

## **The child's right to a nationality as a human right : A new perspective beyond eliminating statelessness**

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The right of a state to determine who will and who will not be regarded as its citizens has been a well-recognized adjunct of state sovereignty. Thus, the Permanent Court of International Justice declared in 1923 that the question of nationality was a matter within the reserved domain of domestic jurisdiction.<sup>1</sup> Actually, the development of the international law of nationality is largely State-oriented and dominated by States' interests. Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws (the 1930 Hague Convention) states that "It is for each State to determine under its own law who are its nationals." Article 2 further states that "any questions as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

However, the competence of States in determining nationality is subject to, though a little, limitations, based on international law and domestic law. Article 1 of the 1930 Hague Convention continues: "This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principle of law generally recognized with regard to nationality." The Permanent Court of International Justice in the same case had highlighted a very important point on the problem of nationality; "The question whether a certain matter is or is not solely within the exclusive jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.

One of the most significant changes in international relations since the World War II is the increasing concerns for human rights as witnessed by a rapidly growing body of human rights law in the international arena. Among them is the emergence and development of the right to a nationality, especially the child's right to a nationality as a human right. However, the right to a nationality has primarily focused to eliminate statelessness, since the right to nationality was originally created for this objective.

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<sup>1</sup> *Tunis and Morocco Nationality Decrees Case*(1923) P.C.I.J.,Ser.B.,No.4,p.4.

Despite this original purpose, the huge increase of migration in the globalized world has made the necessity of the consolidating and strengthening of right of the child to nationality as a human right stand out, *beyond* eliminating statelessness. While many immigrants have gained more and more close relationship with the country of residence, these immigrants and their children have no citizenship or nationality in many cases, especially under the country which have the traditions of *jus sanguinis*.

In fact, about 128,000 children who were born to foreigner parents during 2005 to 2014 in Japan have been denied many rights and obligations of nations, due to Japanese nationality law with *jus sanguinis*.<sup>2</sup> The important thing no less than the number of children who has no citizenship in Japan, is the problem of generation. Already 5<sup>th</sup> and maybe 6<sup>th</sup> generation of oldcomer of Korean children were born, in case of newcomer also 3<sup>rd</sup> generation born, although oldcomer Korean children have the special permanent residence status. It might be similar situation in many Asian countries that define nationality through *jus sanguinis*.

This paper will consider the deep-rooted theme both in domestic and international law whether the discretion of sovereign state to determine nationality could be limited. To begin with, this paper examines the emergence and development of the right to a nationality in the international documents, and concludes that though the right to a nationality has primarily been focused to eliminate statelessness, there is a clear trend in international law towards a gradual recognition of an individual right to nationality in general. Next, in order to address the problem of the right to nationality of the Child *beyond* (other than) the stateless, this paper argues that we start first to change our understanding about the concept and function of state sovereignty and nationality, secondly to gather trends and practices about the right to nationality of the Child and to aggregate and reformulate them to support our argument, lastly to develop reasoning and jurisprudence about why the right to nationality of the Child should be regarded as human rights with the increasing mobility of people on a global scale. Finally, this paper will conclude that the right of the child to a nationality, especially below 3<sup>rd</sup> generation of migrants should be a priority position to the exclusive jurisdiction of sovereign states, and the child born to foreign parents in the country of residence should be given a nationality as a human right.

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<sup>2</sup> Aramaki et al., *Gaikokujinnno Kodomo Hakusyo (Human Rights Paper of Foreign Child) Akasisyoten* (2017) 188.