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EDITORIAL

When do the principles of human dignity trump those of nationality?

Can returning to the fundamentals of human dignity help us navigate through the myriad of competing interests to ensure that we cultivate a child-rights approach to questions of nationality in alternative care, adoption and international surrogacy arrangements to prevent statelessness?

Despite the right to nationality for everyone (Art. 15 of the Universal Declaration of Human Rights (UDHR)), 10 million people worldwide remain stateless¹. Citizenship or nationality, as interchangeable terms, 'not only provides people with a sense of identity, it entitles individuals to the protection of a State and to many civil and political rights. Indeed, citizenship has been described as "the right to have rights"².

At the very least, States are responsible for upholding the rights of its nationals (e.g. justice, social welfare, education, healthcare etc), but who is responsible for those who are stateless? When should principles of human dignity and brotherhood apply (Art. 1 UDHR), especially when statelessness would occur?

For children, this means that irrespective of the circumstances of their birth and costs to the State, they likewise have a right to a nationality, and States have an obligation to prevent statelessness. Yet, countless populations of children remain stateless in alternative care, adoption and surrogacy matters. What can be done to resolve such situations and prevent the emergence of new cases ?

Alternative care

International standards clearly require that a child must acquire a nationality at birth, or as soon as possible after birth (Arts. 3 and 7 of the United Nations Convention on the Rights of the Child (UNCRC)). The obligations of the UNCRC are not only directed to the State of birth of a child, but to all States, with which a child has a link,

such as for example parentage. Yet, what happens when children are abandoned to unknown parents or to parents, who are stateless in countries where *ius sanguinis* [the right of blood] applies? What can be done to protect the status of stateless migrants, particularly children, and facilitate their naturalisation? Should principles of human dignity require the basic right to nationality, when the child would otherwise be stateless?

As a minimum, States must register the birth of all children born on their territory. The registration of birth should be free of charge and be performed without delay. The fulfilment of the right to be registered at birth is closely linked to the realisation of many other rights, *inter alia*, to a name, nationality and identity. However, in many countries, obstacles to birth registration may exist, such as a lack of awareness within communities, cumbersome administrative procedures, direct and indirect costs, or discrimination faced by ethnic minorities. Fortunately, bodies, such as the United Nations High Commissioner for Human Rights and the European Network on Statelessness, have been mandated to tackle such obstacles with promising results, with the Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child challenging States when breaches occur³.

ISS strongly advocates for the granting of nationality to all children born on their territory, who would otherwise be stateless, in a spirit of brotherhood.

Intercountry adoption

In matters of intercountry adoption, *prima facie*, all children initially have the nationality of their State of origin. Questions then arise as to whether the child should lose the nationality of his or her State of origin when dual nationality is allowed, or which nationality is given in expatriate adoptions (see Monthly Review No. 210 of March 2017). What persuasive opinions prevail against the automatic granting of nationality of the receiving State to the adopted child? Arguably, given that adoptions are 'full adoptions' under the 1993 Hague Convention, where there is a termination of rights between the biological parents and the child as well as the creation of new parentage ties with the adopters, once adopted, the child should have the same rights as a biological child of the adopters. Would this not include the granting of the nationality of the adopters?

Moreover, Article 5.c of the 1993 Hague Convention imposes on the Central Authority the obligation of ensuring that 'the child is or will be authorised to enter and reside permanently in that State' (see also Articles 17.d and 18). This view regarding the acquisition of nationality is clearly supported by the Guide to Good Practice No. 1 (GGP1) of the Hague Conference on Private International Law, and also by a recommendation of automatic granting of nationality⁴. The 2005 Special Commission on the practical operation of the 1993 Hague Convention made a clear recommendation that the 'child be accorded automatically the nationality of one of the adoptive parents or of the receiving State, without the need to rely on any action of the adoptive parents. Where this is not possible, the receiving States are encouraged to provide the necessary assistance to ensure the child obtains such citizenship'⁵.

Such a right should not be linked to revocation/termination mechanisms of adoption orders. This can prevent the risk of stateless adoptees, particularly risky for adoptees where there has been an adoption breakdown. For example, regrettably, situations have arisen where adoptees have never been granted the citizenship of the receiving State and can be deported to the State of origin despite having no ties. Countries, such as Germany, have

established that even in sensitive situations such as an adoption breakdown, the child benefits from a valid legal status, which is established in conjunction with the immigration authorities.

ISS advocates for the automatic granting of nationality to adoptees of the Receiving State, to ensure that they are afforded the full protections in the country they have been adopted into, in a spirit of brotherhood.

Surrogacy arrangements

Given birth through surrogacy arrangements is relatively recent, children born through these circumstances present an emerging set of cases of where statelessness can occur. Applicable nationality laws are being tested. How should *ius sanguinis* be applied, when there are potentially links to five persons in the conception of the child? How should *ius soli* [the right of the land] apply – *i.e.* the right of anyone born in the territory of a state to nationality or citizenship – in cases where neither the surrogate mother or intending parent have a link other than the birth?

Irrespective of how one answers such questions – discussions beyond the scope of this editorial⁶ – do not questions of common humanity place an obligation on States to ensure that there is an adequate framework on nationality for all children conceived through surrogacy? States should be guided by the overriding importance of avoiding a situation in which a child is stateless, as deemed by the European Court of Human Rights (see p. 6).

ISS advocates that States should apply its nationality laws under the same conditions as any other child born to that parent, if parentage is established or recognised by a State. Any other practice would be arguably discriminatory to children born through surrogacy arrangements.

ISS encourages States to foster a human dignity approach to granting of nationality and development of concrete solutions, especially in cases where statelessness would occur. Surely, as we express our national identity through patriotism and love for one's country, should we not express our identity as human kind as our love for the world?

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