

## BOOK REVIEW

*NATIONALITY OF FOUNDLINGS: AVOIDING STATELESSNESS AMONG CHILDREN OF UNKNOWN PARENTS UNDER INTERNATIONAL NATIONALITY LAW* BY MAI KANEKO-IWASE (SPRINGER 2021) 443 PAGES. PRICE \$149.99. ISBN 9789811630040

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Most states have some mechanism to convey nationality to at least some children found in their territory who are of unknown parentage. Broad foundling provisions are vital to ensure that children receive nationality and can access basic rights — but there has been little scholarship on foundling legislation. It has primarily been addressed in brief as part of broader legal surveys,<sup>1</sup> in studies of specific states' nationality schemes or stateless populations<sup>2</sup> or in comparative regional studies.<sup>3</sup> This left a gap in global comparative studies and in scholarship identifying best practices in granting nationality to children of unknown parentage. The definition of a foundling and consideration of how states ought to extend nationality to them has not been the focus of extensive scholarship or interpretation prior to this volume.

Mai Kaneko-Iwase, a scholar and United Nations High Commissioner for Refugees ('UNHCR') legal expert on statelessness, fills this gap in her 2021 publication *Nationality of Foundlings: Avoiding Statelessness among Children of Unknown Parents under International Nationality Law* ('*Nationality of Foundlings*').<sup>4</sup> The book compiles and analyses international law and state practice through meticulous research, the review of the nationality legislation of all 193 UN member states and a deeper review of case law from Japan, Italy, Spain and other states. She then proposes policy solutions to minimise statelessness and maximise child protection.

Most states' nationality laws (139 out of 193 UN member states) have some provision addressing the nationality of children of unknown parentage.<sup>5</sup> Leading international and regional instruments — most notably the *1961 Convention on the Reduction of Statelessness* ('*1961 Convention*') and the *European Convention*

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<sup>1</sup> Gerard-René de Groot, 'Children, Their Right to a Nationality and Child Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 144, 161–63.

<sup>2</sup> Raymond A Atuguba, Francis Xavier Dery Tuokuu and Vitus Gbang, 'Statelessness in West Africa: An Assessment of Stateless Populations and Legal, Policy, and Administrative Frameworks in Ghana' (2020) 8(1) *Journal on Migration and Human Security* 14, 19–21.

<sup>3</sup> Bronwen Manby, *Citizenship Law in Africa* (3<sup>rd</sup> edn, African Minds 2016).

<sup>4</sup> Mai Kaneko-Iwase, *Nationality of Foundlings: Avoiding Statelessness among Children of Unknown Parents under International Nationality Law* (Springer 2021).

<sup>5</sup> *ibid* 11, 24.

on Nationality ('1997 Convention') — also address foundlings.<sup>6</sup> Kaneko-Iwase thus argues that state practice establishes a general international principle of granting nationality to children whose parentage is unknown and who are found within a state's territory.<sup>7</sup>

But as Kaneko-Iwase demonstrates, international instruments provide little clarity on which children should receive nationality through these provisions. Article 2 of the *1961 Convention* mandates that '[a] foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State'. Like the term 'being persecuted' in the *1951 Refugee Convention*,<sup>8</sup> the term 'foundling' has no definition in the *1961 Convention* or elsewhere in international law. Worse, the term is translated differently among the five official languages of the *1961 Convention*.<sup>9</sup>

As a result, states differ widely as to who is protected by legislation, particularly relating to the age by which children must be 'found' to receive nationality and whether 'unknown' parentage includes situations where legal parentage is not established but a child's parents are factually known. Legislation also varies in the method of conveying nationality and whether the grant is subject to post facto revocation or cancellation. Kaneko-Iwase explores and categorises this complexity. Sensitive to varied legal systems and political realities, she recommends how States should craft legislation to ensure broad protections against statelessness and advises the UNHCR on how to improve its own guidance to states.

Chapter 1 reviews the *travaux préparatoires* for the *1930 Convention on Certain Questions Relating to the Conflict of Nationality Law*,<sup>10</sup> *1961 Convention* and *1997 Convention*. It also includes an extensive examination of state legislation and practice. Chapter 2 situates the research within broader discussions of international nationality and statelessness law. Chapter 3 explores the definition of a foundling. Kaneko-Iwase argues that a foundling has two elements: being 1) a child of 2) unknown parents. Being 'found' is the event that triggers the state's obligation to grant nationality to that individual, not a condition of being a foundling.

Chapter 4 details the meaning of 'unknown parents'. The term is susceptible to several meanings. A broad interpretation would mean that children can receive nationality even where their parentage may be factually known, as long as that parentage is not legally established. A narrow interpretation would mean that, where parentage is factually known, the child is not considered to be of 'unknown parents'. Kaneko-Iwase establishes that states ought to adopt the broader meaning, in which parentage is considered 'unknown' when it is not established in a manner that would allow the child's nationality to be established.<sup>11</sup> A narrower interpretation would mean that, even if a child is stateless because their parentage

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<sup>6</sup> *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975); *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000).

<sup>7</sup> Kaneko-Iwase (n 4) 21.

<sup>8</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2).

<sup>9</sup> Kaneko-Iwase (n 4) 84.

<sup>10</sup> *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, opened for signature 13 April 1930, 179 UNTS 89 (entered into force 1 July 1937).

<sup>11</sup> Kaneko-Iwase (n 4) 229.

is legally unknown, they cannot receive nationality because their nationality is factually known. This would go against both the protective purpose of the *1961 Convention* and the principle of the best interests of the child.

In Chapter 5, Kaneko-Iwase discusses the burden and standard of proof that is required to determine that a child is of unknown parentage. In discussing how states should expect applicants to prove a negative, this chapter has broad implications in statelessness determination proceedings and refugee status determinations generally. In particular, Kaneko-Iwase explores the concept of the burden of proof and demonstrates that this term encompasses two distinct concepts. First, it includes the burden of production, or the obligation to provide reasonably available evidence.<sup>12</sup> Significant forms of evidence are likely to be in the possession of the state, so the UNHCR recommendation of a ‘shared burden of proof’ is really arguing for a shared burden of production. Second, it includes the burden of persuasion, or which side bears the legal consequence if the evidence does not meet the standard to establish a given conclusion.<sup>13</sup> Only one side can bear this consequence.

Kaneko-Iwase argues that the UNHCR should be clear in its discussion of these two terms and distinguish between the two.<sup>14</sup> She further asserts that ‘the State concerned should bear and fulfil both the burden of production and persuasion regarding the existence of a legally recognized parents’.<sup>15</sup> She recommends that states carry a higher burden than the UNHCR’s guidance currently recommends: if a child’s legal parentage is unknown, the child should receive nationality unless the state can demonstrate that the child’s parentage is legally established.<sup>16</sup> Finally, Chapter 5 also argues that determinations of a child’s nationality and conveyance of nationality should generally be completed within six months, to be extended for up to one year.<sup>17</sup>

Chapter 6 discusses what it means to be ‘found’ in territory and by what age a child must be found. It concludes that being ‘found’ includes any encounter by a person other than the child’s parents. It argues that the child should be granted nationality if found at any time prior to reaching the age of nationality, even if the child then presents to or is discovered by state authorities after reaching adulthood.

Chapter 7 assesses when ‘proof to the contrary’ is established such that a child of unknown parentage will not receive nationality. Kaneko-Iwase argues that ‘proof to the contrary’ exists only where it is conclusively established that the person has another nationality.<sup>18</sup> The chapter also discusses the extensive limitations, including the obligation to avoid statelessness, that states should adopt for revoking or cancelling nationality after granting it.

The book culminates in Chapter 8, which provides a model provision for granting nationality to children of unknown parents: ‘[a] person whose legal parentage cannot be proven who is found as a child in the territory shall acquire the nationality of X [the state where found], unless her or his possession of a foreign nationality is proven’.<sup>19</sup> Summarising the lessons learned from the

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<sup>12</sup> *ibid* 186–88.

<sup>13</sup> *ibid* 187.

<sup>14</sup> *ibid*.

<sup>15</sup> *ibid* 334.

<sup>16</sup> *ibid* 338.

<sup>17</sup> *ibid* 223–26.

<sup>18</sup> *ibid* 267–332.

<sup>19</sup> *ibid* 336 (emphasis omitted).

previous chapters, Chapter 8 explains each phrase of this model legislation and the benefits of this formulation over alternatives, including the less clear and protective art 2 of the *1961 Convention*.

*Nationality of Foundlings* will serve as a valuable reference tool for scholars and researchers of international nationality and statelessness law. The annexes, compiling and analysing nationality legislation, are themselves tools that one hopes will continue to be available and updated. The book's discussion of the burden and standard of proof for children of unknown parentage has significant implications also for similar adjudications that require proving a negative — notably, statelessness determination procedures.<sup>20</sup> Kaneko-Iwase's critique that the UNHCR guidance on a shared burden of proof poses challenges to certain legal systems and is unhelpfully imprecise should be taken to heart in recommendations about statelessness and refugee status determination procedures.<sup>21</sup>

Kaneko-Iwase constructs an overwhelming base of evidence that demonstrates that the term 'foundling', and the method and quality of protection provided to these individuals, is in need of greater clarity and consistency in state practice. Her extensive research into treaties and their preparatory materials, legislative provisions and judicial and administrative decisions identifies gaps in current protection and she provides concrete policy suggestions on how to remedy those gaps. Chapter 4 identifies no fewer than 12 situations in which people might be foundlings or of unknown parentage, with discussions of specific cases falling into each category.<sup>22</sup>

Advocates for children's access to human rights and universal birth registration will also benefit from this volume. Questions of whether children who are abandoned or orphaned — or whose parentage is otherwise not legally established — will receive nationality is a critical matter for the child and for the community in which the child lives. As Kaneko-Iwase reminds us, UN human rights bodies have emphasised that it is 'never in the best interests of a child to be rendered stateless'.<sup>23</sup> Indeed, even as states have adopted increasingly strict restrictions in

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<sup>20</sup> *ibid* 193.

<sup>21</sup> See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Report, 2019) 34 [196]:

'[t]hus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'

See also, UNHCR, *Handbook on Protection of Stateless Persons* (Report, 2014) 34 [89]:

'[i]n the case of statelessness determination, the burden of proof is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts'

<sup>22</sup> Kaneko-Iwase (n 4) 116–58.

<sup>23</sup> *ibid* 260 quoting UNHCR, Expert Meeting: Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality (Summary Conclusions, March 2014) 13 [62]. See also *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017).

nationality legislation, there has been some recent progress in the protection of children of unknown parentage.<sup>24</sup>

The book also has immediate relevance to two situations of increasing international importance: first, state obligations to children who are unaccompanied, particularly in situations of widespread displacement. Where children's nationality and parentage are not conclusively established, Kaneko-Iwase argues that states should extend nationality to children who are 'found' at any point prior to reaching the age of majority.<sup>25</sup> Second, the book has immediate relevance to situations of international surrogacy. There has been increasing attention given to surrogacy arrangements with international aspects that result in children who are stateless.<sup>26</sup> Nevertheless, that literature has rarely explored the possibility of foundling provisions as a safeguard where children cannot obtain nationality through other means. Foundling provisions can provide a safeguard in these situations, especially when interpreted broadly as Kaneko-Iwase recommends.<sup>27</sup>

Kaneko-Iwase notes the limitations of her work. Despite extensive research, as many scholars of international nationality law will know all too well, it is extremely difficult to verify that available versions of nationality laws are accurate and up to date.<sup>28</sup> This means that some analysis may rely on out-of-date legislation or state practice that differs widely from national legislation. The volume's origin as a dissertation means that the volume is peppered with extensive discussion of primary sources, particularly in-depth discussions of judicial and administrative decisions, that may lead some readers to focus on the conclusions and summaries in Chapter 8.

This volume will prove an important reference for scholars of international law on statelessness, policymakers considering reform of legislation concerning nationality, migration lawyers representing unaccompanied minors and advocates for children's human rights and birth registration.

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<sup>24</sup> Miriam Nihal, 'Saudi Arabia Grants Citizenship to Children Born to Unknown Parents', *The National* (online, 26 January 2021) <<https://www.thenationalnews.com/world/gcc/saudi-arabia-grants-citizenship-to-children-born-to-unknown-parents-1.1153889>>.

<sup>25</sup> Kaneko-Iwase (n 4) 280–84.

<sup>26</sup> See, eg, Thomas McGee, "'Rainbow Statelessness' — Between Sexual Citizenship and Legal Theory: Exploring the Statelessness-LGBTIQ+ Nexus' (2020) 2(1) *Statelessness & Citizenship Review* 80–84; Jyothi Kanics, 'Preventing and Addressing Statelessness in the Context of International Surrogacy Arrangements' (2014) 19 *Tilburg Law Review* 117.

<sup>27</sup> Kaneko-Iwase (n 4) 70–75.

<sup>28</sup> *ibid* 405.