A rights-based approach to statelessness

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3 Nationality and rights

3.1 Introductory remarks

The concept of (human) rights plays an important role in how nationality is understood and conceptualized under international law. There are two main ways in which human rights rhetoric frames nationality.

Firstly, nationality is often presented as a means to achieve implementation of (human) rights, or as a gateway to human rights. It tends to be framed as a package of rights and benefits, sometimes with duties included as part of the package deal. I argue that such framing is problematic and often inaccurate. There undoubtedly exist practical and theoretical links between the concepts of nationality and rights, but it is important not to mistake those for defining properties of the status of a national. I discuss three such links. A first link consists of observing that in practice nationals tend to enjoy better access to (human) rights than non-nationals. A second link can be made through regulatory rules on what rights *should* be available to nationals. Thirdly, nationality and rights can be linked by defining nationality and statelessness through rights; such definitions are often referred to as *de facto* nationality and statelessness.[90] In section 3.2 I explain that none of these three links alter the fact that international law constitutively defines nationality independently of rights, and distinguishes between nationals and non-nationals without regard to the (human) rights situation of those concerned. Consequently, generalizations and assumptions that frame nationality as per definition guaranteeing rights, benefits and advantages for an individual are unjustified, and harmful in the context of policy making.

Second, nationality is framed by human rights rhetoric through the human right to a nationality, which is discussed in section 3.3. Although I am somewhat sceptical about the meaningfulness of conceptualizing the right to a nationality as a human right, it is not necessary for the purposes of

[90] As for example in L. N. Kingston, 'Statelessness as a Lack of Functioning Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 127-135; and J. Tucker, 'Questioning de Facto Statelessness by Looking at de Facto Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 276–284. See more in section 3.2.2 below.

my thesis to take a clear stance on whether the right to a nationality is a valid human right. I accept that it is part of the contemporary human rights discourse, as it features in a number of human rights conventions. I explore the implications of framing nationality as a human right for the policies on statelessness. In particular, I discuss to what extent the human right to a nationality gives rise to a duty to be a national, what the 'inalienability' of the human right to a nationality entails for stateless persons, and whether a case can be made for the existence of a human right to be stateless based on the human right to a nationality.

3.2 Nationality as a gateway to rights

3.2.1 Nationals' rights and human rights

Many authors rightly note that nationals are entitled to a set of legal rights, benefits and services which are not (as easily) accessible for non-nationals.[91] Matthew J. Gibney, for example, observes that '[i]n most countries, citizenship is a passport to some key social, economic and political goods that have a huge impact on the well-being of individuals and social groups'.[92] He categorizes the 'benefits of citizenship' into three groups: 'privileges' which involve access to government services and socio-economic rights, 'security' of residence which leads to sense of stability, and 'voice' which refers to various forms of political and societal participation.

Thus, while in theory human rights are an entitlement of all humans, in practice sometimes even access to human rights can be restricted to nationals:

> *While international human rights frameworks assert that 'all human beings are born free and equal in dignity and rights' and therefore have rights simply because they are*

[91] See UNHCR *Global Action Plan to End Statelessness* (2014), p. 1, where it reads: 'Stateless persons are often denied enjoyment of a range of rights such as identity documents, employment, education and health services', p.6. See also K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015, p. 42.

[92] 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), p. 51.

human, in reality there are clear linkages between citizenship status and one's ability to access fundamental rights.[93]

When normatively assessing observations about access to human rights being limited to nationals, two perspectives may come into tension with each other. On the one hand, it is largely deemed acceptable for a state to provide for its nationals better than it provides for non-nationals. On the other hand, human rights are to be enjoyed by all humans regardless of their status, as that is one of the core principles of the human rights framework.[94] It would appear that a state cannot discriminate between nationals and non-nationals in their access to human rights, but can discriminate in access to other types of benefits that do not fall under the category of human rights. Considering this, the human rights ideology cannot prescribe what kind of minimum content of human rights nationals should be entitled to, while at the same time remaining true to the claim that human rights are an inherent entitlement of all humans regardless of their status.

From the point of view of the human rights normative framework, the observation that nationals are better able to access and enjoy human rights than non-nationals should be evaluated as a negative phenomenon. This is not always apparent in academic writings on nationality and rights. The observation of the fact that nationals can access human rights better than non-nationals is sometimes taken for granted.[95] A 'pragmatic' approach which suggests dealing with the reality of certain human rights being restricted to nationals only, without criticizing it, leads to the normalization of a serious human rights problem. The (implicit) normative acceptance of discrimination between nationals and non-nationals in their ability to access human rights may result in (implicit) modifications of the normative ideal of inalienable universal equal human rights. Thus, imperfections of reality modify ideals of human rights, and the modified ideals are used to justify imperfections of reality. Such circular back and forth between observations and normative standards diminishes the value of normative frameworks which are meant to serve as

[93] L. N. Kingston, 'Statelessness as a Lack of Functioning Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), p. 128.
[94] Human rights are 'inalienable rights of all members of the human family', according to the preamble to the Universal Declaration of Human Rights of 1948.
[95] For example, L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), pp. 23-44.

tools for evaluating observations and holding reality up to certain standards, in this case the standard of inalienable universal equal human rights.

Laura van Waas, in particular, makes connections between human rights ideals and realities in the context of nationality and statelessness. She argues that in 'the situation of the stateless, the lack of a bond of nationality with any state, places some doubt on the inclusiveness of the term 'human' in human rights'.[96] She concludes that 'the notion of human rights as rights belonging to all human beings regardless of nationality or statelessness is not beyond question when the human rights framework is subjected to a more thorough analysis'.[97] If international law indeed limits the guarantee of certain rights to nationals only, the conclusion coherent with the ideal of human rights should be that the rights exclusive to nationals are not 'human rights', but 'nationals rights'. Establishing that the word 'human' in 'human rights' might not apply to all humans, even if that is subsequently described as a 'flaw' of the human rights framework,[98] erodes the importance of what the human rights ideology stands for, namely to include all humans without exceptions. Exclusion of some individuals from the scope of 'human' in human rights because of their legal status would not be just a flaw, but a fatal failure of the human rights ideology.

I therefore agree with the authors who argue that being human, and not being a national, entitles one to human rights,[99] and no exceptions to that rule can be justifiable from the perspective of the normative framework of human rights. Empirical observations that do not comply with this ideal should be critically assessed on the basis of human rights standards, and cannot be used to erode those standards. A finding that a certain right might not be inherently intended for all

[96] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), p. 28.
[97] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), p. 28.
[98] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), p. 28.
[99] L. N. Kingston, 'Statelessness as a Lack of Functioning Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), p. 135; See also G.-R. de Groot, *Staatsangehörigkeitsrecht im Wandel: eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit*, (Asser Institute 1988), p. 15, where the author argues that human rights should be enforceable without a nationality as well.

humans, not just in practice by also in theory, should lead to the conclusion that such a right is not a human right, but a national's right or a legal right of a different kind.

From this point of view, human rights ideology cannot provide a normative standard for asserting that states *should* provide access to certain human rights *specifically for their nationals*. The observation that nationals have better access to human rights than non-nationals should be evaluated as negative from the perspective of human rights, and cannot serve as a basis for a normative claim that human rights should play any role in the status of nationality.

Ideologically, national's rights and human rights are competing with each other for which rights they cover, as the same right cannot be a national's right and a human right at the same time. Nationality is inherently exclusive, as it delimitates the boundaries of a state's population, while human rights draw their reason for existence from being inclusive of all humans:

> *The point of human rights is that all humans have them. The point of nationality is that all humans do not. So nationality integrates to the extent that it compromises rights available to all human beings. Or, alternatively put, the expansion of human rights is at the expense of nationality.*[100]

If a right is claimed to be available to all humans, by dint of being a human right, the same right cannot be claimed for the exclusive enjoyment of nationals. At the same time, if a right is normatively claimed for exclusive enjoyment by nationals only, it can no longer qualify as a human right. Human rights discourse can therefore only offer limitations as to which rights (namely, human rights) can absolutely not be part of a normative claim about what content of rights nationality status should offer. One cannot rely on human rights discourse to argue that states should provide a certain minimum content of human rights exclusively for their nationals.

3.2.2 De facto and de jure definitions

[100] R. White, *How does nationality integrate?*, Paper submitted to the 2nd European Conference on Nationality (8-9 October 2001), as quoted in A. Harvey, 'Statelessness: the "de Facto" Statelessness Debate', *Journal of Immigration Asylum and Nationality Law*, Vol. 24, No. 3, (2010), p. 258.

Chapter 2 explained that the concept of rights plays no role in the international definitions of a national and a stateless person.[101] In the previous section I argued that human rights ideology cannot be used to substantiate a claim that nationality should have a minimum content of human rights. Many authors, however, maintain a normative standard that nationality status *should* in fact offer a minimum content of (human or otherwise) rights to its nationals.[102]

The normative/regulatory standard is then frequently translated into constitutive re-definitions of nationality through that minimum content of rights.[103] The reasoning is approximately as follows: if a nationality status does not at least secure access to some basic minimum rights, it is no (true) nationality. In this way nationality can be, implicitly or explicitly, defined through whether it offers access to certain rights. Similarly, statelessness, understood as a lack of nationality, may be implicitly or explicitly defined as lack of access to certain minimum rights. For example, statelessness is sometimes used synonymously with disenfranchisement,[104] or asylum lawyers may sometimes speak of refugees as being stateless to indicate that their state of origin does not protect them from danger,[105] thereby implicitly assuming that a nationality per definition involves protecting nationals from danger and not persecuting own nationals.[106]

[101] Although UNHCR documents occasionally, although in a highly ambiguous manner, seen to indicate that the UNHCR allows for some role of the concept of rights in the constitutive definitions of a national and a stateless person, see 3.2.3 below for a further discussion of this issue.
[102] See, for example, L. N. Kingston, 'Statelessness as a Lack of Functioning Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 127-135; J. Tucker, 'Questioning de Facto Statelessness by Looking at de Facto Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 276–284; B. K. Blitz and M. Lynch, 'Statelessness and the deprivation of nationality' , in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishers 2011), pp. 2-5; D. Weissbrodt and C. Collins, 'The Human Rights of Stateless Persons', *Human Rights Quarterly*, Vol. 28, No. 1, (2006) , p. 251.
[103] See on difference between regulatory and constitutive rules in chapter 2, section 2.1 above.
[104] B. K. Blitz and M. Lynch, 'Statelessness and the deprivation of nationality', in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishers 2011), pp. 2-4.
[105] See, for example, The Equal Rights Trust, *Unraveling Anomaly. Detention, Discrimination and the Protection Needs of Stateless Persons*, (London, July 2010), p. 80, which reads: 'The persecution suffered by refugees at the hands of their state must be placed on the high end of the spectrum of ineffective nationality. Consequently, all refugees, by virtue of not having an effective nationality, are stateless'.
[106] In fact, the *de facto* and *de jure* distinction occurs more often in the discourse on statelessness than in the discourse on nationality, since nationality does not have an explicitly elaborated *de jure* definition under international law, and thus the contrast of taking rights into account with the reality of how the concept of nationality functions under international law is less immediately apparent.

There is in principle no inherent problem with re-defining nationality or statelessness so as to make a reference to rights, as long as the authors are explicit about such definitions not reflecting equivalent international legal definitions. A national whose rights are violated is still seen, by international law, and many scholars,[107] as a national for as long as a state considers him or her to be a national, and a stateless person is still stateless regardless of the rights he or she might be able to access, for as long as no state considers him or her to be one of its nationals.

The emergence of normatively inspired definitions that involve rights, combined with the need to acknowledge existing international definitions, lead to distinguishing between two types of definitions – the 'legal'[108] ones, which are the international definitions discussed in chapter 2 above, and 'factual'[109] ones, which take into account the rights situation of a person. The former are also referred to as 'formal' or '*de jure*' definitions of nationality and statelessness, and the latter as 'effective' or '*de facto*' definitions. [110]

Such distinctions sometimes also occur in legal documents. For example, the Italian Supreme Court has refused to recognize Cuban nationality of a Cuban emigrant, who lost his right to stable residence, as well as access to numerous other rights in Cuba without having lost his Cuban nationality according to Cuban law. [111] The Court decided that the loss of residence rights and of other essential rights touched on the 'inalienable core'[112] of nationality, and therefore 'effectively'[113] amounted to the loss of nationality. The perspective of the Italian Supreme Court

[107] Katia Bianchini, for example, maintains that '[t]he non-enjoyment of rights attached to nationality does not constitute *de facto* statelessness but violation of other human rights', see K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015, p.27.
[108] L. N. Kingston, 'Statelessness as a Lack of Functioning Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 127-135.
[109] L. N. Kingston, 'Statelessness as a Lack of Functioning Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), p. 131; 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), p. 171, where the authors argue that an 'effective' nationality is a nationality where a person has an effective link with a state and where the he or she has 'full ability to enjoy his or her rights and perform his or her duties as a citizen'.
[110] Such as in J. Tucker, 'Questioning de Facto Statelessness by Looking at de Facto Citizenship', *Tilburg Law Review*, Vol. 19, No. 1-2, (2014), pp. 276–284.
[111] See Italian Supreme Court (in Italian - *Corte Suprema di Cassazione*), Nr. 25212/13, of 19 June 2013. See also commentary by G. Gyulai, in G. Gyulai 'Should nationality have a "minimum content"? – Italian Supreme Court passes landmark decision', *European Network on Statelessness Blog*, (19 September 2014).
[112] Italian Supreme Court (in Italian - *Corte Suprema di Cassazione*), Nr. 25212/13, of 19 June 2013, p. 8.
[113] Italian Supreme Court (in Italian - *Corte Suprema di Cassazione*), Nr. 25212/13, of 19 June 2013, p. 8.

is, however, rather exceptional for legal documents, as the distinction between *de facto* and *de jure* definitions of a national is mostly limited to scholarly writings.[114]

De facto definitions of nationality focus on what the person actually gets in terms of rights and benefits from the state of nationality, inspired by the idea that a national *should* have a certain standard of protection. If that standard is lacking, such a person is not (*de facto*/factually) a national. [115] The *de facto*/factual definitions of nationality are thus strongly rooted in normative/regulatory ideas about what nationality should be like, by claiming that bad nationality is no nationality. The normative ideas about what exact content of rights nationality should offer, and therefore what constitutes a bad nationality, differ between authors, and therefore there is no single agreed upon definition of a *de facto* national or a *de facto* stateless person.[116]

The *de facto* and *de jure* distinction occurs more often in the discourse on statelessness than in the discourse on nationality. This could be attributed to the fact that nationality does not have an explicitly elaborated *de jure* definition under international law, only an implicit one that can be derived from how the concept is used in international law. This is somewhat unfortunate, as nationality is often defined through rights without explicitly addressing the fact that such a definition is not consistent with how the concept functions under international law.[117]

However, a *de facto* definition of statelessness always implies a *de facto* definition of nationality. As statelessness is a lack of nationality, *de facto* statelessness is the lack of *de facto* nationality, in whatever way the latter is defined. For example, Weissbrodt and Collins speak of 'individuals who might technically have a nationality and yet are not able to obtain or enjoy the concomitant

[114] There are also occasional references to the distinction between *de jure* and *de facto* statelessness in earlier UN documents, see more in H. Massey, 'UNHCR and De Facto Statelessness', *UNHCR Legal and Protection Policy Research Series,* No. LPPR/2010/01, (Geneva, April 2010).
[115] Matheuw Gibney speaks of 'normative' and 'descriptive' statelessness instead of *de jure* and *de facto* statelessness, but essentially drawing the same distinction between the two, see 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), pp. 44-63.
[116] See more on defining nationality through specific rights in section 3.2.4 below.
[117] For example, B. K. Blitz and M. Lynch, 'Statelessness and the deprivation of nationality', in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishers 2011), pp. 2-5; D. Weissbrodt and C. Collins, 'The Human Rights of Stateless Persons', *Human Rights Quarterly*, Vol. 28, No. 1, (2006), pp. 245 – 276; The Equal Rights Trust, *Unraveling Anomaly. Detention, Discrimination and the Protection Needs of Stateless Persons*, (London, July 2010).

benefits and protections'[118] as *de facto* stateless, implying a *de facto* definition of nationality through certain benefits and protections. The Committee of Ministers of the Council of Europe defines the *de facto* stateless as those who possess a nationality, but where 'the state involved refuses to give the rights related to it',[119] assuming that there are (or should be) rights related to nationality, and thus creating an implicit definition of a *de facto* nationality.

3.2.3 Rights and UNHCR's constitutive definition of nationality

UNHCR's stance on nationality, statelessness, and rights[120] in the context of statelessness policy-making deserves special attention when exploring the understanding of nationality as a gateway to rights. UNHCR policy documents on the one hand suggest there is some space for establishing nationality or statelessness on the basis of the rights situation of affected persons, while on the other hand often the same documents re-affirm commitment to a constitutive definition that leaves no space for the role of rights.[121]

The UNHCR Handbook on several occasions cautiously suggests that the existence of nationality can be established by looking at whether a person is being 'treated as a national', which may mean getting access to public benefits that are usually reserved for nationals,[122] such as access to a passport,[123] and the ability to enter, re-enter, and reside in the relevant state.[124] The UNHCR thus seems to indicate that access to certain rights may play a role in distinguishing between nationals and non-nationals, and therefore constitutively define nationality and statelessness. At the same time, the Handbook maintains there is a difference between these rights being denied to a national, and a person not being a national on the basis of denial of those rights.[125] Where exactly the difference lies is, however, notoriously unclear. The UNHCR states that it is a matter

[118] D. Weissbrodt and C. Collins, 'The Human Rights of Stateless Persons', *Human Rights Quarterly*, Vol. 28, No. 1, (2006), p. 251.
[119] Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children*, (9 May 2009), pp. 20-21.
[120] The UNHCR's approach to statelessness policies is addressed in more detail in part II of the thesis.
[121] Definition of nationality is discussed in chapter 2, section 2.4 above.
[122] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 42.
[123] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 42
[124] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), p. 12, para 53. See also the judgment by the Italian Supreme Court (in Italian - *Corte Suprema di Cassazione*), Nr. 25212/13, of 19 June 2013, and discussion of this case in section 3.2.1 above.
[125] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), paras 42, 43, 53.

of considering individual circumstances of each case, but how such circumstances should be considered and assessed is not explained. Some examples are given, but these do not lead to generalizable conclusions. Thus, according to the Handbook, inconsistent treatment by various state authorities in the person's access to rights associated with nationality 'may be an instance of a national's rights being violated, the consequence of that person never having acquired nationality of that State, or the result of an individual having been deprived of or losing his or her nationality',[126] but no indication is given on how to decide which of the three scenarios is taking place.

In a similarly undecided fashion, the UNHCR Handbook states that:

> *In cases where there is evidence that an individual has acquired nationality through a non-automatic mechanism dependent on an act of a State body, subsequent denial by other State bodies of rights generally accorded to nationals indicates that his or her rights are being breached. That being said, in certain circumstances the nature of the subsequent treatment may point to the State having changed its position on the nationality status of that individual, or that nationality has been withdrawn.* [127]

The assumption of nationality appears to be stronger in cases where it was acquired through a non-automatic mechanism with an explicit act of a state, but even in those cases denial of rights may be a ground for establishing that a person is not a national, according to the Handbook.

The same Handbook, after suggesting that rights may sometimes play some kind of undetermined role in establishing the existence of a nationality bond, proclaims that the human rights situation of an individual does not play a role in determining whether he or she is a national:

> *The fact that different categories of nationality within a State have different rights associated with them does not prevent their holders from being treated as a "national" for the purposes of Article 1(1) [of the 1954 Convention]. Nor does the fact that in some*

[126] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 42.
[127] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 43.

> *countries the rights associated with nationality are fewer than those enjoyed by nationals of other States or indeed fall short of those required in terms of international human rights obligations. Although the issue of diminished rights may raise issues regarding the effectiveness of the nationality and violations of international human rights obligations, this is not pertinent to the application of the stateless person definition in the 1954 Convention.*[128]

According to this passage, it appears that nationality is still a nationality even if it does not offer access to rights.

The UNHCR's position on whether rights do or do not define nationality is therefore unclear. The Handbook refers to nationality as 'a fundamental aspect of the system of human rights protection',[129] but does not advise systematically treating rightless nationals as stateless persons. It seems that the Handbook, having as its main purpose to guide states in policies on protection of stateless persons,[130] wants to allow for a possibility to identify an individual as stateless on the basis that such individual does not have access to some important rights in a country that would otherwise be seen as a country of nationality.[131] In doing so, the Handbook is however extremely cautious not to define nationality as a set of specific rights, and not to claim that a violation of any specific right necessarily leads to the conclusion that a person is not a national, as that would fundamentally alter the understanding of nationality under international law.[132] The result is a contradictory message that nationality is to some extent defined by the package of human rights it offers, but that the lack of access to those rights is not necessarily the same as lack of nationality.

[128] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 53.
[129] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014), para 52.
[130] The UNHCR policies on statelessness are discussed in more detail in Part II of the thesis, in particular chapters 5 and 6.
[131] Chapter 7 below elaborates a rights-based approach to statelessness policies that focuses on empowerment of affected persons through rights without the need to alter the definition of nationality.
[132] See more on attempts to constitutively redefining nationality through rights in section 3.4; chapter 5, section 5.5; and chapter 9.

3.2.4 Zooming in on selected rights associated with nationality

3.2.4.1 Introductory remarks

One of the biggest challenges with regard to generalized *observations* that nationals enjoy access to rights, *regulative rules* that nationality should offer rights, and *constitutive definitions* that nationality is a set of rights, is determining which rights specifically (should) fall within that minimum content of national's rights. In section 3.2.2 I argued that human rights and nationals' rights cannot overlap from the point of view of human rights ideology, even if in practice nationals are often better able to give effect to their human rights than stateless persons. The frequently mentioned nationality-specific rights are 'the right to permanent residence within the state, the right to freedom of movement within the state, the right to vote and to be elected or appointed to public office, the right of access to public services, and the right to diplomatic protection when outside the country'.[133] Rights enjoyed by nationals are often described as *commonly* (or '*normally*')[134] practised *in most countries*. Thus, even though scholars note that certain rights are generally better accessed by nationals than by non-nationals, they do not claim a universally observable minimum content of rights which is without failure ensured by all states for all of their nationals, and which is at the same time not ensured for non-nationals.[135] It is highly unlikely that a right exists that is without failure guaranteed for every single national by his or her state of nationality. Some rights, however, stand out in discussions on nationality as 'core' nationals' rights. Those are the right to vote, the right to enter the country of nationality, and the right to diplomatic protection.[136] This section analyses briefly these three rights, and considers how they can be linked to the concept of nationality.

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[133] B. Manby, *Citizenship Law in Africa. A Comparative Study*, 3rd edition, (Open Society Foundation 2016), p. ix.
[134] A. Edwards, 'The meaning of nationality in international law in an era of human rights: Procedural and substantive aspects' in *Nationality and Statelessness under International Law* by A. Edwards and L. van Waas (eds.), (CUP 2014), p. 30. See more on the concepts of normality and normalization in chapter 5, section 5.4.4 below.
[135] Unless nationality is redefined as a status that provides that specific set of minimum rights, see further discussions on this in section 3.4; chapter 5, section 5.5; and chapter 9. See also G. Gyulai 'Should nationality have a "minimum content"? – Italian Supreme Court passes landmark decision', *European Network on Statelessness Blog*, (19 September 2014), where the author describes defining nationality through its minimum content as opening the 'Pandora's box' where many nationals would no longer qualify as nationals if the minimum content of their nationals' rights is violated.
[136] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), pp. 26-27. See UN Sub-

3.2.4.2 Right to vote

The right to vote and the rights of political participation are often described as classical rights of nationals.[137] In Aristotle's Politics, a citizen is defined as someone who 'share[s] in the civic life of ruling and being ruled in turn' and 'enjoys the right of sharing in deliberative or judicial office'.[138] Authors *observe* that the right to vote is almost always exclusively available to nationals in the state of their nationality.[139] Numerous theories exist on the importance of political participation, maintaining that (at least) nationals *should* have the right to vote in the state of their nationality.[140]

In some scholarly works, nationality is even constitutively defined through the right to vote, or rights of political participation more broadly. Richard Bellamy, for example, describes citizenship as 'linked to the *privileges* of membership […] of democracy – most essentially, the right to vote' [emphasis added].[141] In his study, citizenship is defined not as the mere legal fact of membership in any state, but as access to the privileges of such membership. The privileges must include voting rights in a democratic state. There are more substantive requirements

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Commission on the Promotion and Protection of Human Rights, *The rights of non-citizens: final report of the Special Rapporteur, David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283*, E/CN.4/Sub.2/2003/23 (26 May 2003), where it is established that most human rights are to be enjoyed by non-nationals as well as nationals.

[137] In fact, the word 'citizenship' is sometimes used to emphasise the political participation aspects of state membership, see more in chapter 2, section 2.2 above. See also H. Lardy, 'Citizenship and the Right to Vote', *Oxford Journal of Legal Studies,* Vol. 17, No. 1, (Spring 1997), p. 75.

[138] Aristotle, *Politics*, edited by R. F. Stalley, translated by E. Barker, (Oxford University Press 2009), p. 108.

[139] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), p. 28; A. Blais, L. Massicotte, and A. Yoshinaka, 'Deciding who has the right to vote: a comparative analysis of election laws', *Electoral Studies*, Vol. 20, No. 1, (March 2001), pp. 41–62. Although there are also studies that try to de-couple the concepts of citizenship and enfranchisement, both through empirical observations, as well as theoretical analysis, see, for example, G. M. Rosberg, 'Aliens and Equal Protection: Why Not the Right to Vote?', *Michigan Law Review*, Vol. 75, No. 5/6, (1977), pp. 1092-1136; H. Lardy, 'Citizenship and the Right to Vote', *Oxford Journal of Legal Studies,* Vol. 17, No. 1, (Spring 1997), pp. 75-100; S. Day and J. Shaw, 'European Union electoral rights and the political participation of migrants in host polities', *International Journal of Population Geography*, Vol. 8, No. 2, (2002), pp. 183-199.

[140] See R. Bellamy, *Citizenship. A Very Short Introduction*, (Oxford University Press 2008); A. Keyssar, *The Right to Vote: The Contested History of Democracy in the United States,* (Basic Books 2009); J. Fishkin, 'Equal Citizenship and the Individual Right to Vote', *Indiana Law Journal*, Vol. 86, No. 4, (2011), pp. 1289-1360.

[141] R. Bellamy, *Citizenship. A Very Short Introduction*, (Oxford University Press 2008), pp. 1-2.

attached to Bellamy's definition of citizenship, consisting of rights, duties and civic equality among all citizens:

> *Citizenship is a condition of civic equality. It consists of membership of a political community where all citizens can determine the terms of social cooperation on an equal basis. This status not only secures equal rights to the enjoyment of collective goods provided by the political association but also involves equal duties to promote and sustain them – including the good of democratic citizenship itself.*[142]

According to this approach, if a state is not a democracy, it has no citizens. Persons who lack the right to vote, in democratic or nondemocratic states, are not citizens.[143] The author admits that under such definition a large proportion of the world's population would not qualify as citizens.[144] He does not refer to such non-citizens as 'stateless persons', but rather as 'at best guests and at worst mere subjects'.[145] His notion of citizenship thus clearly deviates from the international legal discourse on nationality and statelessness.[146] Citizenship is not in binary opposition to statelessness, and he discusses citizenship not as state membership per se, but as a specific type of such membership. His terminological framework is a clear illustration of how the right to vote can be explicitly theorized *to define* what state membership *is*, and not merely to *prescribe* what state membership *should* offer, or *observe* what state membership *often entails*. It is also an illustration of how radically different such a terminological framework is from the reality of how nationality is understood under international law. Enfranchisement and nationality are two different issues under international law, and one does not define the other. Not all who are nationals according to international law enjoy the right to vote by definition. There is no ground under international law for asserting that by denying the right to vote to its national a state thereby withdraws nationality. At the same time, not all who enjoy the right to vote are necessarily nationals, as in some states non-nationals take part in the democratic processes in one

[142] R. Bellamy, *Citizenship. A Very Short Introduction*, (Oxford University Press 2008), p. 17.
[143] R. Bellamy, *Citizenship. A Very Short Introduction*, (Oxford University Press 2008), p. 59.
[144] R. Bellamy, *Citizenship. A Very Short Introduction*, (Oxford University Press 2008), p.3-4, where the author states that '[d]emocratic citizenship is as rare as it is important', and estimates that about 40% of the world's population under his definition are not citizens.
[145] R. Bellamy, *Citizenship. A Very Short Introduction*, (Oxford University Press 2008), p. 4.
[146] See more in chapter 2, sections 2.2-2.4, on international law defining nationality and statelessness as each other's binary opposites.

way or another.[147] Thus, a disenfranchised national is still a national under international law, and enfranchised non-nationals exist in many states.

Thus, the right to vote is closely associated with the concept of nationality. There is evidence that enfranchisement is in practice strongly correlated with the nationality status, there are normative standards that require nationals to have political participation rights, and some authors even define nationality through the right to vote. However, it is important to remember that the right to vote does not constitutively define nationality under international law.

3.2.4.3 Diplomatic protection and the right to enter the territory of the state of nationality

Two other rights that are often seen as the core content of nationality are the right of diplomatic protection and the right to return to one's own country. These two rights are frequently invoked together, as they are both linked to the domain of classic international law regulating rights and duties of states vis-à-vis other states. In particular, the state's right to extend diplomatic protection to its nationals, which plays a role in the *Nottebohm* judgment discussed in the previous chapter, and the state's duty to accept its own nationals into its territory. This right and duty of states vis-à-vis other states which occur as a result of a nationality bond created by a state with a person, are seen by some authors as cornerstones of what constitutes a nationality bond,[148] possibly because of their roots in the pre-human rights era of international law. There is, however, not much reason for asserting that an individual's right to diplomatic protection by the state of nationality, and his or her right to enter the state of nationality, constitutively define what a nationality bond *is* under international law.

It must first be noted that the rights (of diplomatic protection) and the duties (to take back nationals) of states vis-à-vis other states do not necessarily give rise to equivalent rights of

[147] See more in S. Day and J. Shaw, 'European Union electoral rights and the political participation of migrants in host polities', *International Journal of Population Geography*, Vol. 8, No. 2, (2002), pp. 183-199; G. M. Rosberg, 'Aliens and Equal Protection: Why Not the Right to Vote?', *Michigan Law Review*, Vol. 75, No. 5/6, (1977), pp. 1092-1136.

[148] K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015, pp. 40-42.

individuals under international law. There is no individual right to diplomatic protection under international law. If a state refuses to exercise its right to extend diplomatic protection to its national, that national has no international law norm to invoke to reproach the state of nationality for refusing diplomatic protection. Nor can such a national claim that he or she is no longer a national of the relevant state.[149] Thus, the right of diplomatic protection under international law is the right of a state, and not of a person. It does not define what nationality is, but is rather the consequence of a nationality bond, which the relevant state is free to exercise at its own discretion.

The individual right to return to one's own country undoubtedly exists in the international human rights discourse, yet it is not necessarily related to the state's obligation vis-à-vis other states to accept its nationals into its territory. Being two separate issues, neither the right of an individual to return to one's own country, nor the duty of a state to accept its nationals into its territory defines the concept of nationality under international law. If a state does not comply with its duty to accept its nationals into its territory, it may be said to violate its duty towards other states under international law, and, as a separate matter, the right of its nationals to return to their own country, but it by no means withdraws thereby nationality from its nationals.[150] Special rapporteur of the International Law Commission Manley O. Hudson even argued that the duty to accept former nationals persists even after the state withdraws its nationality,[151] thus decoupling this duty from the definition of nationality under international law even further. A duty to accept

[149] Although the international policy analysis of events of the Second World War sometimes invoked an argument about the (*de facto*) statelessness of German Jews, on the basis that Nazi regime refused diplomatic protection to this segment of its population. See more in H. Massey, 'UNHCR and De Facto Statelessness', *UNHCR Legal and Protection Policy Research Series,* No. LPPR/2010/01, (Geneva, April 2010), pp. 2-4; M. O. Hudson, Special Rapporteur of the International Law Commission, report 'Nationality, Including statelessness', *Yearbook of the International Law Commission*, Vol. II, Doc. No. A/CN.4/50, (1952), p. 7.

[150] Katia Bianchini acknowledges that denial of diplomatic protection or the right to return does not necessarily lead to the conclusion that the person is not a national, but nevertheless singles out these two rights as essential to the concept of nationality. See K. Bianchini, *The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States*, PhD thesis defended at the University of York, UK, in April 2015, pp. 40-42. See also the Italian Supreme Court (in Italian - *Corte Suprema di Cassazione*), Nr. 25212/13, of 19 June 2013, and commentary by G. Gyulai, in G. Gyulai 'Should nationality have a "minimum content"? – Italian Supreme Court passes landmark decision', *European Network on Statelessness Blog*, (19 September 2014). See a discussion of this case in section 3.2.2 above.

[151] M. O. Hudson, Special Rapporteur of the International Law Commission, report 'Nationality, Including statelessness', *Yearbook of the International Law Commission*, Vol. II, Doc. No. A/CN.4/50, (1952), p. 10. See also League of Nations, *Special Protocol Concerning Statelessness*, 12 April 1930, C.27.M.16.1931.V, available in G.-R. de Groot and O. W. Vonk, *International Standards on Nationality Law*, (Wolf Legal Publishers 2016), p. 100.

a person into a state's territory does not necessarily mean such person is (still) a national, and the non-fulfillment of such duty does not mean a person is not a national. The contrary would lead to an absurd situation where states would be able to get rid of their duty to admit their nationals simply by refusing to admit them and thereby denationalizing them.[152]

Thus, once a nationality bond exists between a state and an individual, the state of nationality may derive international rights and duties from this bond vis-à-vis other states. The exercise of such rights and compliance with such duties among states do not, however, influence in any way the existence of the nationality bond, and thus do not define it. The nationality bond calls these rights and duties into existence (which may persist after the termination of the bond), but the exercise of rights and compliance with duties by states are not a factor in the international definition of nationality.

3.2.5 What about nationals' duties?

The issue of duties of individuals towards the state of nationality is rarely critically addressed in the contemporary Western discourse on nationality,[153] but is nevertheless often assumed to be part of the nationality package deal.[154] The concept of duties sometimes comes up in the definitions of a national in national legal systems. Citizenship of the Republic of Lithuania is, for example, defined as 'the permanent legal relationship of a person with the Republic of Lithuania based on mutual rights and responsibilities',[155] and the citizenship of the Republic of Moldova as a

[152] See also A. Harvey, 'Statelessness: the "de Facto" Statelessness Debate', *Journal of Immigration Asylum and Nationality Law*, Vol. 24, No. 3, (2010), p. 260.
[153] For notable exceptions that refer to the burdens of nationality alongside the benefits, see E. F. Cohen, *Semi-Citizenship in Democratic Politics*, (CUP 2009), chapter 5; and 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), pp. 61-62. Here I refer to duties of individuals towards their states of nationality, not the correlative duties of states which make the rights of nationals implementable. See a discussion on rights and correlative duties of states in section 3.3.3 below.
[154] See, for example, N. Green and T. Pierce, 'Combatting statelessness: a government perspective', *Forced Migration Law Review*, No. 32, (2009), p. 34, who define a national as 'a person owing allegiance to and entitled to the protection of a sovereign state'.
[155] Law on the Citizenship of Republic of Lithuania, No XI-1196, of 2 December 2010, art. 2(8).

bond 'generating mutual rights and obligations between the state and the individual'.[156] It is interesting to note that those are general references to the existence of some reciprocal rights and duties. Even though specific rights may be guaranteed to nationals by state laws, and specific duties may be imposed, those rights do not define the state-national relationship. As a result, violation of any specific right and non-fulfilment of any specific duties cannot, also on the national level, lead to the conclusion that a person is not a national.

The Equal Rights Trust, in its study on statelessness, asserts that 'the most tangible components of an effective nationality are the existence of reciprocal rights and duties between the state and the individual'.[157] The study continues by developing a mechanism for establishing whether the relevant rights of nationals are fulfilled, and therefore whether a nationality is effective, but does not speak of the role of duties.[158] This is illustrative of how the concept of a national's duties is treated in modern discourse on nationality. Nationals' duties are often mentioned in passing, their existence vaguely justified by the assertion that nationals also enjoy rights, and not theorized much further. Little attention is paid to which duties exactly nationals *should* owe to a state, whether any of those duties can define what nationality *is*, whether, for example, excessive or unreasonable duties are capable of rendering a nationality ineffective. The lack of attention to nationals' duties, while such duties can be quite burdensome and potentially life-threatening,[159] contributes to the unhelpful image of nationality as a status inherently beneficial for the individual.[160]

3.3 Nationality as a (human) right

[156] Law on the Citizenship of the Republic of Moldova, No. 1024-XIV, of 2 June 2000 [including amendments up to September 2014], art. 3. Similar references to rights and duties can be seen in the Citizenship laws of Russia and Ukraine, see Federal Law on the Citizenship of Russian Federation, N 62-FZ, of 31 May 2002 [including amendments up to 2014], art. 3; and Law on the Citizenship of Ukraine, N 13, of 2001 [including amendments up to February 2016], art. 1.
[157] Equal Rights Trust, *Unraveling Anomaly. Detention, Discrimination and the Protection Needs of Stateless Persons*, (London, July 2010), p. 81.
[158] Equal Rights Trust, *Unraveling Anomaly. Detention, Discrimination and the Protection Needs of Stateless Persons*, (London, July 2010), pp. 81-82.
[159] Such as obeying totalitarian despotic laws, not leaving the territory of a state without authorization, military service duties and so on.
[160] See more a discussion on how the assumption about nationality being inherently good is problematic for policy making in section 3.4, chapter 5, section 5.5, and chapter 6 below.

3.3.1 The human right to a nationality

In addition to nationality being linked to rights in various ways, the human rights discourse also features the human right to a nationality. The Universal Declaration of Human Rights proclaims that:

> *Everyone has the right to a nationality.*[161]

Some scholars have questioned whether the right to a nationality is a genuine human right.[162] It has been established in the previous section that having a nationality does not by definition come with access to any rights, benefits or privileges. Moreover, nothing in the definition of nationality prevents it from entailing rather unpleasant duties.[163] A human right to such a 'surprise package'[164] of possible joys or sorrows makes little sense.

Laura van Waas argues that the existence of the human right to a nationality is an attempt to remedy the 'flaw' of the human rights framework that some human rights remain the exclusive privilege of nationals.[165] She submits that:

> *If the right to a nationality were fully realized, then no one would be without this legal bond and unable to access the related rights.*[166]

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[161] Universal Declaration of Human Rights, art. 15. See also international treaties protecting the right to nationality for specific groups, such as UN International Covenant on Civil and Political Rights of 1966, art. 24(3), UN Convention on the Rights of the Child of 1989, art. 7; UN Convention on the Elimination of all Forms of Discrimination Against Women of 1979, art. 9 ; Convention on the Rights of Persons with Disabilities of 2006, art. 18; and regional Conventions, such as the Council of Europe European Convention on Nationality of 1997, art. 4(a); American Convention on Human Rights of 1969, art. 20.

[162] C. Hanjian, *The Sovrien: An Exploration of the Right to be Stateless*, (Polysipre, 2003), p. 31; T. A. Aleinikoff, 'Theories of Loss of Citizenship', *Michigan Law Review*, Vol. 84, No.7, (1986), pp. 1487-1488; G.-R. de Groot, *Staatsangehörigkeitsrecht im Wandel: eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit*, (Asser Institute 1988), pp. 15-17.

[163] See more in section 3.2.5 above on the relationship between nationality and duties.

[164] G.-R. de Groot, *Staatsangehörigkeitsrecht im Wandel: eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit*, (Asser Institute 1988), pp. 15-17.

[165] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), pp. 28.

I disagree with this position. There is no basis for asserting that if the right to a nationality were fully realized the situation with regard to access to any rights by individuals would improve. Under the current international definition of nationality, a world consisting of solely nationals is not conceptually incompatible with a world full of human rights abuses. Numerous nationals continuously experience human rights abuses, which also challenges the claim that if everyone becomes a national, everyone will also be able to access human rights.

As Hugh Massey rightly points out:

> *[T]he right to a nationality is distinct from the rights attached to nationality, and the violation of one does not entail the violation of the other. For instance, a State could violate the rights that must be granted to nationals without actually violating the right to nationality. This is the case of dictatorships where all nationals, except for an ethnic group, are denied the right to a passport, the right to vote, and the right to take part in the civil and political life.*[167]

Nevertheless, the notion that nationality is a human right seems to have largely settled in the international legal discourse,[168] and has even made its way into some national laws.[169] As Peter Uvin observed, '[h]uman rights, once set down on paper, never die'.[170] This section considers the consequences of accepting the human right to a nationality for the phenomenon of statelessness. Sub-section 3.3.2 discusses whether and under which conditions statelessness is a violation and a waiver of a right to a nationality; sub-section 3.3.3 questions whether the human right to a

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[166] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), p. 28.
[167] H. Massey, 'UNHCR and De Facto Statelessness', *UNHCR Legal and Protection Policy Research Series,* No. LPPR/2010/01, (Geneva, April 2010), pp. 37-38.
[168] See H. Massey, 'UNHCR and De Facto Statelessness', *UNHCR Legal and Protection Policy Research Series,* No. LPPR/2010/01, (Geneva, April 2010), pp. 33-35; C. A. Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', *International Journal of Refugee Law*, Vol. 10, No. 1-2, (1998), pp. 159-160. Universal Declaration of Human Rights declares everyone's right to a nationality, and so do many international conventions. It is interesting to note that the American Convention on Human Rights contains a right to the nationality of the country of birth, if no other nationality is acquired, see art. 20. The European Convention on Human Rights, on the other hand, contains no article on the human right to a nationality. Some recent case law of the ECHR has derived certain nationality rights from the Article 8 on respect for private life, see in particular ECHR cases Genovese vs. Malta of 11 October 2011, Nr. 53124/09; Ramadan vs. Malta of 21 June 2016, Nr. 76136/12; and K2 vs. UK of 7 February 2017, Nr. 42387/13.
[169] See, for example, Law on the Citizenship of the Republic of Moldova, No. 1024-XIV, of 2 June 2000 [including amendments up to 2014], art. 7, which guarantees 'everyone´s right to a citizenship'.
[170] P. Uvin, 'From the right to development to the rights-based approach: how 'human rights' entered development', *Development in Practice*, Vol. 17, No. 4–5, (2007), p. 598.

nationality gives rise to a duty to be a national; and sub-section 3.3.4 considers whether the human right to a nationality gives rise to the human right to become or remain stateless.

3.3.2 Violating and waiving the human right to a nationality: involuntary and voluntary statelessness

This section considers to what extent statelessness can be theorized as a human rights violation or a waiver of the right to a nationality, from the point of view of human rights.

In order to establish whether statelessness is always a violation of the right to a nationality, it is necessary to start by distinguishing between voluntary and involuntary statelessness.[171] In international policy documents on statelessness, the concept of 'voluntary statelessness' refers not only to the case of individuals who consciously choose to be stateless as a matter of conviction,[172] but also to cases where an individual refuses a specific nationality which is practically available for him or her, for whatever reasons.[173] In the latter case voluntarily stateless individuals might not necessarily want to be stateless as a matter of principle or ideology, but merely prefer statelessness to the nationality that is practically accessible to them. They may be open to acquiring a different nationality if it is accessible to them.

Cases of involuntary statelessness, where an individual cannot access any nationality of any state whatsoever, are cases of a violation of a human right to a nationality. Cases of voluntary statelessness are, however, not a violation of the human right to a nationality, but merely a choice of an individual not to exercise that right in his or her specific circumstances. Comparing nationality to other human rights, refusal to exercise the right to vote by an enfranchised individual is also not a violation of the right to vote.[174] Refusal to work is not a violation of the

[171] This distinction is also essential later in the thesis when considering the implications of applying rights-based approach to policies on statelessness. See chapter 7, section 7.3 below.
[172] See for an example of a personal account of a contentious objection against having a nationality, C. Hanjian, *The Sovrien: An Exploration of the Right to be Stateless*, (Polysipre, 2003).
[173] UNHCR *Handbook on the Protection of Stateless Persons* (Geneva 2014) , paras. 51, 158-162.
[174] Although in academic literature an assumption to the contrary is sometimes made implicitly. For example, Linda McKay-Panos states that 'the right to vote is considered to be part of respecting basic human dignity', and subsequently classifies declining voter turnout as a problem, in L. McKay-Panos, 'Right to Vote', *LawNow*, Vol. 29,

right to work. These examples may be theorized as examples of violation of individuals' duties - to vote or to work - and some legal systems do indeed impose such duties.[175] However, having the right to vote does not in itself generate a duty to vote, and having the right to work does not generate a duty to work. Similarly, having a right to a nationality does not generate a duty to be a national. A duty to be a national may be theorized as a separate matter, and an instance of voluntary statelessness may be an instance of a violation of a duty to be a national, but it is not a violation of the human right to a nationality.

The next section analyses in more detail the relation between rights and duties, and explains why the duty to be a national cannot be derived from the concept of everyone's right to a nationality.

Since voluntary statelessness is not a violation of the right to a nationality, another question is whether it can be seen as a waiver of the right to a nationality. The prevalent line of thought in the human rights discourse on this issue is that a person cannot choose to fully waive his or her human rights. The rights will still always be there by virtue of the humanity of the rights-holder:

> *[O]ne cannot fully renounce, transfer, or otherwise alienate one's human rights. To do so would be to destroy one's humanity, to de-nature oneself, to become other (less) than a human being and thus it is viewed as a moral impossibility.*[176]

From that point of view the right to a nationality cannot be waived. What happens then in cases of voluntary statelessness? Similarly to the cases of refusal to exercise a specific human right, refusal to exercise the right to a nationality is not a waiver of the right to a nationality, but merely a choice not to exercise it under the specific circumstances. If the right to a nationality is a genuine human right, a voluntarily stateless person retains the right to a nationality by virtue of being human, also when he or she chooses to remain stateless at a specific moment in his or her life.

No. 2, (2004), p. 67. Such assumption is problematic and illiberal, and contrary to the Western conception of human rights as tools of empowerment; this is discussed in section 3.3.3 below.

[175] See more in A. Malkopoulou, *The History of Compulsory Voting in Europe: Democracy's Duty?*, (Routledge 2014); S. Birch, *Full Participation: A Comparative Study of Compulsory Voting*, (Manchester University Press 2008), p. 36.

[176] J. Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', *The American Political Science Review*, Vol. 76, No. 2, (1982), p. 306.

3.3.3 Correlative duties, duty to be a national, and statelessness as a violation of that duty

In the previous section I submitted that a human right to a nationality does not imply a duty to be a national. Here I explain why this is not the case by analyzing in more detail the relation between (human) rights and (correlative) duties.

The concepts of legal rights and duties are strongly interlinked. Rights of individuals cannot be effective without correlative duties on the part of other entities, such as states, organizations or sometimes even other individuals. For example, a correlative duty of the right to life is not to kill and to protect human life; a correlative duty of the freedom from torture is to refrain from torture; a correlative duty of the right to liberty is not to imprison; a correlative duty of the right to education is to ensure availability of, and access to, educational facilities, and so on. Noting correlative duty is, however, distinct from claiming that a right-holder has a duty to exercise his or her right. An individual does not have a duty to live by virtue of having a human right to life. It is counter-intuitive to use human rights to coerce the right-holder into specific actions or inactions by virtue of having a right. Thus, while human rights impose correlative duties on entities other than the right-holder, they in themselves do not entail the duty to exercise the right.

Jack Donnelly warns about the dangers of imposing duties on individuals by virtue of rights they hold.[177] He criticized non-Western conceptions of human rights where 'economic rights turn out to be duties to earn a living and to help to provide for the needy' and 'the right to freedom of expression actually is an obligation to speak the truth'.[178]

If a right can be flipped to also impose a duty on the right-holder, such a perspective on (human) rights turns rights into a tool of legal coercion rather than a mechanism of empowerment. It is in the nature of the legal concept of rights to imply freedom, agency and control of the right-holder over a particular situation:

[177] J. Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', *The American Political Science Review*, Vol. 76, No. 2, (1982), p. 304.
[178] J. Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', *The American Political Science Review*, Vol. 76, No. 2, (1982), p. 306. Interestingly, the symbiosis of rights and duties was characteristic of the constitutional law and legal scholarship of the Soviet Union. See G.-R. de Groot, *Staatsangehörigkeitsrecht im Wandel: eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit*, (Asser Institute 1988), pp. 4-5; and J. Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', *The American Political Science Review*, Vol. 76, No. 2, (1982), p. 309.

> *One may exercise, assert, claim, press, demand, waive, or transfer rights, as well as put them to many other uses. Thus rights are under the control of the right-holder, who in large measure manages the use of the right and thereby the consequences of having that right.*[179]

Thus, the correlative duty of the right to a nationality, namely the duty of a state to offer a nationality, should not be confused with the concept of a duty to be a national. To the extent that nationality is a human right, in order to effectuate that right for a specific individual, at least one state should have a correlative duty to accept that person as a national. The (collective) *duty of states to effectuate every person's human right to a nationality*, to the extent it exists, is the duty correlative to the human right to a nationality. A *duty of an individual to be a national*, however, cannot be derived from the human right to a nationality.

It is possible to construe a concept of a duty to be a national on the basis of normative frameworks other than the human rights framework. Having that duty can be justified as a price for benefiting from living in a state, and using services of a state. It can also be construed on the basis of notions of duty to show solidarity to fellow human beings, which arguably can only be effectively expressed through state membership.[180] Various justifications for the duty to be a national are possible,[181] but the duty to be a national cannot be derived from the claim that there is a human right to a nationality.

In this context it is interesting to consider the special nature of the discourse on the rights of children. Children, usually defined as individuals under the age of 18,[182] enjoy limited legal capacity, and are not accorded as much freedom over their lives as adults. It is generally agreed

[179] J. Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', *The American Political Science Review*, Vol. 76, No. 2, (1982), p. 305.
[180] Matthew J. Gibney rejects various moral justifications for imposing an obligation on stateless persons to accept an offer of nationality from a state. See 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), pp. 61-62.
[181] See also, for example, M. O. Hudson, Special Rapporteur of the International Law Commission, report 'Nationality, Including statelessness', *Yearbook of the International Law Commission*, Vol. II, Doc. No. A/CN.4/50, (1952), p. 19, where the author points out that statelessness is undesirable, among others, in light of 'the interest of orderly international relations'.
[182] UN Convention on the Rights of the Child of 1989, art. 1.

that children are vulnerable, and need to be protected, also from themselves. As the preamble to the Convention on the Rights of the child phrases it:

> *[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection […]*.[183]

To the extent children are guaranteed rights, they are often not fully empowered to decide when and whether to invoke their rights. Parents are often entrusted to represent their children, and take decisions about invoking relevant rights on their behalf. However, in the context of human rights, parents do not always have complete freedom in this regard either, they are not the right-bearers, but mere trustees of the right-bearers, and their powers to exercise freedoms on behalf of their children can be limited. In the context of the right to education, for example, it is widely accepted that parents should not be completely free not to invoke their child's right to education and keep them out of schooling without a valid reason. The Convention on the Rights of the Child illustratively frames children's right to education as follows:

> *States Parties recognize* the right *of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:*
>
> *(a) Make primary education* compulsory *and available free to all;*[emphasis added][184]

Here we find language of a duty to exercise the right. The rights discourse in the context of children is often patronizing, uses the language of protection rather than empowerment, the language of duty rather than rights, and it often does not fully fit with the liberal conception of a right as a tool of emancipation. It is questionable whether regulation of compulsory primary education, undoubtedly beneficial, should be framed as a right. Compulsory education for children can derive ethical justifications from many sources, but naming it a 'right' erodes the fundamental understanding of a right as empowerment and freedom. Compulsory education is

[183] Preamble to the UN Convention on the Rights of the Child of 1989.
[184] UN Convention on the Rights of the Child of 1989, art. 28.

thus a justifiable policy goal; it is not a right in the liberal sense, but instead a duty on the part of everyone involved.

Another peculiar concept in the context of the discourse on children's rights is the 'best interests of the child'.[185] This concept implies external establishment of what is best for the child, in a context where the latter is supposedly the right-bearer. The concept of the 'best interests' of relevant right-bearers does not feature in human rights instruments aimed at empowering adults, as the adults are assumed to be free to define and represent their own best interests. To the extent such freedom is limited in cases of children, the latter cannot be fully considered right-bearers, and the rights are in such contexts often benefits of a different kind. From this point of view, the Convention on the Rights of the Child can hardly be seen as a Convention on rights. Most articles in it impose duties on the State Parties to ensure a specific end result, in accordance with the best interests of the child, as opposed to proclaiming the right of the child to something, avoiding implications of empowerment and choice on the part of children. That is not to say that the Convention on the Rights of the Child is ethically questionable or wrong. It is a highly valid international legal instrument with an impressive nearly-universal ratification rate, expressing a noble universally shared commitment to the welfare of one of the most vulnerable segments of humanity. However, calling this Convention a rights convention is unhelpful in understanding its content and goals, as well as its ethical justifications.

In order to speak of a child's right to a nationality, within the liberal meaning of rights, there needs to be an element of freedom to choose on the part of the right-bearers as to whether, when and how to invoke this right. Parents can be regarded as trustees of such freedom. However, where the elements of freedom and empowerment are missing, and mere duties towards achieving some level of welfare remain, the issue of children's nationality cannot be framed as a right, but needs to be framed as a duty, act of care, charity, or protection.

3.3.4 Right not to exercise the human right to a nationality: a (human) right to statelessness?

[185] UN Convention on the Rights of the Child of 1989, art. 3.

The previous sub-section argues that a person cannot be coerced into being or becoming a national, or prevented from becoming or remaining stateless, based on the argument that he or she has a human right to a nationality. The next question is whether the human right to a nationality also means that there is a human right to be stateless.

The human right to be stateless cannot be directly derived from the human right to a nationality. Human rights do not necessarily imply the right not to exercise them.[186] They are largely silent on the issue of whether the individual's right not to exercise the right can be limited. Limiting the ability not to exercise a specific right is not necessarily inconsistent with that right. An obligation to be a national is thus compatible with the human right to a nationality. An obligation to be a national cannot be derived from the human right to a nationality, and needs some different justification, but it is not incompatible with the human right to a nationality. To take the example of the right to life, the freedom to end one's life can be limited by law without this infringing the person's right to life.[187] Thus, the right to die does not directly flow from the right to life. The human right to life is thus silent on the issue of whether there is a human right to die. Similarly, the human right to a nationality is silent on the issue of whether there is a human right to be stateless.[188]

3.4 Concluding remarks: disentangling rights, nationality and statelessness

In this chapter I studied the relationship between the concepts of rights and nationality. I argued that while rights are closely associated with the concept of nationality, and the link between the

[186] See discussions on this in US Supreme Court cases Gannett Co. v. DePasquale, No. 443 U.S. 368, of 2 July 1979, where the Court rules that '[w]hile the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial' ; and Singer v. United States of 1 March 1965, 380 U.S. 24, where the Court found that '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right'.

[187] See, for example, the judgment by the European Court of Human Rights in the case Pretty vs. UK, No. 2346/02, of 29 April 2002, where the Court found that: "no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 [on the right to life] of the Convention'.

[188] Cf. C. Hanjian, *The Sovrien: An Exploration of the Right to be Stateless*, (Polysipre, 2003) , where the author argues for the existence of a human right to be stateless.

two needs to be explored, it is important to remain aware that rights do not define nationality under international law.

The prevalent acceptance of nationality as a human right and as a gateway to other (human) rights leads to an unhelpful utopic discourse of nationality being inherently good, which subsequently misinforms policies on statelessness, where statelessness is assumed to be inherently bad.[189] Conceptualizing nationality as a human right, and considering that most human rights offer access to something that is generally seen as beneficial, contributes to the perception of nationality as being beneficial for a person. I argued that the fact that nationals often enjoy more rights than non-nationals, and that there are perhaps compelling reasons that they should enjoy more rights, does not mean (or guarantee) that every national is in fact protected through access to rights, and does not preclude realizing (human) rights for stateless persons. There is no theoretical or empirical ground for a blanket assumption that acquisition of a nationality necessarily leads to access to (any) rights, protection, or a better life, and that a beneficial statelessness status is impossible.

Nationality status has been accurately described by René de Groot as an 'empty shell',[190] a content-independent legal status. It is not defined through the content of rights or duties it may entail, nor through whether access to it can be seen as a right. Each state determines the content of the nationality bonds with its nationals differently, not necessarily in line with international normative standards, and not necessarily in a nice way.[191] Bad (rightless or unjustly imposed) nationality is still very much a nationality under international law. The definition of nationality, to the extent this concept is used by international law to distinguish between nationals and non-nationals, is thus normatively neutral from the point of view of rights. Statelessness, being the lack of nationality, is also a normatively neutral concept from the point of view of rights: the humanitarian situation of an individual cannot be conclusively predicted based on the mere fact that he or she is stateless.

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[189] See section 3.4 below, and chapter 5, section 5.5 below.
[190] G.-R. de Groot, *Staatsangehörigkeitsrecht im Wandel: eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit*, (Asser Institute 1988), pp. 13-14.
[191] See, for example, the case discussed in chapter 8, section 8.2 below. See also 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), p. 46.

Nevertheless, presenting statelessness as a problem per se, as being a violation of a human right to a nationality and a cause of violations of other rights, is common in the discourse on statelessness. It is standard to speak of 'solving' or 'resolving'[192] the 'human rights challenge'[193] of statelessness. Below I assess critically two extracts from scholarly writings on nationality, statelessness and rights in light of the findings of this chapter, to illustrate how the discourse on statelessness perpetuates misconceptions about how nationality, rights and statelessness are interrelated.[194]

The first example illustrates how observations of hardships experienced by stateless persons are relied on to conclude that statelessness is a human rights violation, and a cause of other human rights violations.

> *It is widely recognised that stateless persons struggle when trying to access various human rights, such as access to health care and education, which are pivotal for the development of a person. Moreover, stateless persons are often marginalised, excluded, discriminated against and are unable to participate in society (by voting for example). Their lack of nationality makes stateless persons among the most vulnerable in the world. Statelessness thus presents the world with a significant human rights challenge, not only because it is in itself a violation of the right to nationality, but also because of its impact on the enjoyment of other rights.*[195]

The first two sentences in the paragraph above make a valid observation about human rights violations and other hardships experienced by many stateless persons. However, by speaking of stateless persons generally, and not of 'most' stateless persons, the observation creates the misleading impression that it is impossible to be stateless and enjoy access to human rights.[196]

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[192] For example, in UNHCR, 'Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness', 23 February 2015; L. van Waas and M. Khanna, *Solving Statelessness*, (Wolf Legal Publishers 2016).
[193] Equal Rights Trust, *Unraveling Anomaly. Detention, Discrimination and the Protection Needs of Stateless Persons*, (London, July 2010), p. 78.
[194] Section 5.5 in chapter 5 discusses in more detail how policy goals on statelessness are poorly justified by invoking misleading connections among nationality, statelessness and rights.
[195] 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), p. 159.
[196] Chapter 5, section 5.3 discusses the policy goal of protection of stateless persons. See also cases discussed in chapter 8, sections 8.2 and 8.4 below.

The third sentence contains a fallacious slip from observing a correlation between statelessness and human rights violations to concluding that there is a causational relation between the two, that lack of nationality 'makes' people vulnerable, implying that acquiring a nationality would necessarily remedy that vulnerability.[197] Then the authors proceed to declare that statelessness is a violation of the right to nationality, impacts on the enjoyment of other rights, and therefore *is* a human rights challenge. The leap from correlation to causality is not uncommon in literature on statelessness. Examples of individuals who experienced hardships as stateless persons, and whose life improved after acquiring a nationality, are generalized to claim that statelessness was the cause of their problems and nationality solved those problems.[198] Other causes of problems, such as a lack of protection for stateless persons, deficient implementation of human rights generally, and subsequently other solutions that address the core of the problem more closely are not considered.

The second example of reasoning that bundles up nationality and rights, so as to reach misleading conclusions, is more complex:

> *Everyone has the right to a nationality. Everyone needs a nationality because nationality serves as the basis for legal recognition and for exercise of other rights. Nationality should, therefore, be effective in ensuring the exercise of these rights. Statelessness should be avoided as it defeats these goals and may, further, lead to displacement and instability in international relations. One of the best means of avoiding statelessness is to ensure recognition of an individual's genuine and effective link with a State, based on identifiable factors including place of birth, descent, and residency.*[199]

The first sentence acknowledges the existence of the human right to a nationality. The first part of the second sentence *'everyone needs a nationality'* is an assumption about everybody's needs,

[197] Further on in their article the authors argue that not simply any nationality, but only a specific suitable nationality would remedy the vulnerability caused by statelessness, yet still frame statelessness as in principle problematic and nationality, if fulfills specific conditions, as a solution to the problem. See more 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.
[198] L. van Waas, 'Nationality and rights' in *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* by B. K. Blitz and M. Lynch (eds.), (Edward Elgar Publishing 2011), p. 23.
[199] C. A. Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', *International Journal of Refugee Law*, Vol. 10, No. 1-2, (1998), p. 168.

which may differ tremendously depending on the individual circumstances of each person.[200] Such assumptions are problematic in the context of empowering affected persons to represent their own needs, and invoke their own rights in the way they see fit.[201] The explanation for this assumption, namely 'because nationality serves as the basis for legal recognition and for exercise of other rights' is problematic too; this chapter illustrated why nationality cannot be assumed to serve as a basis for the exercise of any rights, and should not be framed as a prerequisite to accessing human rights. Statelessness is then presented as 'defeating' the goals of legal recognition and rights, which is problematic in light of international goals to protect and empower stateless persons, and to ensure that they can access legal recognition and basic rights regardless of their nationality status.[202]

Moreover, statelessness is presented as a cause of 'displacement' and 'instability in international relations'.[203] It is certainly true that statelessness and displacement are highly correlated, even though nationals can also be displaced, and many stateless persons have never suffered displacement. The way this correlation is framed in this argument insinuates that nationality is the sole legitimate protection against displacement, and that stateless persons are 'fair game' for states to displace. This creates an unhelpful discourse where the blame for displacement lies on statelessness as a phenomenon rather than with the governments that displace people. The human right to private and family life should protect everyone without exception against arbitrary expulsions from their homes and from arbitrary and discriminatory displacement. Nationality should not be presented as the legitimate shield against the violation of human rights caused by displacement. Being human should be sufficient protection against arbitrary displacement.

Similarly, instability in international relations may indeed be caused by statelessness. I take issue, however, with the 'international stability' argument hiding behind arguments about the rights and well-being of stateless persons. International stability is not about what individual

[200] C. Hanjian, *The Sovrien: An Exploration of the Right to be Stateless*, (Polysipre, 2003), for an interesting personal account of the author's need not to be a national of any state.
[201] See more on how the rights-based approach allows for the affected persons to define their own needs in 7 below.
[202] See more on protection of stateless persons in chapter 5 section 5.3 below.
[203] A very similar line of reasoning can be found in the UNHCR *Global Action Plan to End Statelessness* (2014) , p. 6, namely: 'Stateless persons are often denied enjoyment of a range of rights such as identity documents, employment, education and health services. Statelessness can lead to forced displacement just as forced displacement can lead to statelessness. It can also contribute to political and social tensions. The exclusion and denial of rights to large populations because they are stateless can impair the economic and social development of States'.

stateless persons need, but about what we all as humanity need, and it should be framed as something that is needed for the common good, and not as a charity act to help stateless persons. If it is assumed that international stability is indeed threatened by the presence of stateless persons in the world,[204] perhaps people's freedom to choose when and how to exercise their right to a nationality might be limited so as to prevent statelessness. However, a case for eliminating statelessness for the sake of international stability should be made with awareness that it constricts the agency of the vulnerable rights-holder. This argument should be evaluated on its merit whether such a restriction on people's freedom to manage their state membership is acceptable in light of statelessness affecting international stability. Such evaluation is difficult if the argument on international stability is hidden behind or among a very different type of arguments, with distinct flaws, about nationality being inherently beneficial for stateless persons.

Finally, the argument suggests a way to 'avoid' statelessness through ensuring 'recognition of an individual's genuine and effective link with a State, based on identifiable factors including place of birth, descent, and residency'. The *Nottebohm* judgment gave rise to the doctrine of a genuine and effective link, but as discussed in chapter 2 section 2.5.2 above, this doctrine is unhelpful for addressing or understanding statelessness. It is unclear whether 'ensuring recognition of a link' in fact amounts to offering or even imposing a nationality. In the case of the latter, it would not help to realize everyone's *right* to a nationality, but rather impose an obligation to be a national.[205] There is also an implication that this solution would remedy initially identified problems with regard to 'legal recognition and exercise of other rights', which, as I illustrate in this chapter, is not necessarily true.

It is common for the discourse on statelessness to build on a number of highly questionable assumptions, such as that nationality is good, that it offers rights, that it 'establish[es] identity and instil[s] human dignity'.[206] Statelessness, being lack of nationality, is described as bad, rightless, and leading to instability and despair. Such statements all contribute to framing nationality and statelessness as much more than what their definitions indicate that they are. Some authors note this worrisome trend. Elizabeth F. Cohen, for example, takes a convincing

[204] See K. Swider, 'States as a Root Cause of Statelessness', *European Network on Statelessness Blog*, (28 May 2015).
[205] See more on voluntary statelessness and rights-based approach in chapter 7, section 7.3 below.
[206] N. Green and T. Pierce, 'Combatting statelessness: a government perspective', *Forced Migration Law Review*, No. 32, (2009), p. 34.

stance against 'a normatively driven account of citizenship because of its tendency […] to define citizenship according to what a given normative theory argues it should be, rather than defining citizenship on the basis of how it actually exists'.[207] Imagining and implying that nationality is something better than what it is, does not make nationality any better. Instead, it leads to problematic policies which rely on nationality to solve problems it is in no way equipped to solve.

[207] E. F. Cohen, *Semi-Citizenship in Democratic Politics*, (CUP 2009), p. 14.