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Statelessness as a Lack of Functioning Citizenship

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Abstract

Central to the issue of statelessness is the concept of ‘functioning citizenship’, which requires an active and mutually-beneficial relationship between the state and the individual. This relationship is essential for the protection and promotion of international human rights. In cases of both *de facto* and *de jure* statelessness, however, this robust form of political membership is limited or missing entirely. Expanding on Elizabeth F. Cohen’s concept of ‘semi-citizenship’, this article contends that membership exists along a spectrum and requires not only the granting of formal citizenship, but also attention to the functionality of that relationship. Government-sponsored identities will continue to be important prerequisites for rights protection within the modern ‘society of states’, but truly functioning citizenship requires us to expand our understandings of responsibility and membership. The international community must critically examine the ways that individuals are recognized as worthy of human rights.

Keywords

statelessness – functioning citizenship – human rights – semi-citizenship – political membership

1 Introduction

Functioning citizenship requires an active and mutually-beneficial relationship between the state and the individual. It signifies membership in a political community, in which citizens support their government in various ways while enjoying the protections and services associated with their privileged

legal status. In cases of both *de facto* and *de jure* statelessness, however, this robust form of political membership is limited or missing entirely. While international human rights frameworks assert that ‘all human beings are born free and equal in dignity and rights’¹ and therefore have rights simply because they are human, in reality there are clear linkages between citizenship status and one’s ability to access fundamental rights. As a result, stateless individuals face a plethora of human rights violations.

The negative consequences that result from lack of functioning citizenship are hardly new, although globalized emphases on documentation and surveillance certainly make statelessness an increasingly unbearable condition. In reality, the ideal of functioning citizenship is rarely attained; the *de facto* and *de jure* stateless are denied access to state protections, while various ‘semi-citizens’ hold legal nationality but cannot access the full range of privileges inherent to citizenship. Expanding on Elizabeth F. Cohen’s concept of ‘semi-citizenship’, this article contends that membership exists along a spectrum and requires not only the granting of formal citizenship, but also attention to the functionality of that relationship. Government-sponsored identities will continue to be important prerequisites for rights protection within the modern ‘society of states’, but truly functioning citizenship requires us to expand our understandings of responsibility and membership. The international community must critically examine the ways that individuals are recognized as worthy of human rights.

2 Citizenship and Human Rights

Many scholars believe that a central function of citizenship is to make members of a political community equal, and that is accomplished by creating a ‘single, unitary political identity’.² At a broader level, citizenship signifies inclusion within a bounded group that enjoys a range of fundamental rights. In his foundational work, T.H. Marshall begins with the premise that there is a basic human equality associated with full political membership, or of citizenship. He asserts that citizenship cannot be fully attained until every citizen enjoys a full array of rights, including essential civil, political, and social rights.³

1 United Nations, ‘The Universal Declaration of Human Rights’ (1948) <<http://www.un.org/en/documents/udhr/>> accessed 19 October 2013.

2 Elizabeth F. Cohen, *Semi-Citizenship in Democratic Politics* (CUP 2009) 3.

3 T.H. Marshall, *Class, Citizenship and Social Development: Essays by T.H. Marshall* (Doubleday: 1965).

From this perspective, the state has a duty to uphold the rights of its citizens; the ideal of citizenship requires equal membership in a rights-protective community. This view has shaped modern understandings of nationality and belonging, yet the ideal of fully functioning citizenship is rarely achieved.

Cohen warns against idealizing citizenship and argues that citizenship itself is a gradient category. She writes that norm-driven definitions of citizenship often don't reflect reality, and that many individuals fit on a spectrum somewhere between full and non-citizenship; they are *semi-citizens*. 'Extrapolating what citizenship is from a notion of what citizenship ought to be has the tendency to produce misleading and sometimes troublesome conclusions,' she writes.⁴ The political membership of migrants, children, and the disabled all illustrate situations of semi-citizenship, when an individual may hold legal nationality but cannot access their full range of rights for a variety of reasons. This is closely related to Iris Marion Young's concept of 'differentiated citizenship,' which uncovers injustices within the structure of state society and highlights that not all of those considered full citizens are treated as such.⁵ If we refer back to Marshall's premise that citizenship requires full equality, this spectrum of semi-citizenship quickly raises questions about our understanding of legal nationality and its impact on rights protection.

At the same time, the forces of globalization – including the rise of the international human rights regime – have prompted some to (mistakenly) devalue the importance of political membership. Despite the prevalence of international human rights law, which guarantees rights to all persons regardless of nationality, a number of standards are nevertheless intricately linked to state citizenship. The right to participate in government, freedom of movement, and an array of economic rights all require government action (such as the acknowledgement of votes, the issuance of passports, and the granting of legal work status). These so-called 'universal' rights require citizenship (or, at the very least, some sort of residency status) to be realized.⁶ These norms 'call into question the inclusiveness of the term "human rights",' suggesting that denationalization is

4 Elizabeth F. Cohen, *Semi-Citizenship in Democratic Politics* (CUP 2009) 18-19.

5 Iris Marion Young, *Justice and the Politics of Difference* (Princeton 1990).

6 It should be noted that other human rights that require positive obligations by the state – including education, health, housing, and marriage – are often available to those without citizenship or legal residency. Much depends on the state in question. Undocumented migrants can access public education in the United States, for example, while research suggests that stateless children are often unable to gain a basic education in countries such as Bangladesh and Senegal. See: M. Lynch, 'Futures Denied: Statelessness Among Infants, Children, and Youth' (2008) <http://www.refugeesinternational.org/sites/default/files/Stateless_Children_FINAL.pdf> accessed 19 October 2013.

an incomplete process. ‘There are, in fact, still a number of citizens’ rights dressed up as human rights.’⁷ Rather than marking the declining importance of state citizenship, data suggests that aspects of globalization are actually increasing the individual’s need for legal recognition. Statelessness and irregular citizenship status (including undocumented migration) have been linked to increased vulnerabilities to a range of human rights violations, including the inability to access one’s basic ‘right to health,’⁸ to cross borders legally, and even the right to stay in one’s country of origin.⁹ These vulnerabilities are exacerbated by globalized security concerns, which increase an individual’s need for government-issued documentation in order to access a range of rights.¹⁰

Legal nationality is often an essential prerequisite for the protection and enjoyment of a wide range of human rights, yet status alone cannot guarantee rights protection. It is noteworthy that the international system currently equates citizenship with membership, while scholars such as Kelly Staples caution us not to automatically limit political membership to citizenship. Staples instead focuses on the relationship between inclusion and exclusion, as well as the way that ‘individuality is constituted and constrained within international relations.’¹¹ From this perspective, functioning citizenship is not something that can be proven with a passport. Rather, functioning citizenship signifies membership in a political community; membership that provides individuals with identity and human rights protections.

3 Semi-Citizenship and *de facto* Statelessness

Cohen’s concept of ‘semi-citizenship’ provides a new frame for assessing *de facto* statelessness, when individuals are ‘outside the country of their nationality [and] are unable or, for valid reasons, are unwilling to avail themselves of

7 Laura van Waas, ‘Nationality and rights’ in Brad K. Blitz and Maureen Lynch (eds), *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Edward Elgar 2011) 26.

8 Lindsey N. Kingston, Elizabeth F. Cohen, and Christopher P. Morley, ‘Limitations on Universality: The “Right to Health” and the Necessity of Legal Nationality’ [2010] 10(11) *BMC Health and International Human Rights*.

9 Steffen Mau, ‘Mobility Citizenship, Inequality, and the Liberal State’ [2010] 4(4) *International Political Sociology*.

10 See: John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2000).

11 Kelly Staples, *Rethorising Statelessness: A Background Theory of Membership in World Politics* (Edinburgh University Press 2012) 2.

the protection of that country.¹² This situation has traditionally been linked to the notion of effective nationality, and it is notable that some legal experts tasked with defining *de facto* statelessness believe that similar circumstances can occur within one's country of nationality.¹³ These individuals face situations similar to *de jure* statelessness, but there are no legally-binding protections for the *de facto* stateless within the 1954 Convention Relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness.¹⁴

Globalized categories of membership are based – in large part – on one's ability to access functioning citizenship. Legal nationality is not particularly useful for human rights protection, for instance, if a state is too weak to ensure human security. Individuals connected to failed states – states that have lost control of their territories, legitimate authority, and the ability to provide basic services such as access to clean water and basic education – may hold legal nationality but cannot rely on the state as their duty-bearer of human rights. In these cases, weak and failed states face a 'sovereignty gap' in which the sovereignty they are afforded by the international community does not accurately reflect an ability to provide the rights and protections afforded by citizenship.¹⁵ In response to such political crises (as well as economic push factors), many individuals undertake 'illegal' migration and often expose themselves to situations of *de facto* statelessness that severely limit their ability to access basic human rights. They are located in zones of semi-citizenship, in sites 'more akin to a spatially rescaled conception of the state than to clear-cut distinctions between two sides of a territorial border.'¹⁶ Unable to access functioning citizenship at home, these individuals seek out opportunity and security elsewhere – only to take on the burden of *de facto* statelessness in countries where they are often unable to access rights protections due to their fear of incarceration, deportation, and perhaps even physical abuse as a result of their undocumented migration status.

12 United Nations High Commissioner for Refugees, 'Expert Meeting – The Concept of Statelessness under International Law ('Prato Conclusions')' (2010) < <http://www.refworld.org/docid/4ca1ae002.html> > accessed 19 October 2013.

13 Ibid.

14 The UNHCR's refugee mandate covers the *de facto* stateless who qualify for refugee status, however. Massey (2010) recommends that the Office needed to clarify 'the scope and content of its mandate for the identification, prevention and/or reduction of *de facto* statelessness, and/or for the protection of *de facto* stateless persons' (66).

15 Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (OUP 2009) 3.

16 Anne McNevin, *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political* (Columbia University Press 2011) 3.

Using Cohen's framework, the *de facto* stateless exist somewhere on the membership spectrum between full and non-citizenship. They are denied the benefits of full and functioning citizenship, facing a plethora of human rights challenges similar to the situation of *de jure* stateless. Yet they hold legal nationality to a state; technically, they are members of a political community *somewhere*. The constructed categories of 'in' and 'out' groups do not fully apply to the *de facto* stateless, and their legal status contradicts traditional understandings of citizenship related to equality and rights. Although Cohen's work focuses on the 'inevitable' semi-citizenships that occur within bounded state societies, the realities of *de facto* statelessness highlight her concept's applicability at the global level. For as long as the world is marked by discrimination and migration 'push factors' that limit access to full political membership, the international community will be faced with the issue of *de facto* statelessness. The question is not whether this problem will continue, but rather how we will address it.

4 *De jure* Statelessness and Alternatives to Membership

Most scholarship and advocacy related to statelessness focus on the *de jure* variety, when individuals have no political membership – functioning or otherwise – to any country. 'Nationality is a legal bond between a state and an individual, and statelessness refers to the condition of an individual who is not considered as a national by any state.'¹⁷ This problem affects an estimated 12 million people worldwide, although the legal invisibility inherent to statelessness makes data-gathering difficult. The *de jure* stateless have 'no legal protection or right to participate in political processes, inadequate access to health care and education, poor employment prospects and poverty, little opportunity to own property, travel restrictions, social exclusion, vulnerability to trafficking, harassment, and violence.'¹⁸ The *de jure* stateless are unable to access the rights and protections provided by functioning citizenship, and their violated 'right to a nationality' serves as a root cause for other human rights violations. Experts tend to emphasize the necessity of legal

17 United Nations High Commissioner for Refugees, '1954 Convention Relating to the Status of Stateless Persons' <<http://www.unhcr.org/3bbb25729.html>> accessed 19 October 2013.

18 Katherine Southwick and M. Lynch, 'Nationality Rights for All: A Progress Report and Global Survey on Statelessness', Refugees International (2009) <http://www.refintl.org/sites/default/files/RI%20Stateless%20Report_FINAL_031109.pdf> accessed 17 August 2013.

nationality for human rights protection, and advocates contend that steps toward citizenship – including universal birth registration and the naturalization of marginalized minority populations – will prevent the negative impacts of *de jure* statelessness.

Although legal nationality is certainly an important factor for protecting human rights in our current world system, this narrow focus leads to other rights implications. First, the reality is that legal status alone will not cure the social ills affecting the world's *de jure* stateless populations. An emphasis on legal nationality fails to acknowledge the issue of functioning citizenship, which cannot be guaranteed by legal nationality alone. This is highlighted by *de facto* statelessness, which limits human rights protections for those who possess legal nationality. Shortcomings in the ways we currently approach membership uncover a worldwide 'citizenship gap,' or a 'lack of political mechanisms to ensure individual membership, power holders' accountability, and respect for human rights in a globalizing world system.'¹⁹ To address this gap and the vulnerabilities created by lack of functioning citizenship, new standards of membership must be considered. Alison Brysk and Gershon Shafir argue that existing resources from the citizenship tradition must be used to address protection gaps. New venues and forms of participation must be constructed to broaden human rights accountability, while 'people out of place' (such as the *de jure* and *de facto* stateless) require space in existing institutions and leverage within state structures. The relationship between formal state citizenship and new forms of global community must also be developed, thereby closing the divide between legal nationality and somewhat utopian notions of 'global citizenship' or 'cosmopolitan citizenship.'²⁰

Second, reliance on legal nationality excludes groups who do not conform to the state model. It forces many minority groups into state-sponsored identity categories, requiring peoples who do not identify with states (such as indigenous nations of the Iroquois Confederacy, or *Haudenosaunee*, in North America) to accept state citizenship in order to protect their human rights. Relatedly, states have an interest in identifying and regulating *de jure* stateless populations within their borders. In his analysis of Upland Southeast Asia, for instance, James C. Scott argues that the governance of hill tribes and the international community's reliance on legal nationality constitutes a form of

19 Alison Brysk, 'Conclusion: From Rights to Realities' in Alison Brysk (ed), *Globalization and Human Rights* (University of California Press 2002) 242-256; 246.

20 Alison Brysk and Gershon Shafir, 'Conclusion: Globalizing Citizenship?' in Alison Brysk and Gershon Shafir (eds), *People Out of Place: Globalization, Human Rights, and the Citizenship Gap* (Routledge 2004) 209-215; 210, 213.

internal colonialism.²¹ This view is in stark contrast to the Western ideal of the ‘social contract’ (in which the individual surrenders absolute freedom in exchange for state protection of fundamental rights), as well as oft-accepted ‘solutions’ to statelessness that rely on the provision of citizenship for upholding human rights. Although most discussions of statelessness as a human rights issue contend that the granting of legal nationality is a positive step toward rights protection, it is noteworthy that several groups – including many members of Europe’s Roma community and some indigenous nations – reject state citizenship. These marginalized communities are often ignored by scholars and advocates who only consider one type of inclusion: formal citizenship.

The international community’s reliance on state-sponsored identities and documentation, however, leaves little space for rights protection outside the confines of bounded, legal nationality. There are few (if any) developed theories of partial citizenship because it has always been regarded as the imposition of second-class status on vulnerable groups – and instances of statelessness generally support this view. However, Cohen’s concept of semi-citizenship may offer possibilities not only for the oppression of marginalized groups, but at the same time also opportunities for forms of formal inclusion that could provide some of the protections and benefits currently reserved for citizens.²² This requires us to move beyond the binary juxtaposition of ‘citizen versus non-citizen’ to consider the possibilities that exist along a spectrum of citizenship. This calls into question our understandings of political membership, while also prompting governments to respect so-called ‘universal’ human rights that are, in reality, limited by their close association with citizens’ rights.

Notably, Matthew Gibney’s work on ‘precarious residents’ (including unlawful migrants and asylum seekers awaiting status determination) provides recommendations for ensuring rights protection and political membership outside the bounds of traditional citizenship. Firstly, one potential standard for defining membership is the principle of *choice*. Membership should be available to anyone who chooses to live in a state. A second approach is to emphasize individuals’ situations as *subjects* of state power; a state can only legitimately rule if the people consent to such rule. Third, the principle of *societal membership* states that membership of a state should be composed of those who have a significant stake in the development and direction of

21 James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale, 2009).

22 Elizabeth F. Cohen, *Semi-Citizenship in Democratic Politics* (CUP 2009) 206.

the society. All three of these approaches extend membership beyond formal citizenship and base status on values of autonomy, democracy, and community. Importantly, such alternative approaches to membership extend the social goods of voice (freedom of expression and political participation) and security (security of residence or presence in a state) – rights that are often limited or denied entirely to non-citizens.²³ These approaches ensure a functioning level of membership, even in cases where an individual has not attained legal nationality to a state.

Ultimately the human rights implications of statelessness are not necessarily a sole result of legal status, but rather center on the *functionality* of citizenship – better understood as membership. All individuals require recognition by the international community as a full person worthy of human rights. Traditionally we have understood that recognition through the status of citizenship; an individual is recognized as fully human by a government, either through birthright citizenship or naturalization, and the state's status within the international community is conferred upon its citizens. That status is only valuable if one's relationship with the state is fully functioning – that is, if the citizen is able to access government protections ensured by the social contract. Both the *de facto* and *de jure* stateless would be better served if we expanded our understanding of functioning citizenship, however, to more critically consider the process of recognizing claimants of human rights. If rights are indeed universal and inalienable, then our reliance on legal nationality is not only inefficient – it directly violates the foundational norms that established human rights in the first place.

23 Matthew J. Gibney, 'The rights of non-citizens to membership,' in Caroline Sawyer and Brad K. Blitz (eds), *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (CUP 2011) 58-67; 43.