A rights-based approach to statelessness

Swider, K.J.

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1 Introduction

1.1 Research question and structure

In this thesis I argue that the current policies on statelessness fail to prioritize empowerment of affected persons. I suggest adopting a rights-based approach to statelessness policies to remedy that problem.

My main research question is:

- How should statelessness policies prioritize empowerment of affected persons?

To establish the relevance of the research question I explain how the current statelessness policies fail to prioritize empowerment of those they affect,[1] and make a case for why they should do so. Thus, two supporting research questions are:

- How do current statelessness policies fail to prioritize the empowerment of affected persons?
- Why should statelessness policies prioritize empowerment of affected persons?

Contemporary discourse on statelessness is focused on the avoidance of statelessness and the universal possession of a nationality. Such a focus is often framed as empowering to individuals affected by statelessness based on misleading claims that nationality somehow intrinsically entails rights and empowerment, and that statelessness is per definition a state of rightlessness.

This misunderstanding of the concepts of nationality and statelessness, and their relation to rights, creates confusion and incoherence within policies on statelessness, where the justifications for pursuing policy goals are unclear, and policy goals come into tension with each other. I argue that such tensions and incoherence are symptoms of a lack of a rights-based approach to statelessness policies.

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[1] Chapters 2-6 of the thesis.

Previous studies have problematized the way in which nationality and statelessness are defined under international law on the one hand, and how these concepts are framed when justifying statelessness policies on the other hand.[2] The suggested solutions, however, focused mostly on re-defining nationality and statelessness, often called de-facto definitions, or otherwise adjusting the understanding of these concepts in order to achieve coherence with policies. I suggest accepting what nationality and statelessness mean under international law, and revising policies on statelessness instead. I argue that by adopting a rights-based approach, statelessness policies can live up to their own claims about representing stateless persons, speaking on their behalf, and prioritizing their needs and interests. Re-thinking the concepts of nationality and statelessness, while being a useful exercise for understanding the core problems with policies on statelessness, is not a solution to problematic policies.

The thesis is structured as follows. Part I, which consists of chapters 2, 3 and 4, focuses on the meanings of concepts of nationality and statelessness. Deeply rooted yet unfounded assumptions that nationality is per definition good for everyone, and that statelessness is per definition problematic are at the core of the current policy's failures to empower affected persons. I analyse where such assumptions come from, and why they remain influential. I distinguish between the definitions of what nationality and statelessness *are* under international law on the one hand, and normative standards surrounding how these statuses *should be* acquired, lost, and how they *should* shape the relationships between individuals and states on the other hand. I argue that conflation of constitutive definitions with regulative standards leads to inaccurate discourse on nationality and statelessness and subsequently to misinformed policy justifications. Chapter 2 is dedicated to defining the terms 'nationality' and 'statelessness' as they function in international law. One of the most prominent sources of confusion about what nationality *is* and how it *should* operate is rooted in the relationship between the concepts of nationality, statelessness and (human) rights, which is discussed in chapter 3. Chapter 4 focuses on theories that conceptualize nationality as a form of contractual relationship between a person and a state, and in particular the role of voluntariness in state membership.

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[2] M. J. Gibney, 'Statelessness and citizenship in ethical and political perspective' in *Nationality and Statelessness under International Law* by A. Edwards and L. van Waas (eds.), (CUP 2014). See more in chapter 5, section 5.5.

Part II discusses the current legal and policy discourse on statelessness, identifies the way in which it fails to empower affected persons, and suggests improvements which also constitute the answer to the main research question. Chapter 5, on the basis of UN policy frameworks, identifies and describes two main statelessness policy goals, avoidance and protection, and one subsidiary goal, identification. Chapter 6 discusses how these goals come into tension with each other, and to what extent such tensions are dealt with in the current discourse on statelessness. Chapter 7 introduces a rights-based approach, and explains how it can be applied to statelessness policies to prioritize empowerment of affected persons. There I explain in what way the tensions described in chapter 6 are a manifestation of the lack of a rights-based approach in statelessness policies. Applying a rights-based approach to statelessness policies allows problematizing the current policy goals as focused on objectively quantifiable population-based targets, instead of addressing vulnerability through individual-centered empowerment and rights. I explain how current policies treat persons affected by the policies as objects rather than agents of envisaged change; they passively undergo changes that have been externally identified as 'good for them'. Empowerment through rights has the advantage of granting the rights-holders agency over whether, when and how to invoke their rights, thus achieving their ultimate participation in the direction and speed of desired changes. I argue that a rights-based approach is the key to statelessness policy becoming a tool of empowerment of those affected by these policies. Chapter 8 considers four case studies of policy responses to statelessness taken by various types of authorities, in different geo-political and historical contexts, and applies the rights-based approach to evaluate the extent to which they prioritize the empowerment of affected persons, and to illustrate what practical impact such an approach has not only on formulating, but also on executing policies.

One issue which is not addressed in this part or anywhere else in this thesis is that of disputed statehood and the meaning of the word 'state' in the definitions of nationality and statelessness. States are the creators and agents of nationality bonds, as is argued in chapter 2 below.[3] Understanding the concept of a state is a pre-requisite for understanding what nationality is, and

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[3] Cf. C. Vlieks, E. Hirsch Ballin, and M. José Recalde Vela, 'Solving Statelessness: Interpreting the Right to Nationality', *Netherlands Quarterly of Human Rights*, Vol. 35, No. 3, (2017), pp. 158-175.

the issue of disputed statehood is highly relevant for discussions on statelessness policies.[4] However, in-depth discussions about the nature of statehood would go beyond the scope and aims of this thesis, and are not necessary for understanding the main argument of this thesis, namely the lack of a rights-based approach in statelessness policies. An understanding of a state as an entity with a permanent population, a defined territory, a government, and a capacity to enter into relations with the other states based on the Montevideo Convention is adopted in this thesis, and not discussed much further.[5] This definition has been subjected to valid criticism,[6] and alternative ways to define statehood, among others through the recognition by third states, are common in scholarship.[7] Understanding the complexities of what constitutes a state, as well as taking a position on the statehood of some disputed states, are not essential for illustrating the deficiencies in the statelessness policy discourse that this thesis focuses on, and have therefore been largely excluded from the discussion.

1.2   Methods

I answer my research questions by analyzing legal and policy documents that deal with statelessness. My methods rely on descriptive and normative legal analysis, and critical discourse analysis.

The *descriptive legal method* involves describing how statelessness is regulated through legal norms and policy measures. The comparison acquires a *normative* character where the legal norms involved are in a hierarchical relation with each other and where arguments are made in favour of compliance of the lower level norms with the higher level norms.

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[4] See for the role of disputed statehood in the policy making on statelessness UNHCR, *Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, (20 February 2012), para. 12 – 14; and UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), pp. 11-12, paras. 19-21.
[5] Art. 1 of the Montevideo Convention on the Rights and Duties of States of 1933.
[6] See, for example, T. D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents', *Columbia Journal of Transnational Law*, Vol. 37, No. 2, (1998-1999), pp. 403- 458.
[7] See, for example, J. Crawford, 'The Criteria for Statehood in International Law', *British Yearbook of International Law,* Vol. 48, No. 1, (1977), pp. 93-182.

My primary sources consist of legal and policy documents on nationality and statelessness; to develop and support my analysis, I relied mostly on interdisciplinary academic and policy research on nationality and statelessness. In the analysis of primary sources, my strongest focus is on norms of the current international legal regime on statelessness, in particular the two UN Statelessness Conventions and UNHCR documents that support, build on, and implement them. Other international UN and regional conventions, and their supporting policy documents are also invoked to the extent they form a significant part of the dominant legal and policy discourse on statelessness. I also discuss some national legal and policy responses to statelessness mostly to illustrate through examples the effect international policy discourse is having on national implementing practices.

I assess the compatibility of national and international norms on statelessness with a rights-based approach, where the latter is the reference point for my *normative analysis*. In chapter 7 I justify the normative choice for a rights-based approach as the optimal policy approach to empowerment of the vulnerable. I subsequently conduct a normative analysis of the extent to which international legal norms, as well as the general discourse on statelessness are consistent with the rights-based approach. I conclude with suggestions on how the existing legal and policy discourse on statelessness can better embrace the rights-based approach, and I explain how that would lead to empowerment of those affected by statelessness, as well as to a systematic and coherent resolution of identified tensions within the policy regime on statelessness.

When analyzing my primary sources, in addition to the descriptive legal method I rely on *critical discourse analysis*, which is for the purposes of this thesis defined as systematic and retroductable investigation of texts with the aim of 'de-mystifying ideologies and power'.[8] Empowerment is a key concept to my main research question, and the central focus of critical discourse analysis. Descriptive legal methods are insufficient to detect opportunities for and obstacles to empowerment in the context of statelessness policy making, as they lack the research techniques of focusing on language as an autonomous carrier of (sometimes unintentional) power dynamics.

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[8] Adapted from R. Wodak and M. Meyer, 'Critical Discourse Analysis: history, agenda, theory and methodology' in *Methods for Critical Discourse Analysis* by R. Wodak and M. Meyer (eds.), (SAGE Publications 2009), p. 3.

Language is often approached in the context of legal research as a neutral tool that serves to achieve explicitly formulated or intended goals of law and policy makers. Critical discourse analysis refines this approach by focusing on how language by itself, with or without the intention of the authors, structures our perception of relevant events and actors, reflects implicit agendas, as well as constructs, maintains and alters ideologies and power relations.[9] This method involves close analysis of language as a form of 'social practice' that is connected to the situations, institutions and social structures that produce it. Language is seen as creating social and legal reality, while at the same time being created or reproduced by that reality. Consequently, language is a mechanism that sustains and reproduces the social status quo, but with a potential to also contribute to transforming it. For example, language can help produce, reproduce and alter (unequal) power relations between (for instance) social classes, women and men, ethnic/cultural majorities and minorities through the ways in which it represents things and positions people.[10] Critical discourse analysis is 'fundamentally interested in analysing opaque as well as transparent structural relationships of dominance, discrimination, power and control as manifested in language'.[11]

The concept of 'framing' is central to analysing the role of language in policies. Framing refers to a set of 'linguistic, cognitive and symbolic devices […] to identify, label, describe and interpret problems and to suggest particular ways of responding to them'.[12] Examples of frames in social constructivist theories include 'injustice frames, which identify victims and sources of causality, blame and culpable agents'[13], and 'human rights frames' that 'identify the bearers of

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[9] R. Wodak and M. Meyer, 'Critical Discourse Analysis: history, agenda, theory and methodology' in *Methods for Critical Discourse Analysis* by R. Wodak and M. Meyer (eds.), (SAGE Publications 2009), p. 10.

[10] Adapted to legal context from N. Fairclough and R. Wodak 'Critical discourse analysis' in *Discourse as Social Interaction* by T. van Dijk (ed.), (SAGE, London 1997), p.258; and R. Wodak and M. Meyer, 'Critical Discourse Analysis: history, agenda, theory and methodology' in *Methods for Critical Discourse Analysis* by R. Wodak and M. Meyer (eds.), (SAGE Publications 2009), pp. 3-10.

[11] R. Wodak and M. Meyer, 'Critical Discourse Analysis: history, agenda, theory and methodology' in *Methods for Critical Discourse Analysis* by R. Wodak and M. Meyer (eds.), (SAGE Publications 2009), p. 10.

[12] S. Rushton and O. D. Williams 'Frames, paradigms and power: global health policy-making under neoliberalism' *Global Society*, Vol. 26, No. 2 (Taylor&Francis 2012), pp. 147-167, as referenced in L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (2015), p. 800.

[13] R. D. Benford, D. A. Snow 'Framing processes and social movements: an overview and assessment' *Annual Review of Sociology*, Vol. 26 (2000), pp. 611-639, as referenced in L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (2015), p. 800.

entitlements and duties, specify the range of actions and outcomes required accordingly, and to locate those entitlements and duties within legally binding international law'.[14]

When analyzing language of policies it is important to keep in mind that language does not always accurately represent motivations and powers at work in policy making, nor does it always accurately reflect how policies are implemented in practice. Commentators observe, for example, that adding references to human rights in documents by international organizations does not necessarily have a factual impact on decision making.[15] Nevertheless, 'even the most cynical use of [for example] rights language may unwittingly advance the acceptance and internalization of related norms, and connect drafters with deeper normative paradigms that subtly shape potential policy solutions accordingly'.[16] Thus, even if the language of rights is used for image purposes, without initial plans for practical implications, once actors 'rhetorically accept a norm rather than deny it, it is that much harder to deny the action required to fulfil that norm'.[17] In this way language, which is not necessarily a flawless reflection of reality, is always a product of realities, and impacts perception of reality, hence soliciting special attention particularly where notions of power and empowerment through policies are at stake.

Critical discourse analysis is largely a descriptive method, and does not in itself carry a normative value judgement. It neither criticizes power nor suggests how it should be distributed or balanced. The existence of power is presumed, and the method helps to identify and understand the power structures. This method does not provide solutions to how power *should* be balanced; it helps to see how it *is* balanced in a social and legal system, in particular through the way it is reflected in language. Other normative methods need to be applied to classify specific

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[14] L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (2015), p. 800.

[15] A. Cornwall and C. Nyamu-Musembi, 'Putting the 'rights-based approach' to development into perspective', *Third World Quarterly*, Vol. 25, No. 8, (2004), pp. 1415–1437.

[16] M. Finnemore and K. Sikkink 'Taking stock: the constructivist research program in international relations and comparative politics', Annual Review of Political Science, Volume 4, (2001), pp. 391-416, as quoted in L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (2015), p. 800.

[17] L. Forman, G. Ooms, and C. E. Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?', *International Journal of Health Policy Management*, Vol. 4, No. 12, (2015), p. 800.

distribution of power as desirable or undesirable. To the extent that critical discourse analysis carries a normative character, it encourages awareness of one's own power, needs and interests.[18]

Although the largest part of my thesis relies on descriptive methods to analyse relevant texts, my main research question is normative in nature. To argue how statelessness policies *should* prioritize empowerment of affected persons I rely on the normative legal methods. I explain why right-based empowerment should be prioritized by policies that address vulnerability. I illustrate that not only specific legal rules, but also power relations that are created and reproduced through the language used in statelessness discourse, violate the normative framework of the rights-based approach. I suggest how laws and policies on statelessness, as manifested in norms and discourse, need to alter to embrace the rights-based approach and prioritize the empowerment of affected persons.

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[18] R. Wodak and M. Meyer, 'Critical Discourse Analysis: history, agenda, theory and methodology' in *Methods for Critical Discourse Analysis* by R. Wodak and M. Meyer (eds.), (SAGE Publications 2009), p. 7.