cikk=1097&archiv=1#1>

¹⁶⁶ European Roma Rights Centre, "Personal Documents and Threats to the Exercise of Fundamental Rights among Roma in the former Yugoslavia", European Roma Rights Centre, 2004, see <http://www.errc.org/cikk.php?cikk=1685>

¹⁶⁷ *ibid.*

¹⁶⁸ UN Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child : Romania*. 18/03/2003. CRC/C/15/Add.199. 2003.

¹⁶⁹ UN Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Greece*. 01/02/2002. CRC/C/15/Add.170. 2002

¹⁷⁰ UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child : The Former Yugoslav Republic of Macedonia*. 23/02/2000. CRC/C/15/Add.118. 2000;

¹⁷¹ For a full discussion of birth registration in situations of armed conflict, see UNICEF Innocenti Research Centre, *Birth Registration and Armed Conflict*, UNICEF, forthcoming.

prevent parents from registering the birth of a child: for example, in Kosovo, before the war, Albanian families did not register children from fear of approaching and being associated with the Serbian State authorities.¹⁷² In Eritrea, it is reported that people continue to avoid registration of children from fear of them being conscripted as child soldiers.¹⁷³

In the case of refugee children, host countries are often unwilling to facilitate birth registration and still more reluctant to grant nationality to refugee babies born on their soil. The United Nations High Commission for Refugees (UNHCR) confirms that

Statelessness is often caused by States' deliberate policies not to confer nationality to children born to refugees. It may also be caused by the existence of conflicting laws regarding nationality [...]. All refugee children in the country of asylum must be considered as having, or being able to acquire, including through naturalization, an effective nationality.¹⁷⁴

The sheer number of human beings involved in refugee movements gives an indication of the scale of the challenge. To take a European example, almost a million applications for asylum were made by people fleeing conflict in the former Yugoslavia to industrialized countries between 1989 and 2001.¹⁷⁵ Information on the number of children growing up as refugees and displaced persons is generally scarce, but children and young people often make up a significant proportion of these populations. For example, UNHCR estimates that in 2001 individuals under 18 comprised a third of all refugees and displaced persons in Azerbaijan and a half in Uzbekistan.¹⁷⁶

Implications of non-registration

Unregistered children have no official recognition of their existence. In every part of the world this means that these children are excluded from the benefits of citizenship. The implications of this exclusion may, however, differ from country to country. In Bangladesh, for example, where less than 40 per cent of children are thought to be registered,¹⁷⁷ non-registration is the norm and there exists a plethora of mechanisms - some formal, some decidedly less so - to circumscribe the requirement for a birth certificate. This can lead to problems of false or inaccurate documents and a lack of standardisation. In contrast, in countries of Europe where "universal" registration prevails, there is an assumption that every individual is registered and has the possibility of producing a birth certificate to prove his or her name, nationality and family relations. Since administrative structures reflect this assumption, in the case where a child is unregistered the implications of exclusion can be extreme.

Denial of citizenship rights

A birth certificate is, in many respects, a child's membership card that opens the door to his or her full citizenship. It is normally required in order to obtain an identity card, a marriage licence or a driver's licence, and it may also be needed to open a bank account, inherit property or even to secure formal employment, especially within the public sector. And of course, proof of name and nationality, and state recognition in the form of a birth certificate, is the first step towards ensuring one's democratic rights – not only to vote, but also to stand for election.

A birth certificate is also a prerequisite to obtain a passport, an important document in an increasingly mobile world. Without a passport, an individual wishing to cross national borders may be forced to resort to clandestine means. The significance of personal documents must also be considered in the context of the current global atmosphere of concern regarding national security issues. Perceived threats to national

¹⁷² UNICEF, Kosovo, September 2003.

¹⁷³ UNICEF Innocenti Research Centre, *Birth Registration and Armed Conflict*, UNICEF, forthcoming.

¹⁷⁴ United Nations High Commission for Refugees, *Refugee Children – Guidelines on Protection and Care*, UNHCR, 1994.

¹⁷⁵ UNICEF Innocenti Research Centre, "Refugees and displaced persons: still large numbers", *Innocenti Social Monitor 2003*, UNICEF, 2003;

¹⁷⁶ *ibid.*

¹⁷⁷ UNICEF, *Progress since the World Summit for Children*, "Levels of Birth Registration, 2000 Estimates," UNICEF, 2001, see <http://www.childinfo.org/eddb/birthreg/index.htm>

security have resulted in a much closer attention given to individual identity by many states, especially in Europe and North America. An unregistered individual with no legal means to prove nationality potentially becomes an object of suspicion.¹⁷⁸

For children whose births are not registered and who cannot obtain a birth certificate, the door to citizenship remains closed. Research shows that numerous Roma around Europe - and particularly in countries that were part of the former Yugoslavia, Soviet Union or Czechoslovakia – often lack personal documents. Without them, Roma reportedly face a range of problems in securing other documents such as identity cards and other documents necessary for realizing basic rights such as housing, health, education and social welfare.¹⁷⁹

Because of the massive displacement of Roma from former Yugoslav countries, the repercussions of their statelessness can be seen throughout Europe. In Italy, for example, it is reported that Romani asylum seekers from the countries of former Yugoslav Federation often lack personal documents and thus live in a legal limbo. Many children born in Italy of former Yugoslav Romani parents have not been registered and have no documents. Although Italian citizenship laws allow children born in Italy of foreign parents to apply for citizenship when reaching legal maturity, Romani children living in informal settlements face challenges because they are unable to prove legal residence in the country.¹⁸⁰

Even registered children can, in certain cases, be excluded from enjoying the entitlements of full citizenship and, in contravention of the principle of non-discrimination enshrined in international law, registration has been used by states to classify populations and control their movements. In the Occupied Palestinian Territory, for example, Palestinians have been motivated to register their children in order to establish legal identity. On the basis of this registration, identity cards are issued which designate whether the child was born in Gaza, the West Bank or Jerusalem. This in turn establishes categories of the population subject to controlled mobility, leading to stigmatized treatment and additional discriminations.¹⁸¹

Vulnerability to exploitation

Every child is entitled to State protection against exploitation and abuse. In the case of the unregistered child, however, with no means to prove citizenship, age or family ties, he or she has no guaranteed protection of a specific national jurisdiction. Proof of age and identity in the form of a birth certificate can act as a significant disincentive to child labour, commercial sexual exploitation, early marriage and military recruitment. Unregistered children also become a more attractive commodity to child traffickers, illegal adoption rings and others who seek to take advantage of what is effectively these children's non-status.

If a child is arrested, a birth certificate can protect him or her against prosecution as an adult, prevent their being held in detention centres together with adults and help ensure that he or she receives special legal protection available to juveniles under the justice system. Furthermore, if age-related abuse does take place, without a birth certificate it is difficult for an unregistered child, or that child's family, to seek legal redress.

Lack of protection in conflict and emergency situations

The vulnerability of stateless children becomes still more acute in situations of war or natural disaster, yet lack of personal documents is a common problem. In Sweden, for example, it is reported that approximately 70 per cent of refugees entering the territory do not possess any identity document. This can cause difficulties in the investigation of individual cases, the provision of appropriate protection and the process of family tracing and unification.¹⁸²

¹⁷⁸ Conversely, in the current political climate, citizens of certain states who *can* offer documentary evidence of their nationality (in the form of a passport, for example) are likewise often regarded with suspicion.

¹⁷⁹ Tatjana Perić, "Personal Documents and Threats to the Exercise of Fundamental Rights of Roma in Europe", European Roma Rights Centre, 2003, see <http://www.errc.org/cikk.php?cikk=1097&archiv=1#1>

¹⁸⁰ Ferdinando Sigona cited in Tatjana Perić, "Personal Documents and Threats to the Exercise of Fundamental Rights of Roma in Europe", European Roma Rights Centre, 2003, see <http://www.errc.org/cikk.php?cikk=1097&archiv=1#1>

¹⁸¹ UNICEF Innocenti Research Centre, *Birth Registration and Armed Conflict*, UNICEF, forthcoming.

¹⁸² Larsson Bellander, E. *Birth Registration and Armed Conflict*. A paper presented at the Expert Consultation on Birth Registration and Armed Conflict, 2-3 July 2003, Florence, Italy.

The right of every child to be registered at birth must be a priority in times of humanitarian emergency or armed conflict. Indeed, the importance of this measure becomes increasingly evident at a time when families and communities – and the social environment assuring their well-being - are substantially eroded. Moreover, the inability of the State to identify and monitor children requiring assistance is a major obstacle when planning and implementing humanitarian assistance and development interventions.

Children without birth certificates are at increased risk of under-aged recruitment into armed groups, sexual exploitation, and lack of access to humanitarian relief. These risks increase still more when the child – possibly traumatized and often lacking proper shelter - has been separated from his or her parents or caregivers due to displacement, abduction or trafficking.

Birth registration and certification are equally crucial for internally displaced children who, uprooted by conflict or natural disasters, remain in their own country and may need to be reunited with their families. In Sudan, for example, an initiative has been taken to issue birth certificates to children in internally displaced persons' camps in war-affected areas precisely because these certificates represent a child's legal link to his or her parents.¹⁸³ It is reported that Roma displaced from Kosovo have had difficulty accessing humanitarian assistance from the government and the international community since, lacking proof of their identity and nationality, they are unable to register as internally displaced persons.¹⁸⁴

Promoting the enjoyment of other rights

It is important to recognize that the registration of a child's birth and the issuance of a birth certificate promote the enjoyment of a range of other human rights beyond those to a name, a family and a nationality. While birth registration is not, in itself, a guarantee of these rights, its absence can put them beyond the reach of those already on the margins of society.

For example, according to human rights law, free primary education should be available to *all* children, irrespective of whether or not they possess a birth certificate. However, in several countries - including Algeria, Cameroon, Lesotho, the Maldives, Sudan and Yemen - a child cannot attend school without that crucial piece of paper.¹⁸⁵ In other countries such as India, Myanmar and Thailand, authorities encouraging primary school attendance do not enforce, or have abolished, the legal requirement to produce a birth certificate for school enrolment.¹⁸⁶

Education is not the only service potentially denied to unregistered children. An unregistered child may find it difficult to obtain the same degree of social protection from the state as a registered child. Similarly, medical care may be less easily available or cost more than it would to a "citizen", and it is generally more difficult for medical programmes and campaigns, such as immunization, to identify and reach unregistered children.

In conclusion

Experience from the field indicates that the registration of every child is a practicable possibility, even in challenging circumstances. To give just one striking example, in Afghanistan, between May and October 2003, a total of 775,000 children were successfully registered, representing 97 per cent of the target group of all girls and boys under one year of age. This was achieved using trained volunteers who accompanied polio vaccination teams as they made house-to-house visits to immunize young children.¹⁸⁷

Efforts such as this clearly reflect the recognition of birth registration as an investment in children that allows them to realize their potential and to develop as full and productive citizens of every nation. Birth registration is also a crucial measure to secure the recognition of every person before the law, to safeguard

¹⁸³ Communication from UNICEF Country Office, Sudan, June 2001.

¹⁸⁴ Lindsey Cameron, "The Right to an Identity", *Roma Rights*, no. 3, 2003, see http://lists.errc.org/rr_nr3_2003/noteb5.shtml.

¹⁸⁵ UNICEF Innocenti Research Centre, *Birth Registration. Right from the start*, Innocenti Digest no. 9, UNICEF, March 2002.

¹⁸⁶ *Ibid.*

¹⁸⁷ UNICEF. "UNICEF chief applauds Afghan birth registration effort", UNICEF Press Release, 6 October 2003.

the protection of his or her individual rights, and to ensure that any violation of these rights does not go unnoticed. It is a crucial step in establishing an individual's nationality and, beyond this, in contributing to his or her sense of citizenship and, overall, to the coherence of civil society. Moreover, for governments it is a source of credible data covering all sections of a national population that can facilitate realistic development planning to tackle poverty and provide basic services.

In today's world, with massive population movements, organized child trafficking, the global crisis of children orphaned by HIV/AIDS, and the impact of armed conflict on children, birth registration and proof of nationality is more essential than ever.

EUROPEAN CONVENTION ON NATIONALITY – BEST PRACTICES FOR CHILDREN

Report prepared by Ms Waltraud FUCHS-MAIR¹⁸⁸
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SUMMARY

This paper addresses the question of how the progressive development of legal principles in the field of children's rights could lead to specific changes in the 1997 European Convention on Nationality (ETS No.166) and thus be implemented at the level of internal nationality law.

The inclusion in the ECN of specific principles relating to children could smooth the path for the implementation of rules enshrined in the UN Convention on the Rights of the Child in internal nationality law.

The European Convention on Nationality would thus be able to set standards for children's rights provisions relating to the acquisition and loss of nationality and to procedural rights, which could then be adopted in internal regulations.

In the context of this study, "best practice" means that provisions are to be found in the nationality laws of Austria, Germany and Sweden which already offer preferential treatment in coping with children's rights but are not yet or are only partly contained in the ECN.

At the level of the European Convention on Nationality, "best practice" implies that special provisions for preferential treatment for children are to be incorporated in the ECN so as to encourage their subsequent adoption in internal law.

Preamble - basic principle

As an expression of the basic principle, the preamble to the ECN should be extended to include the following item:

"Convinced that the best possible support should be given to the integration of children in the community at the level of nationality law"

Four principles to ensure best practice nationality rules for children

The following amendments need to be made to the principles formulated in the European Convention on Nationality:

Principle 1 - General preferential treatment rule

Children are to be given preferential treatment with regard to the rules governing the acquisition and loss of nationality regardless of the nationality held by their parents, including the right to multiple nationality.

Principle 2 - Close ties with the country of residence

A prerequisite for preferential treatment is the existence of close ties between the child or the child's parents and the country of residence, in particular in the form of a certain minimum period of uninterrupted residence.

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Principle 3 - No automatic link between the nationality of the parents and that of the child

Changes in the nationality of the parents do not automatically affect the nationality of the child.

Principle 4 - Possible restrictions on parents' rights in nationality procedures

The rules for preferential treatment for children may include restrictions on parents' legal rights to speak for their children on nationality matters.

Additional amendments for the European Convention on Nationality are formulated for the chapters on the acquisition and loss of nationality, procedures and multiple nationality.

REPORT

EUROPEAN CONVENTION ON NATIONALITY – BEST PRACTICES FOR CHILDREN

CONTENTS

1. Introduction

2. Preamble – basic principle

3. Four principles for best practice nationality rules for children

3.1 Principle 1 - General preferential treatment rule

3.2 Principle 2 – Close ties with the country of residence

3.3 Principle 3 - No automatic link between the nationality of the parents and that of the child

3.4 Principle 4 - Possible restrictions on parents' rights in nationality procedures

4. Best practice nationality rules for children in Austrian, German and Swedish law

4.1 The situation with regard to Principles 1 and 2

4.2 The situation with regard to Principle 3

4.3 The situation with regard to Principle 4

5. Proposed rules for the preferential treatment of children for inclusion in the ECN

5.1 Preamble - additional item

5.2 Principles - additional item

5.3 Acquisition of nationality - additional item

5.4 Loss of nationality - change and additional item

5.5 Procedures relating to nationality - Article 10a - additional item

5.6 Multiple nationality - change

6. Bibliography

6.1 European Convention on Nationality

6.2 UN Convention on the Rights of the Child

6.3 German Nationality Law

6.4 Austrian Nationality Act

6.5 Swedish Citizenship Act

6.6 Child Immigration Project

1. Introduction

One of the basic principles of the European Convention on Nationality (ECN)¹⁹⁰ is that, in matters concerning nationality, account should be taken of the legitimate interests of both states and individuals.

Another is the need to promote the progressive development of legal principles concerning nationality and their adoption in internal law.

In general, the Convention establishes principles relating to the nationality of natural persons.

It is based on the assumption that all states can determine who their nationals are under their own laws. Their laws must however be consistent with the relevant international conventions, customary international law and the principles of law generally recognised with regard to nationality.

In the ECN, the term “child” means every person under the age of 18 except where majority is attained earlier under the internal law applicable to the respective child.

The principles enshrined in the ECN include a provision for non-discrimination between the sexes.

According to the Convention, marital status does not automatically affect the nationality of one spouse relative to the other.

In keeping with the principle of private autonomy, there should be no legal obligation on spouses to have the same nationality.

The question of the acquisition or loss of nationality should rather continue to be dependent on the will of the individual spouse.

This approach has found expression in the ECN and subsequently in the internal laws of the States Parties as the concept of the equality and autonomy of the sexes has become accepted in general legal principles. A similar development can be observed with regard to the legal status of children.

The authors have studied these changes over the decades in the context of developments in Austrian civil law.

Over the many years taken to reform Austrian family law, numerous legal provisions have been enacted replacing the sole right of parents to represent their children in law with an increasing emphasis on the autonomous rights of the child. At the practical level, this development is reflected in procedural rules designed to increase the relative weight assigned to the will of the child in the form of the right to be heard and the right to consent.

In this respect, the procedural position of children under Austrian nationality law is already significantly stronger than in other countries.

The ECN, on the other hand, makes no provision for the legal autonomy of children in the rules of procedure relating to nationality law.

The UN Convention on the Rights of the Child¹⁹¹ is a milestone in the development of children’s rights. The Children’s Rights Convention constitutes a single compact catalogue of children’s legal rights and their fundamental needs and interests – unlike the national legislation of most countries, in which the rights and duties of children are scattered over a wide range of legal norms.

¹⁹⁰ European Convention on Nationality 1997, ETS No. 166

¹⁹¹ Convention on the Rights of the Child - 44/25-1989

As a result of the UN Convention on the Rights of the Child, the concept of children's rights has become symbolic of young people's evolving status in society.

The authors have studied ways in which the progressive development of legal principles in the field of children's rights can find expression in the ECN, which would in turn promote their observance in the framework of internal nationality regulations.

The inclusion in the ECN of specific principles relating to children could smooth the path for the adoption of a children's rights approach in the States Parties' internal nationality laws and regulations within the terms of the UN Convention on the Rights of the Child.

The ECN would thus be able to set standards for children's rights provisions relating to the acquisition and loss of nationality and to procedural rights, which could then be implemented in internal law.

On the other hand, it is clear that rules concerning the nationality of children cannot be made dependent on the will of the child alone.

It is rather for the Council of Europe and the States Parties to decide whether it is reasonable for the degree of private autonomy that now applies to the sexes to be applied in principle to the status of children within the terms of the UN Convention on the Rights of the Child.

And if it should be applied, to what extent and in what way?

Within the sphere of their responsibility for public law provisions, which are independent of the will of the individual parties, government authorities have abundant scope for action here taking due account of their respective legal policies, for example through application of the *jus soli* principle for children subject to certain provisions for close ties with the country of residence.

Examples of such rules for children were studied in the nationality laws of Austria, Germany and Sweden.

In the context of this study, "best practice" means that provisions are to be found in the nationality laws of the countries concerned which offer preferential treatment to children in keeping with children's rights as described above but are not necessarily contained in the ECN.

At the level of the ECN, "best practice" implies that special provisions for preferential treatment for children are to be incorporated in the ECN so as to encourage their subsequent implementation in internal law and regulations.

The reasoning and legitimation for preferential treatment for children in the framework of nationality law, however, is based not so much on juridical as on sociological and psychological aspects, and is ultimately a question of political will.

A typical study on the question is the Child Immigration Project¹⁹², which shows that a flexible approach to granting nationality to children also serves to promote integration.

The purpose of this paper can only be to show what rules could be incorporated in the ECN in pursuit of the goal of promoting best practice with regard to the treatment of children in nationality matters.

The first step must be to formulate a basic principle relating to children in the preamble to the ECN.

Appropriate provisions defining the required standard for preferential treatment for children must then be incorporated in the principles of the ECN and in the rules relating to acquisition, loss, recovery, procedures and multiple nationality.

Article 26 of the ECN actually stipulates that more favourable rights may in any case be provided for in the internal laws of the States Parties.

¹⁹² Child Immigration Project - <http://www.injep.fr/chip>

On the other hand, pursuant to Article 29 ECN, the States Parties may make reservations, especially with regard to specific implementation in national law of the rules relating to acquisition, loss, recovery, procedures and multiple nationality.

The ECN only lays down a minimum standard that is really binding with regard to the general principles, to which no reservation may be made.

The main effect of the proposed rules for the ECN would be to support the efforts of the Council of Europe to promote the progressive development of legal principles concerning nationality in as many countries as possible, in this case in the interest of the youngest generation.

In the last part of the study, a proposal is made for provisions that could be incorporated in the ECN in order to achieve a situation consonant with the above approach to children's rights.

2. Preamble - basic principle

As an expression of the basic principle, the preamble to the ECN should be extended to include the following item:

“Convinced that the best possible support should be given to the integration of children in the community at the level of nationality law”.

3. Four principles for best practice nationality rules for children

3.1 Principle 1 – General preferential treatment rule

Children are to be given preferential treatment with regard to the rules governing the acquisition and loss of nationality regardless of the nationality held by their parents, including the right to multiple nationality.

3.2 Principle 2 – Close ties with the country of residence

A prerequisite for preferential treatment is the existence of close ties between the child or the child's parents and the country of residence, in particular in the form of a certain minimum period of uninterrupted residence.

3.3 Principle 3 – No automatic link between the nationality of the parents and that of the child

Changes in the nationality of the parents do not automatically affect the nationality of the child.

3.4 Principle 4 – Possible restrictions on parents' rights in nationality procedures

The rules for preferential treatment for children may include restrictions on the parents' legal rights to speak for their children in nationality matters.

4. Best practice nationality rules for children in Austrian, German and Swedish law

Three countries, namely Austria, Germany and Sweden, were selected to provide examples of nationality rules that satisfy or approximate to the above four principles. The situation in these countries was compared on the basis of current legislation, i.e. the 1999 **German Nationality Law** (abbreviated to **GNL** in the following), the 2001 **Swedish Citizenship Act** (or **SCA** for short) and the 1985 **Austrian Nationality Act** (or **ANA**).

The situation with regard to Principles 1 and 2

The first principle strengthens the rights of children in two respects.

On the one hand it is designed to make the acquisition or loss of nationality independent of the child's parents, i.e. the children are assigned autonomous legal rights.

On the other hand, the aim is to permit children to hold multiple nationality.

In legal terms, this constitutes a departure from the principle of *jus sanguinis* and a partial departure from the policy of avoiding multiple nationality.

Principle no. 2 will strengthen the position of the States by requiring close and enduring ties with the country involved in the form of a minimum period of uninterrupted residence on the part of either the child or the child's parents.

A comparison between the countries studied – Austria, Germany and Sweden – shows that **Germany** comes closest to satisfying Principle no. 1 with its amended Nationality Law, which came into force on 1 January 2000.

One effect of the amendment was to introduce the principle of *jus soli* in Germany, which means that children of foreign nationals acquire German nationality *ex lege* as long as they are born on German soil¹⁹³. That greatly strengthens the legal position of such children, who automatically become German nationals regardless of the nationality of their parents and any nationality acquired additionally by virtue of descent. However, under German law, two conditions have to be met for children of foreign nationals to acquire German nationality in this way: at least one parent must have had his or her lawful place of abode in Germany for a period of eight years **and** must hold a current residence permit or have held an unlimited residence permit for three years.

These requirements or restrictions are a reflection of the interest of the state in Principle no. 2 and also serve to avoid “nationality shopping”, which doubtless will have to be taken more and more seriously with regard to the European Union and the rights of EU citizens (cf. recent developments in Ireland).

In view of the eight-year residence requirement for parents and the need for a residence permit at the time of the birth of the child, it can be assumed that the parents have close ties with the country and in most cases that the family intends to live there permanently. It is therefore also reasonable to assume that such children will grow up to become integrated members of society.

The interest of the State in the existence of close ties with the country of residence is emphasised in the provisions of § 29 GNL¹⁹⁴.

According to this article, German nationals who acquired German nationality after 31 December 1999 pursuant to § 4 (3) GNL and are also foreign nationals lose their German nationality if, upon reaching majority, they declare in writing their wish to retain their foreign nationality. Their German nationality is

¹⁹³ § 4 (3) GNL As a result of being born in Germany, a child of foreign parentage acquires German nationality if one parent

1. has had his or her lawful place of abode in Germany for a period of eight years and
2. holds a current residence permit or has held an unlimited residence permit for three years.

Acquisition of German nationality is recorded by the registrar responsible for issuing the child's birth certificate.

The Ministry of the Interior is empowered, with the concurrence of the Upper House, to issue regulations in the form of ordinances relating to the procedure for recording the acquisition of nationality pursuant to item 1.

¹⁹⁴ § 29 (1) GNL A German who acquired German nationality after 31.12.1999 pursuant to § 4 (3) or by naturalisation pursuant to § 40b and also holds foreign nationality shall make a declaration after reaching majority and instruction pursuant to para. 5 as to whether he or she wishes to retain German nationality or foreign nationality, the declaration to be made in writing.

(2) Should the person required to make a declaration pursuant to para. 1 declare his or her wish to retain the foreign nationality, his or her German nationality shall be withdrawn on receipt of the declaration by the competent authority. German nationality shall also be withdrawn if no declaration is submitted by the 23rd birthday of the person involved.

(3) Should the person required to make a declaration pursuant to para. 1 declare his or her wish to retain German nationality, he or she shall be required to present proof of renunciation or loss of the foreign nationality. Should no such proof be made by the 23rd birthday of the person involved, his or her German nationality shall be withdrawn except where the German national has previously applied for and received written permission from the competent authority to retain German nationality. Application for permission to retain German nationality can only be made, including application as a precautionary measure, up to the 21st birthday of the person involved (time limit)...

withdrawn when the declaration is received by the competent authority and also if they fail to make a declaration by the age of 23.

This *ex lege* loss of German nationality can only be prevented if the German national declares in writing within the allotted period that he or she wishes to retain German nationality and presents proof of renunciation or loss of his or her foreign nationality by the age of 23 or applies for a nationality retention permit by the age of 21.

This new provision greatly strengthens the position of children born in Germany of foreign parents and promotes social integration, as the children of foreign parents can now grow up in the knowledge that they are German nationals and are thus welcome in the country. The administrative burden is also reduced by this *ex lege* rule in as far as the administrative process has been postponed to the end of childhood and can be concluded with a simple declaration instead of a complicated procedure. The requirement for a formal declaration before the age of 23 makes adequate allowance for the justified needs of the State and leads to clarification of the legal and personal status of the German national, who thus has to take a conscious decision with regard to the nationality he or she wishes to live with in future.

No such *jus soli* regime exists in either of the other two countries studied. However, we do find preferential naturalisation rules or modalities for children born in the country concerned. A minor born in **Austria**, for example, is entitled to acquire Austrian nationality after a four-year period of residence in the country (§ 10 (4) and (5) ANA) instead of the usual ten years.

In **Sweden** a simplified registration procedure is available for children to make independent application for Swedish nationality. As long as certain conditions are met, children can avoid the usual administrative procedures and acquire Swedish nationality simply by registering.

With the exception of an illegitimate child born abroad of a Swedish father, for whom naturalisation is also possible on this basis, children following the simplified registration procedure for the acquisition of Swedish nationality always have to meet the twin conditions of holding a permanent residence permit and having their normal place of abode in the country¹⁹⁵. These two requirements ensure close ties between the child and the country, which in the case of the illegitimate child are assumed to derive from the fact of having a Swedish father.

Close ties with the country are not required where children are to be naturalised together with their parents. Neither Sweden (§13 in conjunction with § 12 SCA) nor Austria (§ 12 (item 4) and § 17 ANA) require proof of close ties with the country where the children acquire nationality together with their parents or through a parent in some way and the parents themselves have to satisfy the relevant requirements. In Austria, however, a knowledge of the German language¹⁹⁶ is nevertheless a prerequisite for acquisition of Austrian nationality. This requirement is intended to ensure a reasonable relationship with the country, although it is obviously not relevant in the case of infants. In the case of Germany, § 14 GNL makes explicit reference to “other” ties with the country as a condition to be met by foreigners who are not resident there¹⁹⁷.

The situation with regard to Principle 3

¹⁹⁵ § 7 SCA A child not holding Swedish nationality shall acquire Swedish nationality on registration by the person or persons having the care and custody of the child as long as the child

1. holds a permanent residence permit for Sweden, and
2. has had his or her normal place of abode in Sweden for five years or, where the child is stateless, for three years.

Registration shall be effected before the child reaches the age of 18.

If the child has reached the age of 12 and is a foreign national, the child’s consent shall be required for the acquisition of Swedish nationality. Consent shall not be required where the child is permanently prevented from giving such consent by reason of a mental disorder or similar condition.

¹⁹⁶ § 10a ANA An appropriate knowledge of the German language is a precondition for acquisition of nationality in all cases, taking due account of the alien’s living situation.

¹⁹⁷ § 14 GNA An alien who is not resident in the country and satisfies the other requirements of §§ 8 and 9 can be naturalised if he or she has ties with Germany that justify naturalisation.

Giving children independent status in matters of nationality in the face of changes in the nationality of their parents also emphasises and strengthens their autonomy.

In the case of **Austria**, where a parent acquires Austrian nationality, the position of the child is strengthened in that the parent's acquisition of nationality does not automatically affect the nationality of the child. Instead a separate application, known as an extension application¹⁹⁸, has to be made. The extension application is processed together with and in relation to the main application lodged by the child's father or mother as an extension may only be granted together with the ruling on the main application¹⁹⁹. The advantage of this extension procedure compared with an independent application, which the child could also make in Austria, is that the child need not submit proof of residence or of a minimum period of residence and that the charges are lower.

In the framework of the nationality retention procedure (§ 28 ANA), too, the decision to permit retention of Austrian nationality in spite of the foreign nationality held by a parent does not apply automatically to the children. Here, too, a separate application must be made for the children taking account of the specific procedural requirements (cf. the situation with regard to Principle 4).

In the case of loss of nationality (§ 27 ANA), the children also lose their Austrian nationality *ex lege* where they are minors and single and acquire a foreign nationality together with a parent or already hold that foreign nationality and neither parent remains an Austrian national²⁰⁰.

Quite apart from the fact that this rule penalises children with parents of different nationalities and illegitimate children whose nationality derives solely from their mothers, the law should provide for the children's autonomy from their parents' rights as in the case of acquisition of nationality

The resulting multiple nationalities should be tolerated, although they could be made subject to a time limit in the interest of the state and the subject of a formal declaration to be made upon reaching maturity as is the case with the new *jus soli* regime in Germany.

German nationality is also lost *ex lege* where foreign nationality is acquired and the parent with sole parental custody over the child also applies for the foreign nationality²⁰¹.

In other cases the approval of the guardianship court is necessary and that is not usually granted as the loss of nationality is considered detrimental to the interests of the child.

¹⁹⁸ § 17 (1) ANA Subject to the provisions of § 10 (1, 2-8), the decision to grant nationality shall be extended to include

1. the alien's legitimate children,
 2. his wife's illegitimate children,
 3. the man's illegitimate children where his paternity has been proved or recognised and he has responsibility for the care and education of the children,
 4. the alien's adopted children,
- as long as the children are minors, single and are not aliens following withdrawal of nationality pursuant to § 33.

¹⁹⁹ § 18 ANA An extension of the decision to confer nationality may only be granted at the same time as the original decision and only for the same date of acquisition.

²⁰⁰ § 29 (1) ANA Where a citizen loses Austrian nationality pursuant to § 27, the loss of nationality also applies to

1. his or her legitimate children, and
2. his or her adopted children,

if they are minors and single and they also acquire or already hold the foreign nationality concerned unless one of their (foster) parents remains an Austrian national

²⁰¹ § 25 (1) GNL A German loses his or her nationality with the acquisition of a foreign nationality where such acquisition is a consequence of his or her application or the application ... of his or her legal representative, ... but in the case of a represented party only if those conditions are fulfilled under which application for deprivation could be made.

§ 19 (2) GNL The approval of the guardianship court is not required where the father or the mother applies to renounce nationality for him or herself and, by virtue of parental authority, for a child at the same time and the applicant has parental custody over that child.

In **Sweden** there is no problem with multiple nationality.

The situation with regard to Principle 4

Recognition of procedural rights for children is tantamount to recognition of children as legal subjects. Such procedural rights can vary, ranging from the right to consent to party status and the right of petition.

In **Austria** the procedural rights of minors aged 14 and above are well developed. This is most clearly the case with regard to applications for nationality.

Pursuant to § 19 (2) ANA, alien minors aged 14 and above must make separate application for Austrian nationality. This means that such children can only make an independent application for nationality and an extension application themselves, their legal representatives having only the right to consent²⁰². At the request of the minor or of the competent authority, this right to consent can be replaced by a ruling of the guardianship court where acquisition of nationality is considered to be in the interest of the child (§19 (4) ANA).

In other cases, fourteen-year-old minors do not have the right to file applications but at least they have the right to consent.

Minors enjoy the right to consent in the case of *ex lege* acquisition of nationality through subsequent legitimation²⁰³ or on application for retention of nationality (§ 28 (4) ANA).

In the former case, the minor's refusal to consent (or the refusal of the child's legal representative) can be overcome by a court ruling where the acquisition of nationality is in the legitimated party's interest for educational, vocational or other significant reasons (§ 7a (5) ANA). No such limitation on the minor's right to consent applies in the case of nationality retention proceedings.

The right to consent is also accorded to fourteen-year-old minors in cases of loss of Austrian nationality as a result of the acquisition of foreign nationality, which can also apply *ex lege* to the children²⁰⁴. In all such cases, consent must be given prior to the ruling and in the latter case consent must also be given explicitly prior to acquisition of the foreign nationality. In that case the minor's refusal to consent cannot be overcome in any way.

The situation relating to the right to consent is somewhat different in cases of renunciation of nationality (§ 37 ANA).

Here again, the lack of consent by the minor cannot be overturned by a court ruling, but it is possible for the minor's consent – and also that of his or her legal representative – to be given subsequent to submission of the declaration of renunciation²⁰⁵.

Although **Sweden** has greatly extended and facilitated arrangements for children to acquire Swedish nationality, they have relatively few independent procedural rights there.

Only persons who have reached the age of 18, for example, may register or make an application for Swedish nationality²⁰⁶.

²⁰² § 19 (2) ANA Alien minors aged 14 and above may only make an application pursuant to para. 1 themselves; the consent of their legal representative is required.

²⁰³ § 7a (2) ANA Where the legitimated party is 14 years of age or older, para. 1 only applies if the legitimated party and his or her legal representative consent to the acquisition of nationality.

²⁰⁴ § 27 (3) ANA In addition, an underage Austrian national aged 14 and above only loses Austrian nationality if he or she has explicitly consented to the declaration of will for the acquisition of foreign nationality (para. 1) submitted by his or her legal representative or the third party (para. 2) prior to the acquisition of said foreign nationality.

²⁰⁵ § 38 (1) ANA The declaration of renunciation is to be submitted in writing to the competent authority pursuant to § 39. § 28 (4) applies *mutatis mutandis* except that the consent of the legal representative and the minor aged 14 and above or the approval of the court may be given subsequent to submission of the declaration of renunciation.

In individual cases the law provides for the right to consent or – in the terminology of the Swedish law – to agreement (§§ 5 and 7 SCA)²⁰⁷. This right to consent is accorded earlier than in Austria, namely to minors when they reach the age of 12. In some cases in which the legal consequences also affect the children, however, no right to consent is provided for at all (§§ 13 and 19 SCA).

5. Proposed rules for the preferential treatment of children for inclusion in the ECN

5.1 Preamble - additional item

Convinced that the best possible support should be given to the integration of children in the community at the level of nationality law

5.2 Principles - additional item

ECN Chapter II, Article 4

Children shall be accorded preferential treatment in the rules relating to the acquisition and loss of nationality regardless of the nationality of their parents, including the right to hold multiple nationality.

In order to qualify for preferential treatment, children shall have close ties with the country of residence, in particular in the form of a certain period of uninterrupted residence.

Children shall not be automatically affected by changes to the nationality of their parents.

The rules for preferential treatment for children may include restrictions on parents' legal rights to speak for their children on nationality matters.

5.3 Acquisition of nationality - additional item

ECN Chapter III, Article 6

1c) children born in the territory of a State Party whose parents are in possession of a residence permit pursuant to internal law and have completed the prescribed period of residence.

5.4 Loss of nationality

ECN Chapter III, Article 7 - Loss of nationality *ex lege* or at the initiative of a State Party

Article 7 (2) - current text:

A State Party may provide for the loss of its nationality by children whose parents lose that nationality except in cases covered by sub-paragraphs c and d of paragraph 1. However, children shall not lose that nationality if one of their parents retains it.

Article 7 (2) - proposed amendment:

Children whose parents lose the nationality of a State Party do not themselves lose that nationality.
ECN Chapter III, Article 8 - Loss of nationality on the initiative of the individual

Article 8 (3) - additional item:

Renunciation of a child's nationality through a declaration of will by the child's parents shall only be permitted if it can be proved that renunciation is in the interests of the child.

5.5 Procedures relating to nationality - Article 10a - additional item

Each State Party shall ensure that in nationality procedures children are accorded independent rights to file applications, to consent and to be heard.

²⁰⁶ § 23 SCA Persons aged 18 and above may make an application or register within the meaning of this law, even if they are in the personal care and custody of another person.

²⁰⁷ § 7 last paragraph SCA Where the child is 12 years of age or older and holds a foreign nationality, his or her agreement is required for the acquisition of Swedish nationality. Such agreement is not required, however, where the

The provisions of § 5 (2) SCA are identical.

5.6 Multiple nationality

ECN Chapter V, Article 14 - Multiple nationality

Article 14(1) subpara. a - current text:

A State Party shall allow children having different nationalities acquired automatically at birth to retain these nationalities.

Article 14(1) subpara. a - proposed amendment:

A State Party shall allow children to retain all nationalities once acquired.

6. Bibliography

6.1 European Convention on Nationality 1997, ETS no. 166 (in force since 1.3.2000)

6.2 UN Convention on the Rights of the Child – 44/25 – 1989 (in force since 2.9.1990)

6.3 German Nationality Law 1999 (Federal Law Gazette I, p.1618 - in force since 1.1.2000)

6.4 Austrian Nationality Act 1985 (Federal Law Gazette no. 311/1985 - in force since 1985)

6.5 Swedish Citizenship Act 2001: no. 82 (in force since 2001)

6.6 Child Immigration Project - <http://www.injep.fr/chip>
(contact Dr. Carla Collicelli – c.collicelli@censis.it)

CONTRIBUTIONS

SHOULD NEWLY BORN CHILDREN BECOME CITIZENS AUTOMATICALLY?

Report submitted by Mr Juris CIBUĻS²⁰⁸

According to the data of the Residents' Register Office of the Citizenship and Migration Affairs Board, Ministry of the Interior, the Republic of Latvia (as at 1 July 2004) there were 2,309,339 residents in Latvia, including 1,805,156 citizens of Latvia (78.17 %), 470,220 non-citizens (20.36 %), 33,756 aliens (1.46 %), 203 stateless persons (0.0088 %) and 4 persons having the alternative status (0.00017 %).

In Latvia the categories of persons as to citizenship (in accordance with the Law on Citizenship of 1994) are as follows:

- **A citizen of Latvia** - a person belonging to the citizenship of Latvia,
- **A non-citizen** - that citizen of the former USSR residing in the Republic of Latvia or being temporarily away or his/her child who meets the following requirements at the same time:
 1. on 1 July 1992 that person had been registered in the territory of Latvia or his/her last registered residence was in the Republic of Latvia till 1 July 1992 or the court judgment states the fact that he/she had been residing no less than 10 years in the territory of Latvia;
 2. he/she is not a citizen of Latvia;
 3. he/she is not and has not been citizen of another country.
- **An alien** - a citizen of a foreign state.

A stateless person - a person who is not considered to be a citizen in accordance with the laws of any state.

The Law on Protection of the Rights of the Children (adopted in 1998) says that “A child is a person, who has not attained the age of 18, except those persons, who, in accordance with the law, have attained majority earlier, namely the persons who have been announced to have attained their majority or who are in wedlock before attaining the age of 18.” (Chapter I, Article 3).

The European Convention on Nationality (Article 2) – “child” means every person below the age of 18 unless, under the law applicable to the child, majority is attained earlier. The definition of the term “child” is based on Article 1 of the 1989 United Nations Convention on the Rights of the Child. The reference to the law applicable to the child means that the law to be applied may include the rules of private international law.

In accordance with the Law on Citizenship of Latvia the citizenship of Latvia is the enduring legal bond of a person with the State of Latvia, in its turn, in “The European Convention on Nationality” nationality means the legal bond between a person and a State and does not indicate the person’s ethnic origin. It thus refers to a specific legal relationship between an individual and a state which is recognised by that state.

It should be noted that, whereas the term «nationality» is used in most international instruments in this field and by most western European states, many countries of Central and Eastern Europe use the term «citizenship». However, for the purpose of the Convention the terms «nationality» and «citizenship» should be considered as synonymous. All through the Convention and explanatory report the terms “nationality” and “nationals” are used except one case on p. 48 (should “citizens” be treated as the slip of the pen?).

In accordance with the Law on Citizenship of Latvia the following categories of children are citizens of Latvia:

²⁰⁸ Naturalisation Board, Latvia

- children who are found in the territory of Latvia and whose parents are unknown;
- children who have no parents and who live in an orphanage or a boarding school in Latvia;
- children both of whose parents were citizens of Latvia on the day of birth of such children, irrespective of the place of birth of such children.

If, at the moment of the birth of the child, a parent is a citizen of Latvia, but the other is an alien, the child shall be a citizen of Latvia, if the child 1) was born in Latvia; or 2) was born outside Latvia, but at the moment of the birth of the child, the permanent place of residence of the parents, or that parent with whom the child lives, was in Latvia.

In the aforementioned cases, the parents may, having mutually agreed, choose the citizenship of the other state (not of Latvia) for their child. If, at the moment of the birth of the child, one of the parents is a citizen of Latvia, but the other is an alien, and the permanent place of residence of both parents is outside Latvia, the parents shall determine the citizenship of the child by mutual agreement. If, at the moment of the birth of the child, one parent is a citizen of Latvia, but the other parent is a stateless person, or is unknown, the child shall be a citizen of Latvia irrespective of the place of birth.

Children can acquire the citizenship of Latvia through the following procedures – naturalisation and recognition.

Naturalisation

The Naturalisation Board has been dealing with naturalisation since 1 February 1995.

Naturalisation applications of persons who have attained the age of fifteen years are examined in the sequence of their submission in accordance with the provisions of Articles 11 and 12 of this Law (there are some exceptions as to persons who are Latvians or Livonians as to their ethnic origin etc.).

At the same time as the naturalised persons, their minor children up to the age of fifteen years who permanently reside in Latvia also acquire the citizenship of Latvia. This also applies to the adopted children and children born out of wedlock. The provisions of Article 12 of this Law do not apply to underage children as regards granting the citizenship of Latvia to them. If a parent is naturalised in Latvia, but the other one remains an alien, their underage child shall acquire the citizenship of Latvia if:

- the parents agree upon it; or
- the parents have not come to an agreement, but the permanent place of residence of the child is in Latvia.

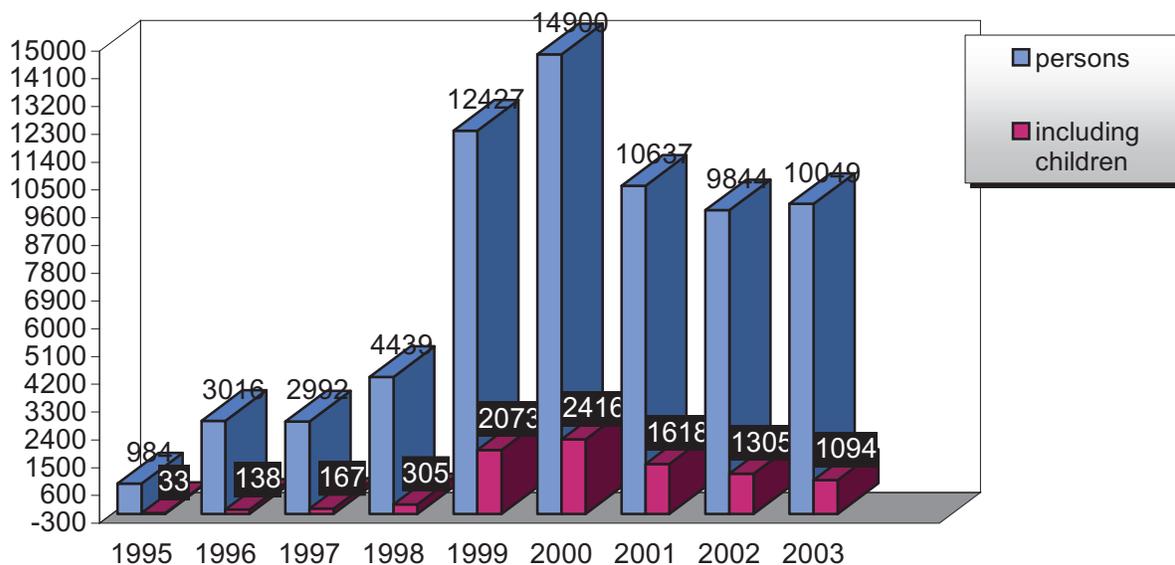
If an underage alien (a stateless person) is adopted by a married couple, of whom one is a citizen of Latvia, but the other is an alien, the child shall acquire the citizenship of Latvia if:

- the adopters agree upon it; or
- the permanent place of residence of the child is in Latvia.
-

In case of annulment of the adoption, the citizenship of the child may be changed.

79,539 naturalisation applications have been received (as at 30 June 2004). **74,656** persons, including **9,724** underage children (under the age of 15) naturalising together with a parent, have been granted the citizenship of Latvia through naturalisation according to decrees of the Cabinet of Ministers (see Diagram No. 1)

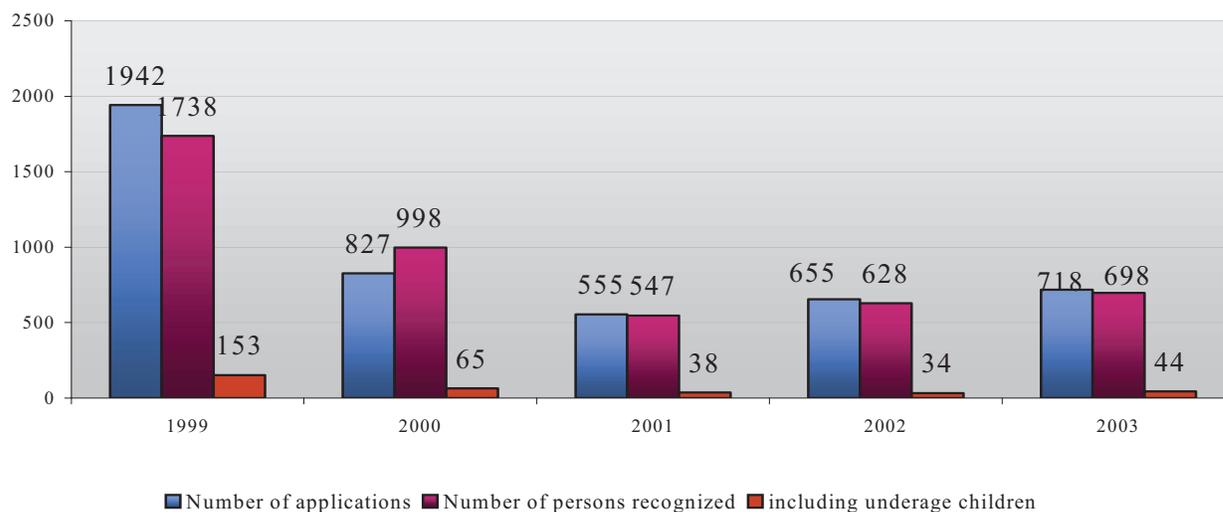
Breakdown of Number of Persons Having Been Granted Citizenship of Latvia through Naturalization (in years)



Recognition to Be a Citizen of Latvia through Registration of the Status of a Citizen of Latvia

The Naturalisation Board registers the status of a citizen of Latvia for those persons who are recognised to be a citizen of Latvia according to the Law on Citizenship (Article 2, Paragraphs 1, 1¹, 1² or 1³) since 1 January 1999. 5,101 applications have been received (as at 30 June 2004). 4,940 persons, including 351 underage children (under the age of 15), have been recognised to be a citizen of Latvia (see Diagram No.2).

**Breakdown of Number of Persons Recognized to Be a Citizen of Latvia
through Registration
(in years)**



Recognition of a Stateless Persons' or Non-citizens' Child Born in Latvia after August 21, 1991 to Be a Citizen of Latvia

Since January 1, 1999 the Naturalization Board accepts and reviews applications as to recognition of a stateless persons' or non-citizens' child who was born in Latvia after August 21, 1991 to be a citizen of Latvia according to the Law on Citizenship (Article 3¹). The Head of the Board makes a decision on recognition of such a child to be a citizen of Latvia.

A child who is born in Latvia after 21 August 1991, shall be recognized to be a citizen of Latvia in accordance with Paragraph 2 or 3 of this Article, if he/she complies with all the following requirements:

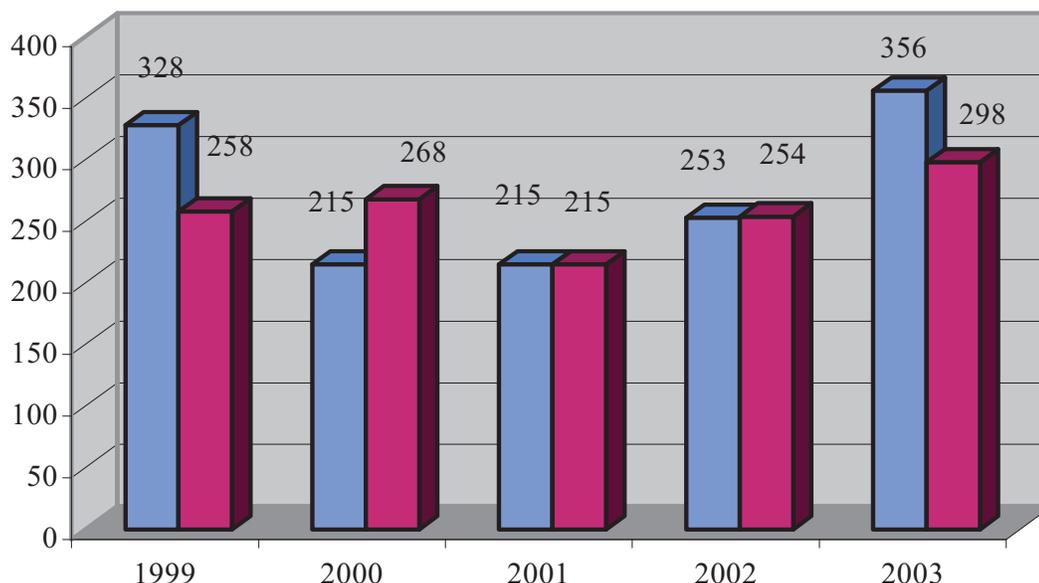
- his/her permanent place of residence is Latvia;
- he/she has not been sentenced to imprisonment in Latvia or in any other state for more than five years for committing a crime;
- he/she, prior to that, has been a stateless person or a non-citizen all the time.

Until the moment a child has attained the age of 15 years, an application for acquisition of the citizenship of Latvia may be submitted by both the parents, the mother of a child, a parent or the adopter. If persons, who have the right to submit an application as regards recognition of a child to be a citizen of Latvia, have not done so, a minor, upon attaining the age of 15 years, has the right to acquire the citizenship of Latvia in accordance with this Article.

The opportunities for acquiring the citizenship of Latvia provided by this Article may be made use of by a person until they attain the age of 18 years.

As at June 30, 2004 in Latvia there were **17, 023** such children who were born in Latvia after August 21, 1991. These newly born children in Latvia have been registered as non-citizens. **2,320** applications have been received. **1,819** children have been recognized to be a citizen of Latvia (see Diagram No. 3).

Breakdown of Number of Applications as to Children to be Recognized a Citizen of Latvia and of Number of Children Recognized to Be a Citizen of Latvia (in years)



■ Number of applications ■ Number of children recognized to be a citizen of Latvia

DIAGRAM No.3

There are several reasons for this, namely lack of motivation, parents' wish to let their children to decide it themselves *inter alia*. However, there has been an increase of applications after Latvia's accession to the European Union and thanks to the project implemented this year by the Secretariat of the Minister of Special Tasks in Affairs of Integration of Society and the Secretariat of the Minister of Special Tasks in Family Affairs. Within the framework of this project parents being non-citizens and having children were sent letters to inform them on the possibility to recognize such children to be a citizen of Latvia and to address those parents who have not decided upon citizenship of their children. The Naturalization Board took part in the implementation of this project as well. As a result of this in the first six months of 2004, **525** children have been recognized to be a citizen of Latvia (1.8 times more than in 2003 in total).

There are some more rules to regulate citizenship of a minor up to 18 years of age. All this has been explicitly prescribed by the Law of Citizenship providing for every child to become a citizen of Latvia.

Irrespective of the fact how long or complicated the law on citizenship may seem each country should decide itself whether to grant children its citizenship automatically or not. Granting citizenship to all newly born children automatically might be the simplest way, but not necessarily the best and appropriate one.

BIRTHRIGHT CITIZENSHIP AS NATIONALITY OF CONVENIENCE

Report submitted by Mr Andrew GROSSMAN²⁰⁹

Introduction

This paper discusses the issue of the attribution of nationality²¹⁰ to the offspring of transient, undocumented and otherwise non-permanent parents in the context of increasingly stringent immigration laws. For at least the past 25 years the vulnerability of *jus soli* provisions to abuse by expectant mothers engaged in “forum shopping” or, more exactly, *fraude à la loi*²¹¹, has been of political concern.²¹² Whether it is a genuine problem or a convenient object for political and journalistic attention is not obvious²¹³. Available statistics are ambiguous and do not include data on the movement and residence patterns of those who gain adventitious birthright nationality. Nor is there a reasoned analysis of why, if such persons in fact remain in their country of birth, withholding nationality serves a useful end. While the Australian Citizenship Act 1948 as amended provides for the automatic vesting of nationality in the child of foreign parents born in Australia where “the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia”²¹⁴, other countries which have modified *jus soli* to depend upon residence of parent or child or status of parent require specific application for registration or facilitated naturalisation. Propensity to naturalise varies by place of origin, religion, country of destination and by certain imponderables.²¹⁵ It remains to be seen how generalised the take-up of

²⁰⁹ LL.B. (Columbia), Docteur en droit (Louvain)

²¹⁰ Except where the context dictates otherwise, “citizenship” and “nationality” are used interchangeably in this paper, ignoring the distinction made between the terms in specific cases, as in the Dominican Republic Constitution: Title III, Section I (Nacionalidad) and Section II (Ciudadanía). Compare 7 FAM 1111.1 (“Terms Not Always Interchangeable”, referring to the U.S. Immigration and Nationality Act). On attribution of nationality, see Patrick Weil, “Access to Citizenship: A comparison of Twenty-Five Nationality Laws”, in T. Alexander Aleinikoff and Douglas Klusmeyer (eds.), *Citizenship Today: Global Perspectives and Practices* (2001).

²¹¹ Thus: Julien Verplaetse, *La fraude à la loi* (1938) (ch. 1, “La nationalité”); Pasquale Fiore, “Du changement de nationalité opérée en fraude à la loi”, 37 *Clunet* 752 (1910). For an example of expedient acquisition of Russian nationality for purposes of divorce, quick remarriage and child custody, see François Duchêne, *Jean Monnet: The First Statesman of Interdependence* at 54-56 (1995).

²¹² Jeanette Money, “No Vacancy: The Political Geography of Immigration Control in Advanced Industrial Countries”, 51 *Int'l Organization* 685 (1997). The debate is much older. See: E.-S. Zeballos, *La nationalité au point de vue de la législation comparée et du droit privé humain* (1914), the product of a series of conferences held at the University of Buenos Aires.

²¹³ An official of the Northern Ireland Registry Office in discussing the Office’s 2002 Annual Report, said that out of approximately 22,500 live births in 2003 only 200 to 300 were to mothers from outside the province, and most of those mothers were from the Irish Republic. In 1983, when this author asked the same question about mothers from outside the province, he was told that “nearly all” such mothers travelled to Northern Ireland to give birth because of family connections there. Unlike birth records in the Republic of Ireland and elsewhere in the United Kingdom, Northern Ireland birth records do not include the declared country of birth of parents. Births and Deaths Registration Act 1953, (1953 c. 20) and Births and Deaths Regulations 1987, SI 1968/2088, Part XIII; Registration of Births, Deaths and Marriages (Scotland) Act 1965 (1965 c. 49); Births and Deaths Registration (Northern Ireland) Order 1976 and Registration (Births, Still-Births and Deaths) (Amendment) Regulations (Northern Ireland) 1996; Births and Deaths Registration Act (Ireland), 1880 (as amended).

²¹⁴ Australian Citizenship Act 1948, § 10(2)(b). But see PETER PRINCE, WE ARE AUSTRALIAN — THE CONSTITUTION AND DEPORTATION OF AUSTRALIAN-BORN CHILDREN (Parliamentary research paper No. 3, 2003-04) (PDF, 552 kb) and pending High Court case *Singh v. Australia* (S441/2003), [2003] H.C.A. Trans. 258 (hearing transcript; 5-year-old Australian-born child of asylum-seeker parents challenging statutory denial of nationality).

²¹⁵ R.F.A. van den Bedem, *Motives for Naturalization (Summary)*, Report K28, Netherlands Ministry of Justice (1993); U.S. Department of Commerce, *Current Population Survey*, Ser. P20-486, “The Foreign-Born Population in the United States”. See also EUROSTAT, *Statistics in Focus, Population and Social Conditions*, 95-11, “Acquisition of Citizenship by Naturalization in the European Union, 1993”.

citizenship will be. In the UK and Germany there may be particular windows of opportunity during which application or election must be made, failing which the opportunity is lost. Ignoring the complexity of the issue and the likely increase in dissonance between nationality, residence and domicile that will result, journalists and politicians have sought to attract attention and crystallise opposition to *jus soli* provisions. They have done this by presenting them in terms of unjust enrichment and attaching to their use by non-permanent foreigners pejorative titles: “maternity tourism”, “citizenship tourism”, “anchor babies”, “passport babies”.

Defining the issue: “birthright citizenship”

With respect to the intentional displacement for purposes of arranging birth within the jurisdiction, one might usefully distinguish between individually-motivated, occasional and incidental movement and organised traffic. A review of press reports suggests that to the extent that there is organised traffic to assure birthright citizenship it is directed towards the United States²¹⁶ and, to a lesser extent Canada²¹⁷. Maternity traffic to Northern Ireland, the Irish Republic and France and the French Overseas Community is unorganised other than by word of mouth. Furthermore, however substantial it may be locally, it does not seem significant in the aggregate. Accidental nationality is a fact of border life.²¹⁸ Wherever economic and social conditions allow for arbitrating nationality, at least some maternity traffic seems to exist. Recent litigation by a Haitian family in the Dominican Republic seeking recognition for two children as Dominican nationals on the basis that the family’s presence was not transitory²¹⁹, illustrates the phenomenon.²²⁰ It also underlines the fact that in a legal system without transparency and administrative probity, paper rights may be illusory.²²¹ The issue of status of Haitian emigrants and their locally-born offspring has been addressed by the Organization of American States and its Inter-American Court of Human Rights.²²²

Claiming the attributes of birthright citizenship is not always without obstacle. The lack of a paper trail through the childhood years can lead to suspicion and challenge.²²³ Some American nationality cases have turned on the issue of proof of parental residence for the requisite period prior to the birth of a child abroad, sometimes many years afterwards. For citizens who return with their mothers abroad, and who are raised and educated in their other country of citizenship, proof of constitutive facts may be difficult. Indeed, Native American peoples, who have treaty²²⁴ and statutory²²⁵ border-crossing rights, have had similar problems with officialdom.²²⁶

²¹⁶ Recent reports of organised prenatal travel by Korean women: Barbara Demick, “The Baby Registry of Choice”, *Los Angeles Times*, 25 May 2002, at A1; “Korean mothers who gave birth in US held”, *JoongAng Daily*, 16 June 2004. (URLs for cited documents and Web pages (where available) are linked at <<http://uniset.ca/naty/maternity>>.)

²¹⁷ Asian Pacific Post Online, “Korean passport babies not a big problem yet says Ottawa” 17 June 2004. Koreans are allowed visa-free entry into the Canada but not the United States.

²¹⁸ E.g., residents of the border town Rock Island, QC, born at a medical facility in Newport, VT, 23 km southwest.

²¹⁹ Dominican Republic Constitution, Art. 11(1) (“Todas las personas que nacieren en el territorio de la República, con excepción de los hijos legítimos de los extranjeros residentes en el país en representación diplomática o los que están de tránsito en él.”).

²²⁰ Human Rights Watch, “Persones Illegales: Haitianos Y Dominicano-Haitianos En La República Dominicana” (Apr. 2002); David Abel, “Haiti’s poorest cross border, face backlash”, *Boston Globe*, 26 Nov. 1999, p. A22; U.S. Dept. of State Human Rights Report, Dominican Republic, 2003.

²²¹ Kevin Sullivan, “In Mexico, a Paper-Thin Barrier to School: Absent Proof of Birth, Children Stay Home”, *Washington Post*, 28 Feb. 2004, p. A01.

²²² *Yean and Bosica v. Dominican Republic*, Case 12.189, Report No. 28/01, 22 Feb. 2001; OAS Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Dominican Republic*, Ch. IX, “Situation of Haitian Migrant Workers and Their Families in the Dominican Republic” (1999).

²²³ Dale Lezon and Carlos Antonio Rios, “Citizenship fight leaves migrant jailed, bewildered”, *Houston Chronicle*, Nov. 24, 2003, p. 1 (“Juan Gabriel Zavala ... was arrested for immigration violations when he applied for a U.S. passport and was jailed at the immigration lockup in Houston. Now, he faces deportation unless he can prove he was born in the United States.”); *Tullius v. Albright*, 240 F.3d 1317 (11th Cir. 2001) (“constructive residence” theory inapplicable).

²²⁴ Jay Treaty, T.S. 105, 8 Stat. 116 (1794); *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974); *U.S. ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660 (W.D.N.Y. 1947); Bryan Nickels, “Native American Free Passage Rights Under the 1794 Jay Treaty: Survival Under United States Statutory Law and Canadian Common Law”, 24 *B.C. Int’l & Comp. L. Rev.* 313 (2001).

²²⁵ *Texas Band of Kickapoo Indians*, 25 U.S.C. § 1300b-11; cf. Tim Vanderpool, “A tribe’s tale of three identities; Indians in Arizona whose land straddles the US-Mexican border want citizenship”, *Christian Science Monitor*, 30 Apr.

It is inherent in the attribution of nationality by *jus soli* that some individuals through happenstance or parental contrivance will acquire a nationality different from (or additional to) that (or those) held by the parents. Nationality carries with it sometimes unwanted obligations (allegiance²²⁷, perhaps military service²²⁸, perhaps taxation²²⁹). Aeneas Macdonald, born in Great Britain of British parents, was educated in France and eventually granted a French military commission. Taken prisoner in England, he was condemned to death, a sentence subsequently commuted to banishment²³⁰. Today especially, nationality carries valuable economic and social rights: to live and work in a country or regional group of countries²³¹, and to pass on that nationality to a succeeding generation or generations. What appears to be lost in the discourse is the role of status and personal identity in the development and education of the child. French²³², German²³³, Latvian²³⁴ and other nationality laws acknowledge the relevance of linguistic and cultural education as criteria for naturalisation. Outside of a suggestion in the news reports on organised maternity tourism from Asia, little is said of the likelihood that the child, as citizen, may be associated with his or her country of felicitous nationality. There is, however, at least anecdotal evidence that such children are sometimes enrolled at British and American schools abroad and grow up conversant with and tangential to British or American culture.

2003, p. 2; Jennifer Sterba, "Treaty separated O'odham", *Ariz. Daily Star*, 12 Feb. 2004, p. H12 (Tohono O'odham tribe). A number of bills have addressed the latter tribe's status; none has passed. See, e.g., 107th Cong., H.R. 1502.

²²⁶ Judith Graham, "Border crackdown vexes tribe", *Chicago Tribune*, 30 Dec. 2001, p. 14.

²²⁷ *Epoux Djebbar*, Cons. d'Etat, 25 July 1986, 1986 Rec. Lebon 214; *Maygründter v. Maygründter*, Cass. ital. (combined), 14 Feb. 1949, *Giurisprudenzia italiana*, 101.1949.II.161, 16 Ann. Dig. 215; Jacqueline Costa-Lascoux, "L'immigration algérienne en France et la nationalité des enfants d'algériens", 1981 *Ann. de l'Afrique du Nord*, 298. For issues and conflicts in matters of indigenous and colonial peoples, personal status and French nationality, see Christian Bruschi, "La nationalité dans le droit colonial". *Procès, cahiers d'analyse politique et juridique*, n° 18, 1987/88, at p. 29; on the concept of nationality as alien to Islam, see *Abd-el-Hakim v. Ministère des affaires étrangères*, 12 Rev. internat. dr. internat. publique 550 (1905); 32 *Clunet* 1035 (1905), Sirey, 1908.II.121, note de Boek; comment., Jean S. Saba, *L'Islam et la nationalité at pp. 81-82 (1931)*.

²²⁸ *Moser v. United States*, 341 U.S. 41 (1951); Marjorie M. Whiteman, 8 *Digest of International Law* at 540-72 (1967).

²²⁹ U.S.: Tit. 26, Ch. 1 Pt. 1 (tax on individuals, 26 U.S.C § 1 (2002)) & 26 U.S.C. § 911 (2002) (earned income of citizens and residents living abroad); *Cook v. Tait*, 265 U.S. 47 (1924); *Estate of Vriniotis v. Commissioner*, 79 T.C. 298 (1982) (estate of Greek dual national); *United States v. Benitez Rexach*, 558 F.2d 37, 42 (1st Cir. 1977); *United States v. Matheson*, 532 F.2d 809, 819 (2d Cir. 1976), cert. denied 429 U.S. 823 (1976); *Benitez Rexach v. United States*, 390 F.2d 631, 632 (1st Cir. 1968), cert. denied 393 U.S. 833 (1968); Philippines (until 1999): Tax Reform Act of 1997, Republic Act 8424, Sec. 23(B); Richard D. Pomp, "The Experience of the Philippines in Taxing Its Nonresident Citizens", 17 *NYU J. Int'l L. & Pol.* 245 (1985). Under certain conditions, birth within a particular territory belonging to a state can afford adventitious "sub-nationality" status: citizens and noncitizen nationals of the United States by reason of birth in an outlying territory are subject only to the "mirror" income tax of such territories and not U.S. federal income tax, except on income from mainland and other U.S. sources: Department of the Treasury, *Territorial Income Tax Systems* (Oct. 1979); 26 U.S.C. §§ 931, 932, 933. Nor are they subject to federal gift tax or their estates to federal estate tax: 26 U.S.C. §§ 2208, 2209; Rev. Rul. 74-25; TAM 7612220070A. Birth in Jersey or in another Channel Island or in the Isle of Man (all outside the scope of UK taxation) will afford rights under local housing and employment laws. See, e.g. Housing (Jersey) Law 1949; Housing (Control of Occupation) (Guernsey) Law 1994; Isle of Man, Residence Act 2001, c. 7; Department of Health and Social Security v. Barr and Montrose Holdings Ltd., [1991] E.C.R. I-3479; *Pereira Roque v. Lieutenant Governor of Jersey*, [1998] E.C.R. I-4607.

²³⁰ *R. v. Aeneas MacDonald*, (1747) 18 St. Tr. 858. Cf. *Kawakita v. United States*, 343 U.S. 717 (1952).

²³¹ Notably the British Isles Common Travel Area, the Nordic Council countries (treaties relating to: nationality acts, Copenhagen, 21 Dec. 1950, 90 UNTS 3, No. 1222 (1951); passport waiver agreement, Copenhagen, 22 May 1954, 198 UNTS 29 (1954); nationality, Denmark, Finland, Norway and Sweden, Copenhagen, 25 Jan. 1969, 667 UNTS 73, No. 91491 (1969); common labour market, Copenhagen, 6 Mar. 1982, 1347 UNTS 36, No. 22678 (1984), BENELUX (The Hague, 3 Feb. 1958), the European Union (Treaty of Rome (EEC Treaty), 1957), the European Economic Area (including, since June 1, 2001, non-member Switzerland), and with particular conditions and limitations, NAFTA (North American Free Trade Agreement, Washington, 8 & 17 Dec. 1992, Ottawa, 11 & 17 Dec. 1992, Mexico City, 14 & 17 Dec. 1992, 32 I.L.M. 289 & 605 (1993)), MERCOSUR (Treaty of Asunción, 26 Mar. 1991, 30 I.L.M. 1041 (1991)), Latin American Integration Association (Treaty of Montevideo, Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela, Montevideo, 12 Aug. 1980, 1329 UNTS 255, No. 22309 (1983)) and other groupings, and treaty partners to various treaties of friendship, commerce and navigation.

²³² Civil Code, art. 21-20.

²³³ StAG, art. 87(3).

²³⁴ Law of 11 Aug. 1994, as amended, § 2(1.3).

Jus soli may function, in countries other than its Common-Law and Latin American traditional homelands, in tandem with or accessory to facts of ancestry, residence, *domicile de nationalité* (notably upon the ending of an imperial connection) for assignment of nationality. Within Europe, Germany, Switzerland, France, Spain, Portugal²³⁵, Italy and Greece are cited as destination countries as well as Ireland and Britain; but attractiveness is relative: to many Moldovans access to Romanian nationality is a precious opportunity. Countries that at an earlier age excluded female citizens who married foreigners and who naturalised abroad, and their children, from the national polity have reversed course, sometimes welcoming back “lost” generations. This may be in response to recognition, sometimes retroactively, of gender equality.²³⁶ The more cynical might suggest that such re-migration is also seen as a potential source of reinforcing a country’s ethnic and racial (if not its linguistic) tradition. It is, in fact, also a reversal of the 19th Century arguments respectively in relation to *jus soli* and *jus sanguinis*.²³⁷ With nationality today viewed more as a source of rights than as a source of obligations, and dual nationality widely tolerated, it should not be surprising that some enterprising individuals avail themselves of opportunities. Nor should it be surprising that once significant numbers are believed to do so to the disadvantage of the state, of its nationals or to the self-image of either, access to nationality is limited, and that the limitation will be restricted.

The Irish Nationality and Citizenship Act and Chen and Zhu v. Home Secretary

The *Chen* case²³⁸ before the European Court of Justice and the 11 June 2004 Irish referendum on constitutional revision²³⁹ have highlighted for Europe once again the fact of nationality as object of political expedience and pragmatism and the issue, never addressed in the *Nottebohm* case, of whether serendipitous possession of a nationality from birth can ever constitute *fraude à la loi*—whether a second country can deem that nationality not “effective” at least for certain purposes. In *Chen*, the issue was, more exactly, not whether baby Catherine Zhu validly possesses Irish nationality under article 7 of the Irish Nationality and Citizenship Acts 1956 and 1986 by dint of her birth in Northern Ireland, but whether her third-country-national mother can derive an incidental benefit from that fact. There was no question as to the validity and effectiveness of Catherine’s Irish nationality in her own regard, as it did not depend on her status under any other law, Irish or non-Irish. It has occasionally happened elsewhere that despite provision for attribution of nationality under the laws of the jurisdiction of birth to offspring of non-national parents by way of avoidance of statelessness²⁴⁰, the authorities and courts of the place of birth attribute to the child a nationality (or facts grounding a claim to nationality) which the other country denies.²⁴¹ An international tribunal may deny recognition on policy grounds.²⁴² Alternatively, the parents may have failed to take an administrative step such as consular registration that might afford a nationality to the child.²⁴³ The European

²³⁵ The experience of Portugal in relation to its Macao and East Timor citizens suggests that the likelihood of mass migration may be less than the polemic would suggest, absent expulsions of the sort that led to mass emigration from Uganda (and, latterly, Zimbabwe) of persons with a British connection. 27% of Macau’s 450,000 residents were Portuguese nationals prior to the territory’s reversion to China, mostly by having met the conditions for grant of nationality by *jus soli*, and they possessed EU citizenship rights.

²³⁶ E.g., R.S. 141.0 Loi fédérale sur l’acquisition et la perte de la nationalité suisse, art. 58, 58a. For background, Swiss nationality theory and the principles behind its forfeiture under prior law are set out in Pierre Immer, *La perte de la nationalité suisse par l’écoulement du temps* (1964).

²³⁷ L.I. de Winter, “Nationality or Domicile? The Present State of Affairs”, 128 *Rec. des Cours*, 347 (1969 III) (conflicting interests between countries of emigration and those of immigration); Ayelet Shachar, “Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws”, Jean Monnet Working Paper 2/03.

²³⁸ *Chen and Zhu v. Secretary of State for the Home Department*, E.C.J. Case C-200/02, Opinion of Advocate General Tizzano delivered 18 May 2004.

²³⁹ To permit legislative abrogation of Ireland’s *jus soli* grant of nationality (or, with respect to persons born in the North of Ireland to non-Irish nationals, the right to be registered as a national).

²⁴⁰ *Mahaboob Bibi v. Secretary of State for the Home Department*, [1987] Imm. A.R. 340 (United Kingdom, Mauritius).

²⁴¹ Existence of a foreign nationality is a question of fact for the trial court. *See*: Issadjee, Cass. (1re Ch. civ.) 8 Jan. 1974, 63 Rev. crit. 625 (1974), note Lagarde; *Oppenheim v. Cattermole*, [1973] Ch. 264 (C.A.), *aff’d*, [1976] A.C. 249 (H.L.).

²⁴² *Flegenheimer*, Italian-U.S. Conciliation Commission, 20 Sept. 1958, A.S.D.I., vol. XVIII, p. 155, 25 I.L.R. 91.

²⁴³ *Département fédéral de justice et police v. Vilchez*, Trib. féd., Cour de droit public, 29 June 1979, A.T.F., 105, 1979, Ib, p. 63, 114 Clunet 674 (1987) (Swiss mother, Peruvian father).

Convention on Human²⁴⁴ Rights is not of help to the claimant in such cases.²⁴⁵ Moreover, the burden of proof remains on the proponent to show statelessness.

Like many notable nationality and allegiance cases, including the first and most famous, *Calvin's Case*²⁴⁶, the *Chen* case was likely contrived to make a political or social point. As Advocate General Tizzano notes,

Mrs Chen works with her husband, who is also a Chinese national, for a company whose registered office is in the People's Republic of China. It is a very large company, which produces and exports chemicals to various parts of the world, in particular to the United Kingdom and other Member States of the European Union. ... Mr Chen [sic, perhaps should read: Mr Zhu] is one of the directors of that company, in which he has a controlling shareholding.

Having taken legal advice, Mrs Chen arranged to be in Northern Ireland at the time of her confinement, and to give birth there.²⁴⁷ She was thus able to claim Irish nationality for her child on the basis of article 7 of the Irish Nationality and Citizenship Acts, 1956 and 1986. Relying on Community law and the right to family life, and the absence of any right to Chinese nationality or right of abode on the part of her daughter, she argued for the right to reside in the United Kingdom (in Wales) and to raise her daughter there. She, and derivatively her dependent daughter, could undoubtedly have qualified for residence in the United Kingdom based on her corporate function or perhaps as sole representative or as a person of independent means, depending on facts. After four years she could have qualified for unlimited leave to remain and after five years she could have applied for British nationality. What impact naturalisation would have had on her Chinese nationality (which her daughter is said not to possess) is unclear. Prior to 1909²⁴⁸ China had no nationality law, although this did not prevent either China nor foreign countries from treating Chinese persons as nationals of that country.²⁴⁹ Today it does, although its interpretation and enforcement are sometimes found to be obscure.²⁵⁰ Mrs Chen was not the first non-European to contrive a European nationality for her progeny, nor the first non-European to seek residence rights on the basis of her child's. It also happens that her case arose amidst a political (or perhaps an identity) crisis in the Irish Republic caused by a perception, advanced by Irish Justice Minister Michael McDowell, that "dangerous" levels of illegal

²⁴⁴ *Nemeth v. Etat Belge*, Cons. d'Etat (3d Ch.), 26 June 1973, No. 15,941, *R.A.A.C.E.*, 1973.539, 77 I.L.R. 384.

²⁴⁵ *Karassev v. Finland*, ECHR App. 31414/96, unanimous decision of inadmissibility by the Court of 12 Jan. 1999 (Finland, Russia). See also *S. v. Switzerland*, ECHR App. 13325/87, Commission decision of inadmissibility of 15 Dec. 1988 and *Harrison v. Secretary of State for the Home Department*, [2003] EWCA Civ 432 (citing both ECHR cases).

²⁴⁶ (1608) 7 Co. Rep. 1, 77 Eng. Rep. 377; Polly J. Price, "Natural Law and Birthright Citizenship in Calvin's Case", 9 *Yale J. L. & Human.* 73 (1997). The *Dred Scott* case, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (person of African descent cannot be a citizen of the United States) might likewise be said to have been contrived to make a political point; its unexpected outcome led to the necessity of promulgating the 14th Amendment.

²⁴⁷ Although the overall numbers of such persons are not great, the writer (who corresponded with the Home Office on the subject in 1977 after the publication of the Green Paper) is aware of several women who, between 1983 and the present, have travelled to Northern Ireland to give birth in order to assure their offspring status granting right of abode in the British Isles.

²⁴⁸ "Law on the acquisition and loss of Chinese nationality", 4 *Am. J. Int'l L.* 407 (1910); C. Sainson & Gaston Cluzel, "La nationalité dans le nouveau droit chinois", 37 *Clunet* 407 & 815 (1910).

²⁴⁹ *Staunton's Pen. Code China*, 272, 255 ("All persons renouncing their country and allegiance, or devising the means thereof, shall be beheaded ..."), quoted in *Wong Kim Ark*, 169 U.S. 649 (1898), at n. 2.

²⁵⁰ Law of 10 Sept. 1980. § 9 reads: "The People's Republic of China does not recognize dual nationality for any Chinese national. ... [A]ny Chinese national who has settled abroad and who has been naturalized there or has acquired foreign nationality of his own free will automatically lose Chinese nationality". See Liu Chai-chi, "On the Question of Dual Nationality", *Fa-hsüeh* No. 3, pp. 20-24, summary in Jerome A. Cohen & Hungdah Chiu (eds.), *People's China and International Law: A Documentary Study*, pp. 770-71 (1974); *Beijing Review*, No. 40 at 17-18 (1980); George Ginsburgs, "The 1980 Nationality Law of the People's Republic of China", 30 *Am. J. Comp. L.* 459 (1982); Dominique T.C. Wang, "Chine", in Michel J. Verwilghen & Charles-Louis Closset (eds.), *Juris-classeur Nationalité* (1983). William L. Tung, *China and Some Phases of International Law*, ch. IV, "Nationality", at. 85-101 (1940).

immigration and asylum-seeking by non-Europeans of childbearing age have resulted in the attribution of Irish nationality to unacceptably large numbers of inappropriate beneficiary babies.²⁵¹

Jus soli issues elsewhere

While the clamour in Ireland is new to that island, it is not new to Britain, nor to other common-law countries that inherited and adapted the English concept of political attachment via “birth in the ligeance of the King”.²⁵² The British Nationality Act 1981 removed the grant of British nationality on the basis of *jus soli* except to persons of whom at least one parent is either a British national or “settled” in the United Kingdom (i.e., who has unlimited leave to remain). That includes Irish citizens from the moment of their arrival, if and only if they can “provide evidence that they were ordinarily resident here, and had established links with the United Kingdom.”²⁵³ Since 2 October 2000, nationals of EU and EEA countries (other than Ireland) are no longer deemed “settled” in Britain unless they have retired from work or have sought and obtained a residence permit and, after four years’ residence, permission to remain indefinitely²⁵⁴ and since that date their offspring born in Britain have no longer been accorded British nationality unless they meet the new criteria. The White Paper²⁵⁵ published prior to the introduction of the British Nationality bill had stated that “the Government’s main uneasiness on this score is that allowing birth to confer citizenship on [] a child [of parents neither of whom is a British Citizen and neither of whom is free of conditions of stay] means also that after he returns with his parents to their country, his own children, born years later, will be British citizens by descent. The additional British Citizens so created, with the right of abode here, would form a pool of considerable size, and they would have little or no real connection with the United Kingdom.”²⁵⁶

The result was legislation that limited the grant of nationality based on birth in the United Kingdom to children of whom at least one parent is either a British national or settled, and limited the grant of nationality to persons born abroad to those of whom at least one parent was born (or registered or naturalised, or adopted²⁵⁷) in Britain. Provisions for registration exist for many or most situations in which the child does, in fact, turn out to develop a real connection with Britain. There will always be anomalies²⁵⁸, and not only because the legislation does not provide directly for avoidance of statelessness. Nonstatutory concession (allowing unlimited leave to remain to persons resident in the United Kingdom for 10 or 14 years, depending on status) and discretionary provisions may resolve many of those. Furthermore, so long as the Irish Republic failed to follow suit in restricting the grant of its nationality to tourists and transients, the United Kingdom’s Ireland Act 1949²⁵⁹ those with the means and the knowledge could acquire Irish, and hence British Isle, rights by giving birth in the North of Ireland.

²⁵¹ Fionnán Sheahan, “Revealed: proof of citizenship tourism”, *Irish Examiner*, 27 May 2004 (“an increasing number of non-nationals from Eastern European countries and Arab states were attempting to book places in maternity hospital before travelling to this country for delivery”); Fionnán Sheahan, “Women arrive from airport in labour”, *Irish Examiner*, 31 May 2004, p. 1; Mark Brennock, “Citizenship tourists’ a tiny group, statistics indicate”, *Irish Times*, 22 Apr. 2004, p. 1; “Figures do not identify status of non-national mothers”, *Irish Times*, 17 June 2004, p. 7. See National Consultative Committee on Racism and Interculturalism, *International perspectives relating to the future of Irish Born Children and their Non-National Parents in Ireland*, May 2004.

²⁵² Sir Frederick Pollock & Frederic W. Maitland, *History of English Law*, vol. 1, p. 299 (2d ed.1898); Sir Francis T. Piggott, “Ligeance of the King”, 83 *Nineteenth Century and After* 729 (1915); Clive Parry, *British Nationality Law and the History of Naturalisation* (1954).

²⁵³ Home Office (David Waddington) letter of 12 April 1984 to the late Ivor Stanbrook, MP, in the possession of the author, replying to the author’s query.

²⁵⁴ Regulation 8 of the Immigration (European Economic Area) Regulations 2000. Discussed in Immigration and Nationality Directorate, *Law and Policy Series* “Nationality instructions: EEA and Swiss nationals”.

²⁵⁵ British Nationality Law: Outline of Proposed Legislation, July 1980, Cmnd 7987, Para. 43, p. 8.

²⁵⁶ *Id.*

²⁵⁷ BNA 1981 (1981 c. 31), ss. 5, 5A & 6.

²⁵⁸ Richard Price, “If I don’t deserve to be British, who on Earth does?” *Daily Mail*, 1 March 2003, at 11 (Revocation of the British passport of a 55-year old aid worker born in Malaya to a serving officer of the Colonial Service); Angela Levin & Peter Allen, “So why did they pick on Mary? Thousands of bogus asylum seekers are allowed to stay here. Yet this devoted grandma, who has lived in Britain all her life, was given 7 days to get out”, *Daily Mail*, 13 Feb. 2003, at 10 (55-year-old school cleaner, born in the U.S. to British mother).

²⁵⁹ 12 & 13 Geo. 6, c. 41.; *cf.* comparable provisions of the Irish Nationality and Citizenship Act, 1956, § 26 (reciprocal rights). And note another anomaly: “The principal Irish legislation relating to the definition of aliens is the

Australia followed Britain's lead. The Australian Citizenship Amendment Act 1986, amending Australian Citizenship Act 1948, limited the grant of nationality in cases of birth in Australia to noncitizen parents to cases where "a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident; or [] the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia." Left unstated is the situation where the Australian nationality of a parent or parents is revoked for fraud or otherwise.²⁶⁰

Malta's nationality law now provides:

5. (1) Every person born in Malta on or after the appointed day shall be deemed to have become or shall become, a citizen of Malta at the date of his birth: . . .

Provided further that in the case of a person born on or after the 1st August, 1989 such person shall not become a citizen of Malta by virtue of this sub-article unless at the time of his birth, his father or his mother was or is:

(a) a citizen of Malta; or

(b) a person referred to in paragraph (a or b) of subarticle (4) of article 44 of the Constitution [relating to certain former citizens, spouses and widow(er)s].²⁶¹

New Zealand has published proposed security-related and technical legislative changes in the Identity (Citizenship and Travel Documents) Bill²⁶². Amidst concern of abuse of the *jus soli* provisions of current legislation, Internal Affairs Minister George Hawkins said that "The issue of citizenship by birth, for instance of babies born in this country to mothers who are not New Zealand nationals, is an issue separate to matters covered in the Identity Bill," and was still being worked on by a number of government agencies, with no decisions having yet been made.²⁶³

The perception in Canada seems to be that the attribution of nationality to children of noncitizen nonresidents is not a significant issue:

During the consultations carried out in 1994 by the Standing Committee on Citizenship and Immigration, of which I am a vice-chairman, I asked departmental officials to provide us with statistics on the number of children born to persons who were not Canadian citizens. They were unable to give us exact figures. All they could say was that approximately 400 children were in this situation. The problem therefore is really not of such a magnitude as to require a legislative amendment and changes to a basic principle²⁶⁴

1935 Aliens Act which in section 2 defines an alien as 'a person who is not a citizen of *Saorstát Éireann*.' However, this definition has been amended, by statutory instrument under the Act, to exclude from the definition persons born in Great Britain (including the Channel Islands and the Isle of Man) or Northern Ireland. It is interesting to note that the category of persons 'born' in the aforementioned territories may include some persons who are not entitled to British citizenship under the provisions of the 1981 UK legislation and may exclude others who are entitled to citizenship under that legislation. There is thus a lack of symmetry between the Irish definition of 'alien' and the UK equivalent. Irish immigration control is exercised in relation to 'aliens'." J.P. Gardner, "Cooperation in the Field of Aliens Law in the United Kingdom and Ireland", in H.G. Schermers et al., eds., *Free Movement of Persons in Europe* 199-215 at 206 (1993).

²⁶⁰ *Rani Santosh v. Minister for Immigration and Multicultural Affairs*, Fed. Ct. of Australia, Case 394 of 1997, [1997] 1493 FCA (holding that "a declaration should be made that, in the events which have occurred, the child is an Australian citizen").

²⁶¹ XXIII.1989.3, approved by the House of Representatives 20 July 1989 (*Malta Times*, 19 July 1989, p. 3; 21 July, p. 3; 22 July p. 8, 25 July, p. 24. The debates seem to have been more concerned with the introduction of dual nationality than the new restrictions on *jus soli*). See also former art. 25 of Maltese Constitution, deleted and transferred to the Citizenship Act, c. 188, by Act Nos. III and IV of 2000.

²⁶² Text submitted to Parliament 17 June 2004.

²⁶³ Government statement of 14 June 2004.

²⁶⁴ Canada, Hansard (Commons), 2 October 1996, p. 5018.

More recently, press reports have outlined a network supporting an organised maternity traffic.²⁶⁵ Increased scrutiny of visa applications by the United States authorities may be diverting some pregnant travellers to Canada. Whatever the perception elsewhere, the United States remains the destination of choice for most maternity tourists, and in particular those from the Far East and Latin America. It is in the United States that the discourse has been the most shrill, and there that the legal and constitutional hurdles are most formidable. The common-law notion of *jus soli* was incorporated in the 14th Amendment to the Constitution in 1868. The result is that notwithstanding the seeming clarity of the Supreme Court's expression of the rule in *Wong Kim Ark*²⁶⁶, the argument is sometimes made that "subject to the jurisdiction thereof" does not include transient parents.²⁶⁷ Bills have been introduced in the Congress based on that argument²⁶⁸; a constitutional amendment is also sought.²⁶⁹ For some Americans, the awareness that at least some persons born in the U.S. and raised and educated elsewhere, like Yaser Esam Hamdi²⁷⁰ and several of the defendants in *Ex Parte Quirin*²⁷¹ bear ill will against the country, has led them to support urgent action, however unfocused.

In France, notwithstanding the 1998 revisions²⁷² to the *Code de la nationalité française*, the provisions of articles 19 through 19-4 afford at least potential or inchoate nationality rights to beneficiary children of maternity tourism. Furthermore, it remains possible for a child of at least one Algerian parent who was born in the French departments of Algeria before 3 July 1962 to be born in France and entitled to French nationality under art. 19-3 (second generation born in France). This is not a new issue.²⁷³ For France, however, the greatest concern is in respect of its overseas communities. This has been nowhere more clearly articulated than with respect to French Guyana.²⁷⁴

Some of the cases, and much of the press argument, are devoted to the burden imposed upon the state and upon medical facilities in caring for maternity patients. It is not obvious that the issue of nationality of offspring is connected with the costs of providing maternity services, or that any favourable impact on either public health or on postnatal health expenses relating to the mother and the child can result from either denying the child the nationality of a state, or from refusing the mother prenatal and maternity care.²⁷⁵ In addition, available statistics suggest that the problem is overstated.²⁷⁶ Live births in the United States totalled 4,021,726 in 2002. The Federation for American Immigration Reform (FAIR), an anti-immigration lobbying group, claims that births to foreign-born (but not necessarily non-U.S.-citizen) mothers account for 17% of the total. The U.S. Citizenship and Immigration Services (USCIS) estimate the total population of undocumented aliens at 5 million as of 1996 and 7 million in 2000 and that it is growing at the rate of 5-1/2% per year. The National Center for Health Statistics offers a crude birth rate varying in 2001 from 13.7 per thousand for whites, to 16.3 for African-Americans, 13.7 for Native American, 16.4 for

²⁶⁵ *Supra*, n. 7

²⁶⁶ 169 U.S. 649 (1898), *And see, for background*, Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny", 100 *Harv. L. Rev.* 853 (1987); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995). The Supreme Court wrestled with the problem of defining "Chinese" in *Nagle v. Loi Hoa*, 275 U.S. 475, 477 (1928).

²⁶⁷ Charles Wood, "Losing Control of America's Future-the Census, Birthright Citizens and Illegal Aliens", 22 *Harv. J. L. & Pub. Pol'y* 465 (1999).

²⁶⁸ 108th Cong., H.R. 1567 "To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens".

²⁶⁹ 108th Cong., H. J. Res. 44 "Proposing an amendment to the Constitution of the United States to provide that no person born in the United States will be a United States citizen unless a parent is a United States citizen, or is lawfully admitted for permanent residence in the United States, at the time of the birth."

²⁷⁰ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), cert. granted, 124 S.Ct. 981 (2004).

²⁷¹ 317 U.S. 1 (1942) (German saboteurs landed by submarine off the Eastern coast of the United States).

²⁷² L. No. 98-170 of 16 March 1998.

²⁷³ *Deroissart*, Cass. civ. 25 Feb. 1890, 17 *Clunet* 113 (1890), person born in France of a father born in Belgium while that territory was part of France.

²⁷⁴ David Rennie, "Pregnant women are target for the people smugglers", *Daily Telegraph*, 14 April 2004; Sénat, Sess. 1999-2000, *Rapport d'information, fait au nom de la commission des Affaires sociales à la suite d'une mission effectuée du 23 au 30 juillet 1999 par une délégation chargée d'étudier la situation sanitaire et sociale en Guyane*, No. 246.

²⁷⁵ Marc L. Berk et al., "Health Care Use Among Undocumented Latino Immigrants", *Health Affairs* (Jul.-Aug. 2000) at 44; Stephen A. Norton, Genevieve M. Kenney and Marilyn Rymer Ellwood, "Medicaid Coverage of Maternity Care For Aliens in California", 28 *Family Planning Perspectives* 108 (1996); Lynda Flowers-Bowie, *America's Newcomers: Funding Prenatal Care for Unauthorized Immigrants: Challenges for the States* (1997).

²⁷⁶ "Figures do not identify status of non-national mothers", *Irish Times*, June 17, 2004, at 7.

Asian and Pacific Islanders, 23.0 for Latinos, 17.8 for Puerto Ricans.²⁷⁷ The Hispanic total was skewed by the rate for ethnic Mexican women of 24.8 (the general rate for Latinos was 23.0); the rate for all races was 14.1. FAIR claims a fecundity rate of 18 for “immigrants” in the United States²⁷⁸; this rate may, in fact, be low. USCIS offers a table of country of origin of undocumented immigrants²⁷⁹; Mexicans were estimated to constitute 68% of the 7 million total. Applying the FAIR fecundity rate to the USCIS estimate of undocumented aliens yields a total of American citizen births to out-of-status noncitizens of 126,000, or 3.1% of total live births of 4,058,814 in 2000. It is true that the lack of an obligation on to part of residents to register their presence with officialdom in their community creates a real opportunity for undocumented aliens to live and engage in commerce and enterprise with small chance of discovery: the numbers speak for themselves. It makes no more sense in such a case, however, to visit the sins of the parents upon the children and to deny them public health²⁸⁰ and education²⁸¹ services. Denial of these will give rise to future social costs. Denial of status (nationality) can lead to their marginalisation.

The grievances on the part of the anti-immigration lobby with respect to granting citizenship to the locally-born offspring of undocumented or transient migrants appear to be that undocumented aliens and their progeny represent a net expense to society, that they dilute the traditional ethnicity, that they foster disrespect for law and provide an incentive to avoidance of normal immigration procedures. Especially in the United States these have expressed themselves, through legislation, in various ways, sometimes perverse, relating to education, health, driver licensing, census, welfare, taxation and employment. Citizens have rights irrespective of the status of their parents, and whether or not their parents have a derivative right of abode. Where there is an entitlement on the part of the child and none on the part of the parent, the outcome may depend on difficult analysis.²⁸²

Human rights and European Union law

In the countries discussed, domestic law, European Union law, European human rights law, asylum law and practice, and administrative discretion combine in varying ways to afford at least some parents the right of abode in the country of which their child is a newborn national. How and when that happens depends inevitably upon the specific facts of the case, the circumstances in the country or countries of origin and, often, especially where there is administrative discretion, upon domestic politics. Notwithstanding article 8 of the European Convention on Human rights, a child does not have the absolute right to grow up and be educated with one or both parents in any particular country, including his or her own.²⁸³ Parents of citizen children have been deported, and given the option of taking the children abroad at the expense of the deporting state or leaving them behind with family or friends or in the care of the

²⁷⁷ National Center for Health Statistics, Revised Birth and Fertility Rates for the 1990s and New Rates for Hispanic Populations, 2000 and 2001.

²⁷⁸ Federation for American Immigration Reform, “Immigration and Population Growth, 1995-2000”, Oct. 2002.

²⁷⁹ USCIS, “Immigration Statistics”, 7 June 2004.

²⁸⁰ See references *supra*, n. 66.

²⁸¹ Plyler v. Doe, 457 U.S. 202 (1982) (undocumented school-age children may not be denied free public education).

²⁸² M v The London Borough of Islington, [2004] EWCA Civ 235 (housing benefit, British child, Guyanan mother).

²⁸³ Sorabjee v. United Kingdom, App. No. 23938/94, (held inadmissible by the Commission, 23 Oct. 1995); similarly: Poku v. United Kingdom, App. No. 26985/95, 15 May 1996 (deportation of pregnant mother of national children; application inadmissible); Uppal v. United Kingdom (No. 2), App. 8224/78, No. 9285/81, Dec. 6 July 1982, D.R. 29 p. 211, (1981) 3 EHRR 399 (substantial discussion of issues and found admissible under art. 8; but friendly settlement reached on compassionate grounds and application withdrawn). In the United States, in a case reported only in the press, U.S. District Judge Scott O. Wright barred the deportation of Myrna Dick (a Mexican national resident in the United States since childhood) on grounds of “falsely claiming American citizenship” pending the birth of her American-citizen baby. Joyce Howard Price, “Deportation blocked; fetus ‘American’”, *Washington Times*, May 29, 2004, p. A3. Birth of two children to a British Honduras couple did not cure their deportability for unlawful entry in Reid v. INS, 492 F.2d 251 (2d Cir. 1974). Similarly, Filipina mothers who bore children in the U.S. after overstaying their tourist visas were deportable, Cabuco-Flores v. INS, 477 F.2d 108 (9th Cir. 1973); likewise a Hong Kong native who entered the U.S. based on a sham marriage, Chow v. INS, 641 F.2d 1384 (9th Cir. 1981). The provision under which the mothers sought relief, former INA § 241(f), 8 U.S.C. § 1251(f) was repealed by the Immigration Act of 1990, (P.L. 101-649, 104 Stat. 5081).

authorities.²⁸⁴ There is a lack of symmetry with the treatment of international adoption and family unification and reunification generally.²⁸⁵

Member states of the European Union are largely free to attribute their respective nationalities in accordance with their own political objectives. By way of derogation to the *Nottebohm*²⁸⁶ principle allowing denial of recognition to a nationality acquired by contrivance (which I would argue is inapplicable to a nationality acquired at birth, and in large part superseded by subsequent events and evolved law and practice), member states may not deny rights to a person recognised and documented as its national by another member state.²⁸⁷ They may not attribute, or more precisely effectuate to a person's disadvantage, their own nationality at a time other than birth or adoption except with the consent of the individual or a parent acting on his or her behalf.²⁸⁸ Both the Council of Europe and the European Commission have influenced European states in the matter of nationality legislation, particularly with a view to gender equality. Thus there has been reduction, if not elimination, of perverse situations that might result in denial to offspring of the nationality of their parents while the parents are exercising right of establishment in another member state.²⁸⁹ The *Ramadanoglou* conundrum (administrative revocation of the Greek

²⁸⁴ By way of example: UK: *R v Secretary of State for the Home Department, ex parte Isiko*, [2001] Imm AR 291; *R v Secretary of State for the Home Department, ex parte Gangadeen and Kahn*, [1988] Imm AR 106 ("European jurisprudence does not support the notion that paramountcy was to be given to the interests of the child.") *but see* *R v Secretary of State for the Home Department, ex parte R*, Times L. Rep., 29 Nov. 2000; Canada: *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817 ("for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them."); *Pacheco v. Canada*, (1990) 71 D.L.R.(4th) 762 (Fed. Ct., Ct. App.) (deportation of pregnant illegal entrant quashed). France (right of residence for parents of French-citizen child within limits specified in Ordinance of 2 Nov. 1945 as amended): denied in four Conseil d'Etat rulings: Nos. 234053, 244204, 255018, 256108 (on grounds of non-support and absence of exercise of parental authority); *cf.* Trib. admin. de Lille, 6 May 1999, No. 98-1629, Rec. Lebon (table) (finding entitlement in absence of polygamous relationship). US: the law provides in certain cases for discretionary withholding of deportation where that would result in "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence" (former INA sec. 244(a)(1), 8 U.S.C. § 1254(a)(1), now (with changes including a more rigorous standard) INA sec. 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2002); *see* Carl R. Baldwin, "BIA finds 'Extreme Hardship' for Deportation Purposes where US Citizen Child is 'Completely Integrated Into the American Lifestyle'", *Immigration Daily*, 13 June 2001. There are numerous exceptions to the relief provisions, supported by many cases: e.g., *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004) and *Oforji v. Ashcroft*, 354 F.3d, 609 (7th Cir. 2003) (both involving immigration fraud); *Cervantes v. INS*, 510 F.2d 89 (10th Cir. 1975) (immigration violation; citing cases). Many cases involve deportation following conviction for crimes notwithstanding the difficulty for American-citizen children: *Garcia v. Boldin*, 691 F.2d 1172 (5th Cir. 1982); *Falcon Carriche v. Ashcroft*, 335 F.3d 1009 (9th Cir. 2003) (procedural issues); *Gonzales-Cuevas v. INS*, 515 F.2d 1222 (5th Cir. 1975) ("Petitioners, who illegally remained in the United States for the occasion of the birth of their citizen children, cannot thus gain favored status over those aliens who comply with the immigration laws of this nation."). Particular legislative and administrative attention is afforded claimants that the Chinese one-child policy violates the rights and safety of American-citizen children: *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004); Paula Abrams, "Population Politics: Reproductive Rights and U.S. Asylum Policy", 14 *Geo. Imm. L.J.* 881 (2000); Kimberly Sicard, "Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control", 14 *Geo. Imm. L.J.* 927 (2000) (also examining Australian and Canadian case law). Other cases have addressed the risk of female genital mutilation of an American-citizen daughter: *Nwaokolo v. INS*, 314 F.3d 303 (7th Cir. 2002); *cf.* *In re Kasinga*, 21 I.& N. Dec. 357 (BIA 1996); "In re Kasinga: An Expansion of the Grounds for Asylum for Women", 20 *Hous. J. Int'l L.* 671 (1998).

²⁸⁵ Victor C. Romero, "The Child Citizenship Act and The Family Reunification Act: Valuing The Citizen Child As Well As The Citizen Parent", 55 *Fla. L. Rev.* 489 (2003).

²⁸⁶ *Liechtenstein v. Guatemala*, (2d phase), ICJ, p. 4. (1955).

²⁸⁷ *Micheletti v. Delegación del Gobierno en Catabria*, [1992] E.C.R. I-4239; obs. Jessurun. d'Oliveira, 30 *Common Mkt. L. Rev.* 623 (1993).

²⁸⁸ Harvard draft nationality convention, art. 15, 23 *Am. J. Int'l L. Spec. Suppl.* 13 (1929); *Airola v. Commission*, [1975] E.C.R. 221 (automatic naturalisation upon marriage); *cf.* Venezuelan imposition of its nationality upon immigrants at their arrival in the country: Robinet de Cléry, "De la nationalité imposée par un Gouvernement étranger", 2 *Clunet* 160 (1875).

²⁸⁹ I would argue that this is inconsistent with the principle of European citizenship, a view that finds support with Prof. Gerard-René de Groot: *Towards a European Nationality Law* (University of Maastricht lecture, 13 Nov. 2003) at 18-32 esp. 24-28. Prof. de Groot takes issue with Jessurun d'Oliveira's statement to the contrary in "Nationality and the European Union after Amsterdam" in David O'Keeffe & Patrick Twomey, eds., *Legal Issues of the Amsterdam Treaty* 395 at 406-07 (1999). De Groot goes further, however, and argues that a member state could decline to

nationality of a Greek citizen of Turkish ethnicity exercising his right of free movement and employed in Germany)²⁹⁰ is rendered nugatory by the abrogation of former article 19 of the Greek nationality code. In any case Ramadanoglou seems to have regained his passport once litigation was threatened. Nearly all European states will accord their nationality to an expatriate worker employed abroad, perhaps subject to declaration or registration by the parents or, eventually, the individual, and the necessity of identity and travel documents make it improbable, in most situations, that necessary consular registration will be neglected. The United Kingdom, however, except in the case of Crown or European Union servants²⁹¹, will deny attribution of its nationality to the offspring born abroad to citizens also born abroad. They may be stateless or possibly obtain by default the nationality of the country of birth, or they may be registered as British citizens at the discretion of the Home Secretary under s. 3 of the British Nationality Act 1981 within the time (12 months or, exceptionally, 6 years) fixed in the Act.²⁹²

The relationship in European Union law between child and parent of different nationalities has rarely been tested. Many of the situations which have arisen in the past will not do so again: women no longer are attributed an involuntary nationality upon marriage in any European country; all European states attribute their nationality to the offspring of female nationals, whether or not married and whether or not the father is also a national of the country subject, perhaps, to an obligation of election at majority.²⁹³ The European Court of Justice, in *Deak*²⁹⁴, declined to find a Community right to a job-seeker grant on the part of the member state-citizen child of the citizen migrant worker, but had no difficulty in characterising that grant as a social benefit for the worker parent. In *Garcia-Avello*²⁹⁵ the Court addressed the problem of inconsistent rules and customs regulating the assignment of names to newborns by parents by different countries of nationality of a child with more than one nationality and was deferential to the custom of the “other” member state of nationality. *Martinez-Sala*²⁹⁶ addressed an issue that may be of interest here: the right of a European citizen who is not and perhaps cannot for the time being obtain a residence permit, to family and other social benefits following the birth of an infant.

Martinez-Sala in fact, suggests a corollary to *Ramadanoglou* and an issue that is bound to arise in the fullness of time: if member states (as I argue) are not free to revoke the nationality of one of their nationals for the sole reason that he or she is exercising a Union right in another member state, may a state use a technical breach of immigration or residence registration rules to deny attribution of nationality to an infant

recognise another member-state nationality acquired “as a result of the application of a rule that violates international law” (*id.* at 24); this conclusion is heroic, since in any such case the acquisition, or status, is likely to come to the other state’s attention only as a result of its use, and hence ratification, by the holder or a parent of the holder, as provided for in the Irish Nationality and Citizenship Act 1956, art. 7, or in a challenge between the public policy of one state and the sovereignty of another (as, perhaps, in an extradition claim, of which the *Sheinbein* and *Coumas* cases are examples: Lee Hockstader and Craig Whitlock, “Israeli Court Sentences Sheinbein to 24 Years”, *Washington Post*, Oct. 25, 1999, p. B1; Attorney Grievance Com’n of Maryland v. Sheinbein, 812 A.2d 981 (Md. 1999); *Coumas v. Superior Court*, 192 P.2d 449 (Cal. 1948); *Coumas v. Brownell*, 222 F.2d 331 (9th Cir. 1955)). Compare the *Airola* situation, preceding footnote. There is a political reality to most cases of expansive grant of nationality (viz., Ireland, as to which, see the Good Friday Agreement, “Constitutional Issues”, art. 1(vi); and Germany, as to which see Basic Law, art. 116). Even if this is not dealt with by specific exception, neither the European Union nor its member states are likely to tread in such sensitive territory.

²⁹⁰ Press release, Greek Helsinki Monitor, 12 June 1996.

²⁹¹ BNA 1981 (1981 c. 31), s. 2(1)(b) & (c).

²⁹² United States law likewise sets conditions under which the offspring born abroad of its citizens may not be afforded U.S. nationality and may be stateless: in the absence of qualifying residence in the U.S. by a citizen parent (5 years at specified ages where the U.S. parent is married to a alien; one uninterrupted year where the U.S.-national mother is unmarried); INA sec. 301(e) & (g), 8 U.S.C. § 1401.

²⁹³ Andrew Grossman, “Gender and National Inclusion”, 2001 (1) *Law, Social Justice and Global Development (LGD)*. See, e.g., Estonia, Law on citizenship, art. 3: “Article 3. Avoidance of Multiple Citizenship. Any person who by birth in addition to Estonian citizenship acquires the citizenship of another state must within three years after attaining the age of eighteen years renounce either Estonian citizenship or the citizenship of another state.”

²⁹⁴ *Office national de l’emploi v. Jozsef Deak* [1985] E.C.R. 1873.

²⁹⁵ *Garcia Avello v. Belgian State*, Case C-148/02, judgment of 2 Oct. 2003, not yet published.

²⁹⁶ *Martínez Sala v. Freistaat Bayern*, [1998] E.C.R. I-2691.

born to migrant EU citizens in that state? Indeed, one may ask whether *Martinez Sala* and the driver license cases²⁹⁷, among others, support the proposition that neglect to meet a registration deadline can not be used

to deprive an individual in those circumstances from a nationality right. This question is suggested by the 1999 German nationality law revision, specifically the terms of § 4 (3):

(3) Durch die Geburt im Inland erwirbt ein Kind ausländischer Eltern die deutsche Staatsangehörigkeit, wenn ein Elternteil

1. seit acht Jahren rechtmäßig seinen gewöhnlichen Aufenthalt im Inland hat und
2. eine Aufenthaltsberechtigung oder seit drei Jahren eine unbefristete Aufenthaltserlaubnis besitzt.

Thus children born in Germany to non-national parents from 1 January 2000 are attributed German nationality (subject to loss if any foreign nationality is not renounced between the ages of 18 and 23) if a parent has been lawfully habitually resident in Germany for eight years, or unrestricted right of residence in the three years prior to the birth.

It is also raised by the rules imposed in Britain as from 2 October 2000. Thus:

Before 2 October 2000, European Economic Area (EEA) nationals exercising Treaty rights under European Community law were regarded as having been settled here. However, from that date, EEA nationals are only regarded as settled if they have been granted indefinite leave to remain in the United Kingdom or have an unconditional right of residence under European Community law (for example, retired people or people unable to work because of incapacity).²⁹⁸

Notwithstanding registration is, under EU concepts, declaratory and not constitutive of rights, Britain measures eligibility for settlement (unlimited leave to remain) from the date that a residence permit is acquired. It appears that the justification for doing so is that the status granted with settlement goes beyond what the Treaties require. From the standpoint of the European Union, a relevant conflict should exist if, and perhaps only if, an assertion of a Community right leads to disenfranchisement or diminution of rights of a family member compared with the nationality and residence rights that family member would otherwise have enjoyed. That would include the right to retain and develop the culture and association of origin (at the expense of the family and not of the state of establishment) or to choose to avail of the culture and education of the country of establishment up to (but not necessarily including) membership in the local polity.

Conclusions

Although European states, taken together, have reduced, through gender equalisation and provisions for naturalisation or facilitated naturalisation of the second- (or perhaps third-²⁹⁹) generation, a question that threads its way through the studies in “propensity to naturalise”³⁰⁰ needs addressing: are integration and assimilation assisted by a child growing up as a member of the polity, or do we so much regret pluralism³⁰¹

²⁹⁷ *Skanavi and Chryssanthakopoulos*, [1996] E.C.R. I-929; *Krüger v. Directie van de rechtspersoonlijkheid bezittende Dienst Wegverkeer*, Case C-253/01, judgment of 29 Jan. 2004, not yet published; *compare Awoyemi v. Openbar Ministerie*, [1998] E.C.R. I-6781.

²⁹⁸ Immigration and Nationality Directorate, *Policy instructions*, “European Economic Area and Swiss Nationals”.

²⁹⁹ 01.076 – *Objet du Conseil fédéral, Loi sur la nationalité, Révision*.

³⁰⁰ *Supra*, n. 6.

³⁰¹ *Compare* the view of the American Dillingham Commission, whose report, published in 1911, supported the popular notion of the (racial) superiority of migrants arriving from north-western Europe in comparison with those from southern and eastern Europe.

that nationality should be reserved for those with proven capacity and will to assimilate? *Hamdi*³⁰² has been cited in the United States for the proposition, heard before at the time of the German American Bund³⁰³ and in the Japanese internment³⁰⁴ cases that adventitious, unconditional grant of nationality to offspring of transients facilitates the establishment of a fifth column. What has happened, in fact, is that the source of the concept of *jus soli*—allegiance³⁰⁵ (subjection) to the Crown based on fact of birth in the realm—has lost meaning in the same way as has the nationality proposition of Mazzini (and those who followed, including Mancini, Esperson, Fiore, Weiss, Laurent and Brocher) who saw in nation and nationality commonality of language, territory, ethnicity, culture, religion and history.³⁰⁶ The pluralist state, and European citizenship, is antitheses of those.

³⁰² *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

³⁰³ *Klapprott v. United States*, 335 U.S. 601 (1949); *United States v. Baecker*, 55 F. Supp. 403 (E.D. Mich. 1944); *United States v. Bregler*, 55 F. Supp. 837 (E.D.N.Y. 1944); *United States v. Kuhn*, 49 F. Supp. 407 (S.D.N.Y. 1943).

³⁰⁴ *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); compare *United States ex rel. Steinvorth v. Watkins*, 159 F.2d 50 (2d Cir. 1947) (German nationality lost upon Costa Rican naturalisation could not be reattributed to the petitioner to justify his internment as an enemy alien, even though Costa Rica had revoked that grant of nationality).

³⁰⁵ And not just in Britain: “La soumission au pouvoir souverain de sa patrie existe depuis la naissance de l’individu, et continue aussi longtemps qu’il ne change pas de nationalité.” M. Fœlix, *Traité du droit international privé ou du conflit des lois de différents nations en matière de droit privé*, vol. 1, § 1 (3d ed. 1856).

³⁰⁶ M. J. Farrelly, “The New Italian School of Private International Law”, 5 *Jurid. Rev.* 105 & 197 (1893).

CHILDREN'S RIGHT TO CITIZENSHIP

THE SWEDISH CASE

Report submitted by Ms Elena DINGLU-KYRKLUND

General principles

Citizenship expresses a formal relationship of belonging – or ultimately remaining an outsider in the most significant club-membership tie between state and its subjects, establishing the conditions of their traditional mutual interdependency. According to various opinions, this relationship can be primarily regarded as a legal instrument granting equal rights and access state-granted privileges to all its members (Layton-Henry 1990), as an enduring membership-status as subject belonging to the nation-state (Brubaker 1992:21, 188) – thus entitled to its protection, as a more traditionally defined relationship of “obedience and loyalty” of the citizens towards the protective state (Seton-Watson 1977:1), ensuring universal access to citizenship-related rights through guarantor-institutions (Bauböck 1991:28) against historically shifting defined contents details (see Marshall 1964). That can nowadays range from a horizontally limited ‘quasi-citizenship’ form achievable by long-term/ permanent residents (Castles & Miller 1998:44-5, 238), also called *denizenship* (Hammar 1990), or vertically constructed to encompass emerging forms of ‘trans-national citizenship’³⁰⁷ (Bauböck 1991, 1994) – the latter raising a new set of questions. The changes of approach and perception as to the contemporary content and significance of citizenship leads to a tendency of relativization of the practical importance and relevance of the concept (Brubaker 1992, Soysal 1993, 1994) or its actual value (Brubaker 1989:27). However, even if the formal rights implied by citizenship do not necessarily ascertain actual informal access to benefits contended by it, there are aspects that confer citizenship its ultimate value of confirming an (normally, but not always³⁰⁸) indissoluble relation of protection between the state granting citizenship and its citizens. This should for instance be considered by contrast to situations of statelessness, where a person is out of various reasons forced to live without the formal protection of any state, a situation likely to render such a person vulnerable, especially against the possible risk of expulsion or lack of specific protection in certain situations.

There has constantly been a preoccupation for the Swedish legislator to avoid cases of statelessness, particularly among children – especially when newborns are concerned, that most often fall victims of circumstances totally outside their control. The provisions regarding children have therefore attempted to take into consideration the special predicament of children and their implicit exposure, both in relationship to their parents and other adults in charge, and in relationship to the state/ state authorities concerned, faced to finding viable solutions for their particular situation beyond adult interests. That is why, apart from the automatic ascription of citizenship at birth, by considering blood descent – *ius sanguinis*, and the general applicable rules of naturalization, Sweden applies secondary rules of acquisitions taking into consideration the personal relationship developed by children to the place where they grew up, as an integrative part of the Swedish society.

Acceptance of dual citizenship is the most important change introduced by the new Swedish Citizenship Act in force since July 1st 2001, no longer imposing renunciation to one’s earlier/ initial citizenship as a pre-

³⁰⁷ EU-citizenship is a paramount example of this relatively newer citizenship form

³⁰⁸ as citizenship is normally supposed to express a permanent, non-unilaterally irrevocable relationship of interdependency and mutual pledge of protection between the guarantor-state and the (formerly ‘subject’) citizen, but that today has possible exceptions in some parts of the world, under specific circumstances. I am not referring here to those particular cases of automatic loss of citizenship when acquiring another citizenship under earlier legal quest for not accepting more than one citizenship for one person, or automatic loss of citizenship when leaving one’s country of origin (as in former East European states) or more generalised when entering the service of another country than that of (initial) citizenship in functions considered as questioning the position of loyalty/ reliability of a citizen towards his/ her state.

condition to be granted Swedish citizenship. This provision equally affects Swedish citizens, thus also allowed to preserve their citizenship even if they seek another citizenship. The provision has a theoretical potential/propensity to encourage more many persons of foreign origin permanently residing in Sweden – some already for decades – to seek citizenship, which could favour an increased sentiment of belonging and by that, achieve better prerequisites for integration, by better taking into account the predicament of many immigrant groups that, due to family- or personal identity - related reasons declaredly experienced difficulties to feel sufficiently motivated to seek citizenship. The side-effect of lacking formal citizenship (despite the relatively limited practical impact in everyday life, as residents enjoy much about the same social rights as citizens, with minimum – if important! – differences) is among others lack of social participation and involvement, resulting in marginalization, self-exclusion or allegedly inferred mutual non-acceptance, (dis)integration effects worth considering as arguments in favour of allowing dual citizenship.

Persons granted Swedish citizenship according to age and gender 2000-2003

<i>Age</i>	<i>Gender</i>	2000	2001	2002	2003
-6	men	3875	2918	2686	2145
	women	3752	2945	2723	2394
7-17	men	4512	3566	3766	3508
	women	4207	3277	3456	3074
18-24	men	2235	1883	1890	1675
	women	2223	1978	1928	1696
25-44	men	7507	5988	5738	5064
	women	8391	7920	8402	7166
45-64	men	2623	2157	2568	2384
	women	2742	2579	3265	2968
65+	men	567	412	540	428
	women	840	776	830	720
Total both		45474	38400	39794	35225

Source: Statistics Sweden

The categories described above are overlapping to a certain extent, and the results can show slightly different figures and proportions as related to the in-born Swedish population, with a variable ratio around 10-15 percent or more if comprising more than the first generation immigrants. However, for the moment it is too early to determine the actual impact of the modification concerning acceptance of dual citizenship upon this category of (probable) applicants. It is difficult as yet to present clear statistics of the actual occurrence of cases of dual citizenship to be connected to the enactment of the new law, and the available statistical data are so far inconclusive on this point, also taking into account the procedural delay between the moment a person files an application and the moment when this application is going to be handled and solved (notwithstanding eventual appeals against an initial decision).

Acquisition of Swedish Citizenship

Sweden applies *ius sanguinis* as a main rule of granting citizenship by birth right, which implies automatic ascription if any of the child’s parents is a Swedish citizen. The Citizenship Act in force (SFS 2001:82) increases the equality of treatment between the parents as to deriving citizenship rights to their offspring as compared to the provisions of the earlier Citizenship Act (SFS 1950:382).

The main rule remains primarily that of maternal descent from a Swedish mother. The rule is though equally applicable on the paternal side if the father is a Swedish citizen and the child is born in Sweden *or* married to the child’s mother, by presumption. This alternative was earlier a simultaneous request, and the result is in practice that of conferring equal treatment to children born within and out of wedlock, which was a necessary adaptation to the factual realities of the contemporary Swedish society, where no legal discriminatory treatment of non-married couples can be justified in this respect, as compared to many other legal systems within and without Europe. The same alternative applies even when the father is deceased, with the same additional requirement that either the child was born in Sweden, or the father was married to the child’s mother at the time of his death (§1).

A similar effect but retroactive occurs *post factum* through the marriage of a Swedish father to a non-Swedish/ alien mother, when earlier born children to the couple that have not acquired Swedish citizenship according to the rules above under §1 consequently become Swedish citizens if they are not married and still under 18 years of age at the time, through *legitimatization* (§4) (see also Dingu-Kyrklund 2001, Dingu-Kyrklund & Kyrklund 2003).

Adoption by a Swedish citizen of a child under the age of 12 may implicitly confer the child Swedish citizenship if (s)he is adopted in any of the Nordic countries (Sweden, Denmark, Finland, Iceland or Norway) (§3:1), or is adopted by virtue of a foreign adoption decision *approved or otherwise valid in Sweden* under the Act on International Legal Procedures relating to Adoption (SFS 1971:796³⁰⁹) or the Act concerning Sweden's Accession to the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption (SFS 1997:191) (§3:2).

According to (§2), a foundling discovered in Sweden will be assumed to be a Swedish citizen unless and until any indication to the contrary is established³¹⁰. This provision is meant to avoid the occurrence of cases of statelessness, according to Sweden's commitments. However, all efforts will be made to discover the real identity of the child and consequently whether the child should rather be entitled to bear another citizenship than the Swedish through descent or other applicable rules that should take precedence considering the child's parental line and origin.

An explicit declaration or choice from the part of the parents is otherwise required for the child to be considered a Swedish citizen, by applying a simplified procedural requirement. It suffices for the Swedish father of a child who hasn't automatically been granted Swedish citizenship based on the rules of descent in 1§ or 4§, to notify the desire to that effect before the child's 18th birthday. A child older than 12 years of age and already holding another citizenship at that time needs to consent to acquiring Swedish citizenship, unless a major impediment such as mental disorder or similar prevents him/her from doing so. The child's legal guardian(s) must consent to that (5§).

There are also a number of provisions granting the child rights of his/her own, addressing situations under which the child would otherwise run the risk of remaining stateless despite of being rightfully domiciled, grown and even born in Sweden – country that thus becomes, beyond legal considerations and descent, in practice the only homeland the child him-/herself actually is directly connected with, irrespective of national roots, alternative ethnic declared or self-ascribed belonging of the parents. The legislator gives precedence in these cases to a *factual* belonging that the child is assumed to have developed towards the Swedish society by growing up into it, as a part of it, and through this also living up to the commitment of avoiding statelessness among children born and/or grown in Sweden, considering the kinship developed directly by the child to the hosting society, his/her actual home.

A child born stateless in Sweden but holding a residence permit and domiciled in Sweden acquires citizenship by simple notification, that has to be filed before the child reaches the age of five (§6).

If this age-limit has passed, an alternative applicable rule confers a non-Swedish child holding a permanent residence permit the right to citizenship by the simplified rule of notification after five years domicile in Sweden – reduced to three if the child is stateless. If the child already holds another citizenship, (s)he should consent to acquiring the Swedish one after reaching the age of twelve, unless a serious impairment (mental disorder or similar) should prevent this (§7).

The legislator goes even further with these considerations, providing similarly simplified measures of acquiring citizenship even for children whose parents, whatever the reasons, haven't taken the necessary steps for providing their access to citizenship during childhood, conferring the children the right to seek citizenship upon reaching majority age, 18, with the only limitation that the procedure should take place no

³⁰⁹ Unlike other legislations, all international legal instruments ratified by Sweden such as Conventions, Agreements, etc., need to be adopted in the Swedish legislation as Swedish laws in order to apply, that is why they will have to be adopted explicitly as a Swedish law, and thus be integrated in the national legislative system. SFS is an abbreviation for *Svensk FörfattningsSamling* – The official Swedish law-collection, where the first figure indicates the year of adoption and the second figure indicates the number thus received by every piece of legislation.

³¹⁰ First introduced through law (1979:139).

later than upon reaching the age of 24 and, apart from being a legal resident, the child should have been domiciled in Sweden at least since having reached 13, or 15 if stateless (§8). Special preferential provisions apply to Nordic/EEA citizens, that acquire Swedish citizenship if their (other) Nordic citizenship has been acquired by any other means but application, has reached 18 of age, has been domiciled in the country for the previous 5 years, and hasn't been sentenced to imprisonment during that period³¹¹ (§18:1-4). Even in this case, the citizenship thus acquired is transmittable to the next generation according to the applicable rules in (§10).

Expanding the realm of these rights based on own qualifying conditions gained during a childhood spent in Sweden before reaching adulthood, the Swedish law provides such an adult person over 18 of age who has lost or have otherwise been deprived by their Swedish citizenship to recover it by the same simplified procedure of notification, as long as the person is still a legal permanent resident of Sweden, was domiciled in Sweden for a total of ten years before reaching 18 and been continuously domiciled in the country the last two years (§9). In all these cases of non-Swedish-born children with preferential rights to acquire citizenship according to (§§5, 7, 8, 9) the citizenship right thus acquired is transmittable to the next generation, i.e. their unmarried children not having reached 18 of age, as long as these persons now parents having derived their citizenship rights by growing up as factual Swedes have sole custody of their child, or joint custody with another parent who also is a Swedish citizen, or secondarily upon the parents' acquiring Swedish citizenship and holding joint custody (§10).

All cases above, apart from special rule applicable to Nordic citizens in (§18), involve applying a simplified procedure of gaining citizenship by rights derived by children directly, by the fact of having grown in the Swedish society (*increscens*³¹²).

As an adult, there is always the possibility of acquiring citizenship by naturalization, with the main difference that the requirements, as the procedures, are much more strict and complex in this case, with a strong request of clear identity, good conduct, and permanent residence for a period varying between 2-5 years depending on the applicants' previous citizenship. Preferential treatment is applied to Nordic citizens (2 years); stateless persons with refugee status need to wait 4 years, and other aliens 5 years (§11), unless preferential time-derogatory treatment applies on other basis, such as: previous holders of Swedish citizenship, spouses/ significant others to Swedish citizens, or other special cases (§12). Exceptionally, even if the clear identity clause in §11 sub-section 1 is not fulfilled, naturalisation is still possible but according to a delayed procedure, on condition that the applicant has been domiciled in Sweden for at least the previous 8 years and can provide sufficient evidence to the authorities that there is a high probability to believe that the stated identity is correct (§12, section 2). Naturalization of the parents normally implies that even their children (i.e. unmarried and under the age of 18) consequently acquire citizenship.

Involuntary Loss of Swedish Citizenship

A Swedish citizen may lose his/ her Swedish citizenship if it's considered that the link to Sweden has become so weak by absence and lack of interest in maintaining it, or has been discontinued for such a long time as to have been rendered legally irrelevant, and thus unmotivated to formally maintain. This provision can affect children of Swedish origin born abroad, who have never been domiciled in Sweden nor have been present in the country under the circumstances indicating a defined link to Sweden (§14:1-3), unless they lodge an application stating their wilful intent to retain their Swedish citizenship, before reaching the age of 22 (§14 sub-section 2). If the citizenship is lost according to these provisions (in §14), this even affects the respective person's children, if they acquired their citizenship derived through their parent(s) (§14 sub-section 3), unless this would result in their becoming stateless – in which case the provision does not apply (§ 14 sub-section 4).

Voluntary loss/ Release from Swedish Citizenship

A person who is or wishes to become a Swedish citizen may apply to be released from his/ her Swedish citizenship, a wish that may normally be granted if the applicant is not domiciled in Sweden or otherwise denied to persons domiciled in Sweden unless special reasons motivate that (§15).

³¹¹ see/ compare to the good conduct clause in (§11:5)

³¹² or *inväxande* in Swedish ("growing up") in the society.

If the applicant does not already hold another citizenship, a condition of acquiring another citizenship within a certain period of time can be imposed, to grant being released from the Swedish one (§15 sub-section 2). This is a rule meant to protect the applicant from running the risk of becoming stateless, which is consistent with the obligations assumed under the Convention on prevention of cases of statelessness.

Conclusions

Sweden has comparatively been one of the most liberal states with respect to naturalization, (Brubaker) imposing a relatively short waiting period before an application can be filed. A particular feature of the Swedish legislation is that of considering children's rights not only with respect to their parents/ parental line, but also as an individual right in its own, that may under given circumstances even be considered on its own merits, beyond customary blood relationships as basis. That becomes possible because the child is considered by the Swedish legal system a juridical person /entity of its own, with own rights, that may both coincide and get disjunctive with those of the parents, even though of course the main assumption at least initially is that of shared interests within the family. The Swedish juridical system is therefore striving to comply with principles encompassed by assumed commitments both under national and international law, regarding citizenship as a human right, and the right of children to citizenship as a particularly important embodiment of these paramount principles. This should be for instance compared to the results of the recent referendum in Switzerland still denying comparable rights even for the third generation legal residents.

Bibliography

Barbalet, J.M. (1988) – Citizenship. Open University Press.

Bauböck, R. (1991) – Migration and Citizenship, *New Community* 18:1.

Bauböck, R. (1994) – Changing the Boundaries of Citizenship: The Inclusion of Immigrants in Democratic Polities. In: Bauböck, R. (ed.) "From Aliens to Citizens", Aldershot, Avebury.

Bauböck, R. (1994) – Transnational Citizenship: Membership and Rights in International Migration, Aldershot: Edward Elgar.

Bauböck, R., Rundell, J. (Eds.) (1998) – Blurred Boundaries: Migration, Ethnicity, Citizenship. Aldershot (UK), Ashgate.

Brubaker, W. R. (1989) – Immigration and the Politics of Citizenship in Europe and North America. Lanham, University Press of America.

Brubaker, W.R. (1992) – Citizenship and Nationhood in France and Germany. Harvard University Press.

Castles. S. & Miller, M.J. (1998) – The Age of Migration: International Population Movements in the Modern World, Second Edition. London, Macmillan Press.

Castles. S. & Miller, M.J. (2003) – The Age of Migration: International Population Movements in the Modern World, Third Edition. London, Macmillan Press.

Castles, S. and Davidson, A. (2000) – Citizenship and Migration: Globalisation and the Politics of Belonging. Macmillan.

Dingu-Kyrklund, E. (2001) – Citizenship Rights for Aliens in Sweden. In: A. Kondo (Ed.) "Citizenship in a Global World. Comparing Citizenship Rights for Aliens". Palgrave, UK.

Dingu-Kyrklund, E. & Kyrklund, L. (2003) – Nordic Citizenship and EU-citizenship: A Comparative View. In: Kondo, A. & Westin, C. (eds.): "New Concepts of Citizenship: Residential / Regional Citizenship and Dual Nationality / Identity", CEIFO, Akademityck Edsbruck, Sweden.

Hammar, T. (1990) – Democracy and the Nation-State: Aliens, Denizens and Citizens in a World of International Migration. Aldershot, Avebury.

Layton-Henry, Z. (Ed.) (1990) – The Political Rights of Migrant Workers in Western Europe. London, Sage.

Marshall, T.H. (1964) – Citizenship and Social Class. In: T.H. Marshall – “Class, Citizenship, and Social Development: Essays by T.H. Marshall”. New York, Anchor Books.

Seton-Watson, H. (1977) – Nations and States. London, Methuen.

Soysal, Y. (1993) – Construction of Immigrant Identities in Europe. Paper presented at the conference: European Identity and Its Intellectual Roots, Cambridge, May 6-9 1993.

Soysal, Y. N. (1994) – Limits of Citizenship. Migrants and Postnational Citizenship in Europe. Chicago, University of Chicago Press.

Legal documents

The Swedish Citizenship Act (SFS 2001:82) (In Swedish: *Utlänningslag*)

The Swedish Citizenship Act (SFS 1950:382) (In Swedish: *Utlänningslag*)

Act on International Legal Procedures Relating to Adoption (SFS 1971:796)

Act Concerning Sweden’s Accession to the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption (SFS 1997:191)

European Convention on Nationality /*Europeiska konventionen om medborgarskap*. SÖ 2001:20.

Prop. 1997/98:182 *Strategi för att förverkliga FN:s konvention om barnets rättigheter i Sverige*. (Strategy to apply the UN Convention on the Rights of the Child in Sweden).

Prop. 2004/05:2 *Makten att bestämma – rätt till välfärd* (Power to Decide – The Right to Welfare).

Betänkande (SOU 1999:34) *Svenskt medborgarskap* (Committee Report: Swedish Citizenship)

Betänkande (SOU 1997:116) *Barnets bästa i främsta rummet. FN:s konvention om barnets rättigheter i Sverige* (Committee Report: The best interest of the child. The UN Convention of the Rights of the child in Sweden).

Betänkande (SOU 2000:106) *Medborgarskap i svensk lagstiftning* (Committee Report: Citizenship in the Swedish Legislation)

BO /Barn Ombudsmannen – *Yttrande över betänkandet* (SOU 1999:34) *Svenskt medborgarskap* (The Children’s Ombudsman: Statement on the Committee Report SOU 1999:34, Swedish Citizenship). Kulturdepartementet, 1999-09-22 Remissvar.

CONCLUSIONS

Conclusions and proposals
for the follow-up to the 3rd European Conference on Nationality
on the theme “Nationality and the Child”,
organised by the Council of Europe in Strasbourg on 11-12 October 2004

The participants at the Conference, having discussed the various topics introduced by the rapporteurs, called on the Council of Europe, through its Committee of Experts on Nationality (CJ-NA), to take account of the discussions at this Conference and in particular to

1. Develop the principles and rules of the European Convention on Nationality with regard to:
 - acquisition of nationality of the country of residence by first- and second-generation migrant children
 - change of nationality of the parents and its effects on the nationality of the child
 - avoidance of statelessness of children in particular
 - the acquisition of nationality by foreign children in the event of their international adoption falling through or the adoption procedure breaking down, in particular when there is a risk of their being stateless.

2. Pay particular attention in its future work to:
 - the relationship between the acquisition of nationality by migrant children and their integration
 - the best interests of the child as stipulated in the Convention on the Rights of the Child
 - the right of children/minors to be heard in decisions affecting their nationality
 - the effect of the absence of birth registration on the acquisition of nationality by children
 - equal treatment of children “born in and out of wedlock” with regard to their nationality.