

THE PROMISE AND PRACTICE OF NATIONALITY LAWS
IN BRAZIL, CHILE, AND COLOMBIA



EXECUTIVE SUMMARY

Born in the Americas

OPEN SOCIETY JUSTICE INITIATIVE

Born in the Americas
The Promise and Practice of Nationality Laws
in Brazil, Chile, and Colombia

EXECUTIVE SUMMARY

Open Society Justice Initiative



Copyright © 2017 Open Society Foundations.

This publication is available as a pdf on the Open Society Foundations website under a Creative Commons license that allows copying and distributing the publication, only in its entirety, as long as it is attributed to the Open Society Foundations and used for noncommercial educational or public policy purposes. Photographs may not be used separately from the publication.

ISBN: 978-1-940983-68-4

Published by
Open Society Foundations
224 West 57th Street
New York, NY 10019, USA
www.opensocietyfoundations.org

For more information contact:

Juliana Vengoechea
Open Society Justice Initiative
juliana.vengoechea@opensocietyfoundations.org

Cover photo © Guillermo Legaria | Getty
Cover designed by Judit Kovács | Createch Ltd.
Text layout and printing by Createch Ltd.

Executive Summary and Recommendations

“The groups...most vulnerable to non-registration of birth due to structural discrimination—including undocumented migrants, indigenous, minority and nomadic groups, refugees, internally displaced persons, and stateless persons—also face a greater risk of having their nationality disputed.”

—United Nations Human Rights Council, December 2015

Countries throughout the Americas have traditionally granted citizenship through birth in their territory, known in Latin as the *jus soli* rule. Most scholarship and research on citizenship in the continental Americas finds that *jus soli* regimes are relatively straightforward to implement and generally prevent people from becoming stateless. However, this study argues that *jus soli*, while laudable in theory, can be problematic in practice. Even facially generous *jus soli* provisions are only as effective as their implementation, and do not guarantee nationality to everyone.

Research conducted for this report identified significant problems in the operation of *jus soli* laws in Brazil, Chile, and Colombia. The citizenship regimes of all three countries are marked by difficulties and systemic flaws in implementation. By closely studying the strengths and especially the weaknesses of *jus soli* in Brazil, Chile, and Colombia, it is possible to draw lessons in improving *jus soli* citizenship policies and practices.

A key conclusion of this report is that **states have no clear notion whether all persons born in their territory, with the attendant right to nationality, can actually prove their nationality in practice.** All three countries studied have incomplete data and lack disaggregated information that would enable them to identify and address gaps in citizenship practices. All three states over-rely on birth registration statistics as the sole measure of progress in ensuring nationality rights. Overreliance on this one data point obscures the fact that many people in Brazil, Chile, and Colombia are unable to secure nationality. States maintain multiple databases that are neither compatible, nor centrally administered, making it nearly impossible to analyze data, and hampering development of targeted policies. To determine why children who are born in the territory are unregistered, or registered but unable to secure nationality, appropriate data collection is paramount.

This report further concludes that **access to civil registration and documentation of identity is the foundation for securing the right to nationality in practice.** For example, having one's birth officially registered is a universal right of all children, and a birth certificate is the central document to prove nationality and the foundational document for other national identity documents. But as this study finds, the actual practice of birth registration is uneven across the three countries, marked by gaps in services, discretion granted to low-level functionaries, and frequent failure to register births among indigenous groups, ethnic minorities, and residents of remote areas.

The countries profiled here represent varied challenges in the implementation of *jus soli* provisions. They represent a range of *jus soli* practices, from unrestricted *jus soli* in Brazil, to *jus soli* subject to exceptions in Chile, to conditional *jus soli* in Colombia. All three countries are bound by the *jus soli* statelessness safeguards of the American Convention on Human Rights.

Brazil, Chile, and Columbia share problems that undermine the right to nationality in practice. These problems are common to many countries in the Americas. First, discrimination and persecution often discourage people—especially members of indigenous and ethnic minority groups—from seeking birth registrations. Discretion in the interpretation of nationality laws coupled with limited oversight of the officials in charge of documentation of identity processes render these fears well founded. Short-term solutions cannot remedy this problem.

Beyond discrimination, there are other problems that affect the right to nationality in Brazil, Chile, and Colombia. These include **legal deficiencies**, such as conflicts between domestic legal frameworks and international obligations; conflicts between nationality regulations and other fields of law, particularly civil registration; unrealistic standards for proof of birth; and the absence of retroactive measures to address gaps left by changes in administrative policies and nationality laws.

Administrative deficiencies, such as limited access to identity documents, also present a challenge, particularly for populations in border regions. Insufficient training and supervision of registrars and service providers, inconsistent procedures across government agencies, and a lack of information on rights and services and the processes to access them constitute related barriers to nationality.

Meanwhile, **policy shortcomings** cause additional problems. These inadequacies include the low priority given to the prevention of statelessness and documentation of at-risk populations; lack of consistent policies between the national government and local/provincial authorities; inappropriate linking of documentation of identity and nationality; little or no cooperation between levels of government; insufficient measures to address the needs of vulnerable populations; poor data collection, resulting in a poor understanding of birth registration; and the gap between the state's international commitments and the resources devoted to meeting them in practice.

These challenges are exacerbated by **difficulties in gaining access to justice**. Lack of legal services in areas where bad practices are likely to occur, the high cost and procedural obstacles to seeking redress through judicial mechanisms, and the modest role courts play in clarifying legal norms make it more difficult for those who suffer citizenship problems to find effective redress.

In light of these challenges, Brazil, Chile, Colombia, and other countries in the Americas must do more to extend good practices and policies on nationality. Such efforts must focus in particular on geographically isolated and ethnically and culturally distinct populations. States must invest greater resources in training officials, adjusting legal frameworks and administrative procedures to provide better services, and reaching underserved populations.

States in the Americas have achieved great progress in increasing birth registration, and hence access to citizenship and the protections that come with it. But challenges remain. These obstacles to birth registration disproportionately affect those more likely to face discrimination, such as members of indigenous and ethnic minority groups, residents of remote areas, and the children of migrants. Changes in policy and practice are needed to address these shortcomings.

Recommendations

The following recommendations apply to many countries in the Americas.

To ensure access to documentation of identity:

- Ensure that birth registration policies are coordinated and implemented uniformly throughout the national territory.
- Review and enact legislation in order to ensure that all children who are at risk of becoming stateless, particularly children of ethnic minority groups and children of migrants, have access to birth registration.
- Invest in training and supervising of officials responsible for documentation of identity and nationality.
- Provide special procedural accommodations (such as simplifying the process for late registration) to address the challenges vulnerable populations face.
- Adopt realistic standards of proof of birth; when necessary, facilitate access to necessary documentation for birth registration through diplomatic cooperation.
- Grant facilitated access to necessary documentation for birth registration through diplomatic cooperation, in which a failure of response by another state may suffice as means of proof.
- Implement or increase mobile registration in remote areas.
- Ease the process for late birth registrations by accepting the same level of evidence as used for on-time registration.
- Interpret all relevant rules and procedures for registration in accordance with the principle of best interests of the child.
- Develop effective communication strategies and awareness-raising campaigns specially tailored to the information needs of at-risk populations.

To address the data gap:

- Register data comprehensively, including by gender, ethnicity, and region of origin.
- Increase technical capacity for data gathering, processing, and analysis within the entities responsible for documentation of identity and nationality.
- Carry out targeted mapping studies to identify populations that are at risk of statelessness due to barriers in registration and access to other documentation of identity processes.

- Analyze available data to determine baseline information and to measure progress and inform policies.
- With due respect to privacy and data protection, improve reporting on birth registration and childhood statelessness, and make it publicly available.

To prevent discrimination in access to identity documents and nationality:

- Prioritize attention to patterns of discrimination against specific minorities, particularly in regions where indigenous groups reside, or where migrant populations enter and settle.
- Collaborate with local communities to identify and address any patterns of discrimination.
- Eliminate any risk of deportation or other sanctions for parents seeking to register the birth of their children; instead, offer guarantees and incentives for migrants to register their children's births.
- Enshrine the principle of nondiscrimination in both law and practice, being cognizant, for example, that practices that seem like errors may constitute discrimination if they have that effect.
- Use documentation of identity processes to guarantee rights protection for populations vulnerable to discrimination and exploitation.

To ensure that officials carry out their responsibilities appropriately:

- Give special attention to public officials who provide rights and services in remote regions, particularly when there are shifts in administrative policy (as is the case in Chile and Colombia). This study shows that these officials are the last to know about changes in policy and that they deal with populations at great risk of disenfranchisement.
- Furnish trainings founded on a rights-based approach, particularly anchored on the principles of nondiscrimination and the best interests of the child.
- Increase resources to thoroughly monitor the behavior of officials who provide services to at-risk communities, to ensure the prompt identification and resolution of bad practices.
- Ensure communication, information sharing, and unified policies in the implementation and interpretation of nationality laws across different sectors and levels of government (e.g., periodic meetings between relevant authorities, particularly civil registration authorities and ministries or departments in charge of migration and foreign affairs).

- Coordinate efforts to carry out outreach campaigns and activities with populations of concern, and assist them in navigating state bureaucracy by facilitating access to the competent officials.

To harmonize domestic laws and practices with binding international norms and standards:

- Comprehensively review all relevant laws, regulations, and practices, particularly those that predate the relevant international human rights treaties, to ensure their compatibility with any international legal frameworks that apply to the country.
- Adopt amendments to nationality and documentation of identity laws to address existing legal gaps, as well as to cement good practices that exist as a matter of administrative policies and are vulnerable to change.
- Use regional forums to address shortcomings and share good practices in identity documentation processes.
- Assess and take into account the best interests of the child as a primary consideration in all actions or decisions that concern the right to nationality or documentation of identity of a child.

The right to nationality, the importance of protecting individuals from statelessness, and the right to documents of identity have gained the attention of the international community as essential human rights. Global initiatives such as the #IBelong Campaign to End Statelessness, led by the United Nations High Commissioner for Refugees, as well as the United Nations Global Sustainable Development Goals agenda, are particularly relevant platforms to address some of the issues detailed in this report. States should capitalize on the technical capacity and funding opportunities that these platforms create to incorporate concrete actions to protect the right to nationality of each child born in the Americas, as well as the means to prove that right.

As this study makes clear, there remains a significant gap between the promise of *jus soli* citizenship and the reality on the ground in Brazil, Chile, and Colombia. These three countries—and others in the region—must do more to ensure that the right to citizenship becomes a reality for all people born in the Americas.

CASE STUDY

Guajará-Mirim, Brazil

Guajará-Mirim is a municipality within the Brazilian state of Rondonia in the Amazon. It sits on the Brazilian side of the Mamoré River, across from the Bolivian city of Guayamerín. Many indigenous people reside in the area, and have traditionally migrated back and forth for commercial purposes. The control of the border by the two countries is asymmetrical. The Bolivian side is not policed and allows unrestricted entrance without papers or customs inspection. The Brazilian side has a military outpost securing and controlling the border.

There have been reports of arbitrary and discriminatory behavior by Brazilian authorities against people crossing from the Bolivian side of the river. On July 5, 2007, a local court (*Comarca*) judge in Guajará-Mirim issued an ordinance stating that any child of foreign migrants could only be registered if his or her parents were in regular migratory status at time of birth. Further, the judge instructed registrars that the testimonies of unauthorized migrants could not be accepted in registering births in Brazil. The judge also ruled that giving false testimony over a birth was a federal crime punishable by 1–5 years in prison, and that any witnesses who aided in the commission of such crime would also incur the same criminal liability.

Although the judge's order was unconstitutional, at least one local notary and his employees have followed it in practice under the belief it was a correct interpretation. Pastoral do Migrante, a local NGO that works with immigrant communities, confirmed that the policy exists and remains in place, and that some immigrants remain subject to the policy. Some local officials justified the existence of such a policy in interviews carried out by a local researcher in August 2015, stating it was a necessary tool to address unauthorized migration and to avoid giving undocumented people access to social security benefits, (although they are legally entitled to them).

The case of Guajará-Mirim may be viewed as a local problem, and it is not clear if this problem exists in other municipalities. However, this case suggests that similar practices could occur, particularly in remote regions. It reveals that judges exert a considerable degree of discretion on these matters and that an administrative order within the judge's judicial power can have far reaching effects and be difficult to challenge. The situation in Guajará-Mirim shows how Brazil's decentralized system of providing identity documents, combined with discretion granted to local actors, can make it difficult to obtain nationality as a practical matter, especially for indigenous peoples and others living in remote areas.

CASE STUDY

The Aymaras in Arica and Taracapá

The Aymaras are an indigenous group that has lived on the border of Chile and Peru since before the founding of the two countries. The Aymaras are nomadic shepherds and crafters who sell their wares in town markets as they travel. Thus the birth of Aymara children can occur in either Chile or Peru, depending on the group's movements.

Researchers have documented nearly 200 cases of Aymara children who were registered in Chile as born to “in transit” parents and were therefore denied Chilean nationality. Rectifying the situation for these children and ensuring others do not fall into the same gap has been complicated by language barriers—some Aymaras do not speak Spanish, and the authorities do not speaking Aymara—cultural barriers, and the absence of governmental entities in the area. Fortunately, the children of Aymaras have been able to attend public schools despite lacking Chilean nationality. However, their years of schooling are not officially recognized, affecting their promotion from grade to grade, and they cannot access the “*beca indígena*,” a special scholarship the Chilean government provides to indigenous people to finance the cost of post-secondary education. The situation of Aymaras who lack nationality is likely to become more dire: as borders within their ancestral lands become increasingly securitized, and the Aymara are forced to abandon their traditional way of life, the education of their young people takes on mounting importance. Without greater outreach efforts by Chile's government, more Aymaras are likely to be left without nationality, without educational opportunities, and thus without prospects for the future.

As the Aymaras' case study illustrates, Chile struggles to extend citizenship to all of its people, especially minority groups in remote locations. Changes in government policy and the interpretation of the “in transit” designation, often combined with discrimination, have created significant challenges in realizing citizenship rights. These challenges can be surmounted, but only through concerted effort by Chile's government.

CASE STUDY

The Darién Gap

Migrants seeking to enter the United States from Africa, Asia, or the Caribbean often start their journey in South America before moving northward. When they reach the border between Colombia and Panama, they have two options. One is to cross through the controlled border where Panamanian officials check for documentation; the other is through the rainforest. The terrain is so difficult that this region is known as the Darién Gap. This route has been long used for drug smuggling as well as human trafficking.

With little to no state presence or service provision, births in the region are usually unregistered. Displacement of the indigenous communities by violent attacks from Colombian armed groups, particularly drug trafficking guerrillas, worsened the situation. Meanwhile, increased migration has increased the number of children born to migrant women passing through the region. For both members of the indigenous communities and migrants, their children's right to Colombian nationality and the process by which they might establish it are unclear.

In response to increased migration through the area, Panama tightened immigration controls on May 9, 2016, leaving about 1,300 migrants stranded in the town of Turbo, close to the Panama border, unable to cross. The Colombian Ombudsman's Office calculated that 1,273 of these stranded migrants were Cuban, including 300 children, and 11 pregnant women (with one reported birth). As law and practice in Colombia stand, a child born to Cuban parents, with no proof of domicile, will not have access to Colombian nationality under the statelessness safeguard. Thus, the child born in Turbo to Cuban parents has a birth certificate, but no nationality, as Cuba will only grant nationality if parents request it while being physically present in Cuban territory. The same destiny awaits other children born in Colombia to these stranded migrants.

Like the Aymaras in Chile and various communities in Rondonia, Brazil, this case illustrates the challenges of documenting the identity of populations in border regions, where there are virtually no registration services available—and in this case with the added complexity of an influx of migrants. This situation would pose a problem for most states, but is particularly challenging for Colombia, with its conditional *jus soli* and gaps between its citizenship laws and practices.

States in the Americas enjoy a reputation as exemplars in granting citizenship and preventing statelessness. Yet every state in the region must recognize and address the challenges they face in granting citizenship as a practical matter. Brazil, Chile, and Colombia all grant *jus soli* citizenship (to varying degrees), but for many people born in the three countries, achieving it is another matter.

This report is one effort to study state practice in the field of statelessness and documentation of identity, and the contexts and situations in which statelessness can result even in the face of generous national legal frameworks based on *jus soli* norms.

Based on the findings of this report, there are areas where the gap between the text of the laws and their implementation can be bridged through concrete actions by legislators, policy makers, local officials, and other relevant stakeholders.

Like most countries in the Americas, Brazil, Chile, and Colombia practice *jus soli* citizenship, in which nationality is generally granted to those born in the country's territory. In theory, this is the simplest and most straightforward form of citizenship, and the most likely to prevent statelessness. But in practice, many people in Brazil, Chile, and Colombia struggle to obtain proof of citizenship and fully enjoy their citizenship rights, and some are left stateless.

Born in the Americas looks closely at the strengths and weaknesses of the three countries' citizenship regimes, finding a significant gap between the promise of *jus soli* citizenship and its implementation on the ground. Further, the report finds that this disparity most often affects indigenous peoples, members of ethnic minority groups, migrants, internally displaced persons, and children.

Based on a comprehensive review and analysis of the history, laws, and practices of the three countries, *Born in the Americas* makes a major contribution to the growing scholarship on citizenship laws, practices, and policies. Through case studies, analyses of case law, and detailed recommendations to improve current practices, the report argues that Brazil, Chile, and Colombia—and other countries in the region—must do more to ensure that the right to citizenship can be realized in practice for all people born in the Americas.

