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A rights-based approach to statelessness

Swider, K.J.

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9 Conclusion and discussion

9.1 Conclusion

In my thesis I make a case for adopting a rights-based approach to statelessness policies, as it is the only approach that prioritizes the empowerment of affected persons. Current statelessness policies set objective quantifiable targets in relation to avoidance of statelessness, and prioritize those over the more rights-focused measures on the protection of stateless persons. Such an approach contradicts the principles of empowerment of affected individuals through rights, and therefore falls short of being rights-based. I illustrate that replacing statelessness with a nationality cannot be presumed to be empowering for all persons affected by statelessness policies. Nationalities may be associated with problems, instances of statelessness may be empowering, and while one status eliminates the other, none is a problem or a solution per se, and therefore neither solves the other. Instead of cancelling out statelessness with nationalities, statelessness policies should focus on empowering individuals affected by statelessness.

In the introductory chapter I asked the following question:

- How should statelessness policies prioritize empowerment of affected persons?

My answer is that statelessness policies should prioritize the empowerment of affected persons by adopting a rights-based approach. A rights-based approach consists of equipping affected persons with legal rights, and is often opposed to approaches that set objective quantifiable targets. Under the rights-based approach, by choosing how to invoke (or not invoke) rights in various contexts, affected persons become individually empowered to address their problems in the way they see fit. Moreover, they become active decision-makers in the process of statelessness policy development, which leads to optimal representation of their interests. In chapter 7 I discuss how current statelessness policies need to change in order to prioritize the empowerment of persons they affect through adopting the rights-based approach. I argue that rights-based values are not completely absent from the current statelessness discourse. The rights-based approach is dominant in the way protection measures for stateless persons are

framed and implemented, and it is influential in the discourse on the identification of stateless persons. Even in the context of avoidance of statelessness, the frequent references to the right to a nationality indicate the influence of rights-based ideas. Unfortunately the goal of avoidance of statelessness is ultimately framed as an objective, quantifiable target to reduce the numbers of stateless persons, where rights are mere tools towards achieving this target rather than being an end goal in themselves. This is particularly obvious in the way statelessness policies approach the issue of voluntary statelessness. The goal of avoidance of statelessness, being the least rights-based element of the current statelessness policies, is moreover prioritized over the goal to protect and identify stateless persons. The statelessness policy overall thus suppresses its rights-based aspects in favour of other policy approaches that do not prioritize empowerment of affected persons through rights. I suggest that by reconsidering the priorities among the current goals on statelessness, revising the language that frames the policy discourse, as well as altering specific rules so as to achieve a greater focus on empowerment of affected persons through rights, the statelessness policies can embrace the rights-based approach, and thereby live up to their own claim of representing affected persons, empowering them and acting on their behalf.

This concluding chapter takes a step back to look at two main themes in this thesis that shaped the answer to the research question: first, the role of language and definitions in the way current statelessness policies are critically evaluated and second, the role of rights in conceptualizing empowerment.

9.2 Language, discourse, and the power of defining

Many of the problems identified in the current statelessness policies are rooted in the lack of clarity surrounding the definitions of the core concepts. This lack of clarity creates space for a misleading illusion of empowerment through nationality. I illustrate that the constitutive definition of a national under international law is simply a person who is considered to be a national by a state. A stateless person, as per the international definition, merely lacks a state that considers him or her as its national. Both are based solely on the state's perspective, and do not involve any external objective criteria about how the relationship between the relevant state and

individual has been formed, and what its content is. I argue that these are the correct definitions of nationality and statelessness not (necessarily) because this is how they have been codified under international conventions, and not because they are optimal, but because this is how international law in fact distinguishes between nationals and stateless persons.

Such definitions, however, have on multiple occasions been observed to be too simplistic for such complex phenomena as nationality and statelessness, because, among others, no place is given to the notions of empowerment and rights. Not only the definitions seem not to cover the complexity of what nationality and statelessness are, they are not easily reconciled with current international statelessness policies that aim to eliminate statelessness.

A common approach in scholarship to these definitions that appear too simplistic and do not support policies on statelessness has been to re-think the definitions. This approach is very valuable as it acknowledges the problems with the default (*de jure*) international legal definitions of nationality and statelessness; namely that they are in fact not based on anything other than the state's perspective on a person's membership in that state, and that such definitions in fact do not justify the problematic policies. Defining nationality and statelessness as something else potentially opens the door for including all those complexities the two statuses are so closely associated with, such as enfranchisement, loyalty, 'rights, dignity, identity, inclusion, equality and a home'.⁶⁰⁵ Changing the definitions may lead to a sense of satisfaction at having covered the full meaning of two complex phenomena. Moreover, if nationality is defined as all the good things, and statelessness is defined as all the bad things, the policies to end statelessness make a lot more sense.

However, this approach has the important disadvantage of never being able to 'talk to' laws and policies, because no matter how hard all parties involved may try to pretend otherwise, the same words will mean different things. One may define nationality as membership in a state that entails certain minimum political participation, or that ensures access to the territory, or freedom from persecution in the state of nationality, or even as a sense of belonging. However, if international laws and policies were indeed to adopt such criteria of a constitutive definition of nationality, it would mean that everyone who is not enfranchised is stateless, everyone who

⁶⁰⁵ C. Vlieds, 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. 175.

cannot access their state of nationality is stateless, everyone who is persecuted is stateless, or even everyone who does not experience a sense of belonging to a state is stateless. I do not think it is feasible to redefine nationality and statelessness at the international level in such a way. Depending on the exact content of the alternative definitions, which differ tremendously per author, I may agree that re-definitions can be desirable, but I do not believe they are achievable. In the unlikely event that an agreement could be reached as to what criteria such an alternative definition would need to be based on, the implications of constitutively re-defining nationality would be far-reaching, and extend far beyond the domain of statelessness policies. For example, if states are no longer free to consider individuals whom they persecute as their nationals, persecuted minorities may face serious challenges in how they formulate political and legal claims within the state they live in. If enfranchisement is a criterion, non-democratic states could not be considered to have (many) nationals, and possibly consequently could not be considered as states at all. If a certain minimum set of rights were the criterion, states would, whether they like it or not, de-nationalize people by violating any of the rights included in the set.

Adopting alternative (de-facto) definitions of nationality and statelessness is therefore counter-productive for coherent discussions between scholars and policy makers about statelessness policies. Such definitions may contribute to a false sense of agreement, for example that statelessness is undesirable, and nationality is beneficial. Alternative (*de facto*) definitions of statelessness, while often expressing valid policy criticism, indirectly contribute to an unhelpful illusion of nationality being an idealized version of what it actually is. The resulting discourse places expectations on nationality to solve problems that this status per definition is in no way qualified to solve.

A constructive critical discussion with statelessness policy makers is only possible if everyone acknowledges and adopts the terminology of international law's constitutive definitions of a national and of a stateless person. Other phenomena, problems, and benefits associated with both, such as access to human rights, identity, belonging, discrimination and enfranchisement, have words of their own that can be relied on to express relevant ideas, as well as to criticize and formulate policies. Instead of re-thinking what nationality and statelessness mean in order to achieve coherence with the policy initiatives to end statelessness and to promote nationality, I

suggest to accept what nationality and statelessness actually are, and to reconsider policies that aim to promote or end them.

In the end, an exercise in redefining nationality and statelessness, while possibly making rights more visible, still ultimately supports a policy discourse that chases objective goals, and decides for the affected persons what is best for them, rather than letting them decide. Re-defining nationality and statelessness in *de facto* terms does not prioritize empowerment and representation of affected persons in the same way as the rights-based approach does, and thus does not optimally address their vulnerability.

Thus, while I often agree with the problems implicitly or explicitly identified as the reason for needing *de facto* definitions, namely that nationality does not (necessarily) remedy what is wrong with statelessness, I do not think solutions lie in getting the international legal and policy regime to re-think constitutive definitions of nationality and statelessness. Instead, the constitutive definitions of nationality and statelessness, as used within the policy discourse to distinguish between nationals and stateless persons, need to be acknowledged by any realistic solutions. A rights-based policy does not need to alter these definitions, it does not need to idealize nationality or demonize statelessness to achieve its objective of empowering affected persons through rights.

9.3 Rights as a path from vulnerability to empowerment

In this thesis I argued that current statelessness policies lack a rights-based approach. This does not mean that they do not invoke, apply, use, or promote rights. In fact, rights play an important role in the current discourse on statelessness, yet the rights-based approach that places empowerment through rights at the core of a policy is lacking. References to rights within a policy, without the policy actually being rights-based in the sense of promoting empowerment through rights, are a mixed blessing. On the one hand, references to rights give the concept of rights a place in the policy discourse, creating opportunities for critical analysis that can result in more coherence with rights-based values. On the other hand, references to rights, without a rights-based approach, can create a misleading assumption that empowerment of affected

persons is in fact prioritized or achieved. Below I summarize two main ways in which the current policies on statelessness invoke rights, and explain in what way such appeals to rights are distinct and different from adopting the normative framework of empowerment through rights which defines the rights-based approach.

Firstly, nationality under the current policy regime on statelessness is often framed and celebrated as a gateway to (human) rights, or as a collection of rights. In chapter 3 I have discussed extensively the relationship between the concepts of nationality and rights, and illustrated the problems with seeing nationality as a magic potion that enhances and realizes rights. The effects of each nationality on the rights situation of each individual may differ under different circumstances; and those differences are not merely different degrees of empowerment. Nationality can be disempowering and can have a negative impact on the human rights situation of affected persons. Thus, making an unfounded blanket assumption that nationality leads to improvement in the rights situation, and subsequently working towards everyone being a national without regard to each person's individual circumstances, wishes or needs, does not constitute a rights-based approach. It is a misleading discourse, which invokes the terminology of rights without promoting empowerment of individuals whose rights are at stake.

Second, rights rhetoric is used in the current policy discourse on nationality to proclaim a human right to a nationality. Treating nationality as a matter of human rights in principle supports the rights-based approach. However, I argue that current statelessness policies do not actually give full effect to the meaning of the human right to a nationality, and do not fully rely on it as a tool of empowerment. Under the current laws and policy documents there is insufficient respect for the agency of the right-holder to decide whether, when and how to invoke their right to a nationality. The fact that voluntary statelessness is prohibited or strongly discouraged is a clear illustration of this lack of respect for the agency of the right-holder. The importance of voluntariness is also deeply rooted in the scholarship on state membership, as discussed in chapter 4. The conceptualization of nationality as a right and the conceptualization of nationality as a contract overlap when it comes to the importance of voluntariness and agency of individuals. Full commitment to nationality as a human right would also imply that this right is inalienable and cannot be waived, and thus individuals who renounce or reject a specific nationality remain fully entitled to a nationality simply by virtue of being human, and efforts towards their ability to

realize that right should continue. Instead of using the human right to a nationality as a tool of empowerment, the statelessness policies rely on it more often to demonstrate that being a national is something everyone should simply be. This association between something that is a human right always being something good or necessary is my only objection against ‘crowning’ the right to a nationality as a ‘human’ right.

A rights-based policy approach does not need to rely on human rights only, and a mere reference to human rights terminology certainly does not constitute a rights-based approach. I do not think that resolving the question of whether nationality as a right deserves to be included in the list of human rights is essential for my thesis. The status of ‘human’ gives a right universal legitimacy, inalienability and political importance, which is a helpful ideological tool. However, the status of ‘human’ is not necessary for a right to be part of a rights-based policy. The aim of a rights-based approach is to address vulnerability through empowerment, by granting agency and representation to the vulnerable. The relevant rights for each specific policy depend on the vulnerabilities at play. In the context of statelessness policies the right to a nationality may be essential, but certainly not sufficient. The right to statelessness may be equally important, which is not currently a right commonly accepted as ‘human’. Other rights associated with the vulnerability of those affected by statelessness, such as freedom from discrimination, political rights, and a variety of other basic human rights, need to be pursued within a rights-based policy on statelessness. A rights-based policy does not discipline the vulnerable into specific actions, but instead expands the range of options available to them, and fosters their agency to address their own vulnerability by deciding whether, when and how to invoke their rights.

The rights-based approach to statelessness policies poses particularly interesting challenges with regard to the position of children in the debate on the right to a nationality. As discussed in chapter 3, section 3.3.3, human rights of children often cannot be fully qualified as rights in the liberal meaning as tools of empowerment, as children’s empowerment to make choices is limited by considerations to protect their best interests, sometimes against the wishes of the rights-holder. Parents are often the representatives of the wishes of children as rights-holders, but human rights of children sometimes limit the agency of parents to decide for their children about how the relevant rights are to be invoked. Human rights of children often empower the holders of correlative duties also to decide on how human rights are to be invoked against those very same

duty-holders. This system can be justified by reference to the collective responsibility of all adults to care for all children, which is a strong, universally shared sentiment expressed in a nearly-universally ratified Convention on the Rights of the Child. However, I do not believe that this system is truly a system of rights. Most individuals acquire their nationality automatically at birth, and it is difficult to describe that process as rights-based. In this context, a consistent implementation of a rights-based approach might result in a system where states can no longer maintain the stability of their populations by automatically assigning nationality to certain children at birth. However, without the commitment to the rights-based approach statelessness policies cannot address the vulnerability of affected persons, and should not invoke the concept of rights to create an illusion to the contrary.