



Questioning *de facto* Statelessness

By Looking at de facto Citizenship

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Abstract

This article challenges the concept of *de facto* (by fact) statelessness, often conceptualised as ineffective citizenship, from being included within the statelessness discourse. This is done by considering the nexus between *de jure* (by law) statelessness and *de facto* citizenship. The argument that if someone can have citizenship that is so ineffective they are *de facto* stateless is extended to consider if a person can receive such effective 'citizenship', despite *de jure* statelessness, that they should be considered a *de facto* citizen, thus not stateless. By drawing upon the example of the stateless Estonians of Russian origin, the dangers of not recognising the centrality of the legal bond of citizenship, seen in attempts to incorporate *de facto* statelessness into the statelessness debate, are reflected upon. *De facto* 'statelessness' is shown not only to underutilise the plethora of human rights conventions available, but also to threaten the statelessness conventions themselves.

Keywords

de jure stateless – *de facto* stateless – statelessness – ineffective citizenship – effective citizenship – Estonians of Russian origin

1 Introduction

De jure (by law) statelessness defines a stateless person as someone 'who is not considered as a national by any State under the operation of its law'.¹ Defining

1 United Nations Convention on the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117, art 1(1).

de facto (by fact) statelessness however is highly problematic, due to the lack of legal framework behind it and the various uses of the concept. Much ambiguity still surrounds the term and while some explicitly embrace this,² most simply state the ineffective citizenship principle as the justification for the labelling of persons or populations as 'stateless'.³ However, several key themes can be drawn out as widely agreed upon within the discourse. Such as 'a *de facto* stateless person is normally regarded as a person who does possess a nationality, but does not possess the protection of his country of nationality and who resides outside the territory of that state, *i.e.* a person whose nationality is ineffective'.⁴

This piece challenges the concept of ineffective citizenship being situated within the statelessness discourse, as a *de facto* manifestation of the legal stateless phenomena. This is done by considering the nexus, not between *de jure* and *de facto* statelessness, but through that of *de jure* statelessness and *de facto* citizenship. By doing so the flaws of *de facto* statelessness are highlighted. This is done by extending the argument that if someone can have citizenship that is so ineffective they are *de facto* stateless, then presumably one can receive such effective 'citizenship' (despite *de jure* statelessness) that they should be considered *de facto* citizens, and thus not stateless.

De facto statelessness implies there is a need to broaden the definition of statelessness as currently set out in international law, as Blitz claims, to capture the '(...) countless others who cannot call upon their rights to nationality for their protection and are effectively stateless'.⁵ Further to this, it is argued that the exclusionary nature of the international legal definition of statelessness is problematic as the '(...) definition only encompasses *de jure* statelessness, and its failure to treat *de facto* statelessness is implicitly detrimental to *de facto* stateless persons'.⁶

What conceptualisations of ineffective citizenship do, arguably quite rightly, is to question classical theories of citizenship, namely the citizenship non-citizenship dualism. While I do not refute the impact of ineffective

2 Jay Milbrandt, 'Stateless' (2011) 20(1) *Cardozo Journal of International and Comparative Law (JICL)* 75,7.

3 Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 173; David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28 *Human Rights Quarterly* 251.

4 P. Weis, 'The Convention relating to the Status of Stateless Persons' (1962) 10(2) *The International and Comparative Law Quarterly* 255,1086.

5 B. Blitz, 'Statelessness, protection and Equality' (Refugee Studies Centre 2009) <www.rsc.ox.ac.uk/publications/policy-briefings/RSCP3-Statelessness.pdf/view> accessed 7 July 2013.

6 M. Stiller, 'Statelessness in International Law: A Historic Overview' (DAJV Newsletter 3, 2012) 94.

citizenship on people's lives, I do question whether this is an issue of 'statelessness', rather than an issue of ineffective citizenship itself. As will be argued here, the enjoyment of certain 'citizen' rights, even to a level nearly as effective as a citizen, does not make the legal bond of citizenship to a state redundant, just as ineffective citizenship does not make a person stateless, *as a legal bond of citizenship remains*. To highlight the centrality of this legal bond, this article will look at the other side of the ineffective citizenship (*de facto* stateless) discourse, that of effective though not legal *de facto* citizenship.

2 *De facto* Citizenship from *de facto* Statelessness

If a person's citizenship can become so ineffective that they become stateless (thus warranting our concern), it would be reasonable to assume that a *de jure* stateless person can receive such effective citizenship from a state that we should consider them a *de facto* citizen (thus not warranting our concern). Therefore, to slightly reword Blitz's earlier justification of *de facto* statelessness, we can *exclude* the 'countless others who *can* call upon their rights, despite their lack of nationality, for their protection and are effectively *citizens*'. This would then allow us to move certain *de jure* stateless populations out of our stateless population of concern, due to their effective citizenship of a state.

The point at which a person becomes a *de facto* citizen is similarly ambiguous to the point at which a person becomes *de facto* stateless. To reflect this diversity let us consider two examples where populations have been labelled *de facto* stateless. First *de facto* statelessness has been used to describe the victims of hurricane Katrina in 2005.⁷ It is argued that the federal government's lack of response to the disaster was a reflection of wider trends of ineffective citizenship of those who were not assisted, such as the poverty and social problems being faced by the residents, through the 'stigmatizing venom of personal blame and cries of dependent immorality'.⁸ As citizens with less effective citizenship then, their needs were not adequately addressed in their time of crisis, compared to times when the government has come to the aid of those they consider more valued citizens – who have, as a consequence, more effective citizenship. Their citizenship was therefore shown to be ineffective during the events surrounding hurricane Katrina. This understanding would include any

7 Margaret R. Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge Cultural Social Studies, Cambridge University 2008).

8 *Ibid* 11.

citizen who, despite their equal legal bond to their State, are not in the same right receiving or obtaining position as other more valued citizens. Therefore, this understanding would include large amounts of the world's population as suffering from various forms of ineffective citizenship, such as the female citizens of Qatar who have fewer rights than male citizens, or even arguably, citizen prisoners who have fewer rights than their fellow non-incarcerated citizens.

Second, *de facto* statelessness has been labelled on those seen in a migratory setting, such as people who have a nationality 'but whose status where they reside is not legal because they are illegal, irregular, or undocumented migrants in their current location'.⁹ This understanding would encompass a vast number of the world's migrants, whose illegal status in a country means their citizenship is ineffective as they are unable or unwilling to secure certain rights their fellow citizens receive when residing legally in a country other than their own.

These two examples reflect some of the diversity surrounding the concept of *de facto* statelessness, however to really explore *de facto* statelessness/citizenship, I will refrain from using a minor deviation from the norms of equally effective citizenship. Instead I will use an example of possibly the world's most credible *de facto* citizen *de jure* stateless population, the stateless Estonians of Russian origin. I use this population to show that even at the extreme of *de facto* citizenship, their *de jure* statelessness is still of great concern.

3 The *de facto* Citizens But *de jure* Stateless Estonians of Russian Origin

By considering one of the strongest claims for *de facto* citizenship for a *de jure* stateless population the importance and centrality of the legal definition of statelessness and the function of citizenship is reinforced, thus problematizing *de facto* citizenship - and by association *de facto* statelessness. The population chosen for this are the *de jure* stateless Estonians of Russian origin. This group largely consists of migrants from the Soviet Union to Estonia and their descendants, who, with the fall of the Soviet Union did not acquire citizenship of Russia or Estonia,¹⁰ thus making this group *de jure* stateless. Numbering

9 J. Bhabha, *Children without a state* (MIT, Cambridge 2001) 1.

10 A more detailed analysis on the causes of the statelessness can be found in Järve and Polshchuk, 'EUDO Citizenship Observatory: Country Report Estonia' (2013).

approximately 92,000, they are described in Estonian national legislation as 'aliens' or 'persons of undetermined citizenship'.¹¹

Despite their *de jure* statelessness, the Estonians of Russian origin enjoy many rights on par with Estonian citizens, and it has been claimed that they should be considered *de facto* citizens of the country.¹² While there is not the space to explore all the intricacies of this group's rights, it has been claimed that their rights can be enjoyed to such an extent that 'the main particularities of the issues of statelessness in Estonia consists of the fact that legal status [their *de jure* statelessness] does not seem to have any noticeable impact on how people manage in their daily life'.¹³ Their legal status, namely their *de jure* statelessness, thus seems relatively inconsequential. These 'citizen' rights include social rights, legal protection, nearly equal political rights,¹⁴ passports and consular protection.¹⁵ The population is also protected under a supranational regime, namely the European Union's laws on non-discrimination and the rights of long term residence, to name but a few.¹⁶

Considering the closeness of their effective citizenship to Estonian citizenship proper it can be argued that they are one of the world's 'luckiest' *de jure* stateless groups and a shining example of *de facto* citizenship. The discourse

11 Human Rights Europe, 'Stateless Europeans: Nils Muižnieks warns of "significant" problem in Russia, Ukraine, Estonia and Latvia' (2013) <www.humanrightseurope.org/2013/01/stateless-europeans-nils-muiznieks-warns-of-significant-problem-in-russia-ukraine-estonia-and-latvia/> accessed 5 October 2013.

12 R. Vetik, 'The Stateless issue of Estonia', in C. Sawyer and B. Blitz (eds), *Statelessness in the European Union; Displaced, Undocumented, Unwanted* (Oxford University press 2011).

13 Ibid, 251.

14 Despite there being 'no international norms which demand that the persons of other countries or people with undetermined citizenship should participate in the elections of parliament (...) [T]he fact that stateless people can vote on the local elections in Estonia is a positive tendency'. K. Kaldur et al, 'Political participation of third country nationals on national and local level' 2011 <<http://pasos.org/6905/political-participation-of-third-country-nationals-on-a-national-and-local-level/>> accessed 5 October 2013, 12.

15 Article 59 of the Consular Act even stipulates that consular assistance shall be provided to an alien who is residing in Estonia in accordance with the international custom (reference). Article 1(2) of the same law specifies further that for the purposes of this act, an alien is a person who lives in Estonia on the basis of a residence permit and to whom an Estonian alien's passport has been issued on the basis of Article 27 of the Identity Documents Act. UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: ESTONIA 2011' <<http://www.refworld.org/pdfid/4c3abco02.pdf>> 6.

16 EU Council Directive 2003/109/EU.

surrounding their rights situation is considered in relation to that of citizens, rather than non-citizens or illegal immigrants, as is common in the statelessness field. As such, these comparisons reinforce the position of the *de facto* citizenship of the population. For those who advocate for an incorporation of (in)effective citizenship into the statelessness discourse, this group, based on the effective citizenship principle, should be considered *de facto* citizens and thus as a consequence should not warrant our concern as a stateless population.

Yet, to claim that their *de facto* citizenship means that their *de jure* statelessness is inconsequential would be to greatly under appreciate the consequences of being *de jure* stateless for this population. First, consider that all the rights received by the stateless Estonians of Russian origin can be removed arbitrarily, at any time. This is not a farfetched notion, as even the rejection of the renewal of residency permits for these 'aliens' can occur 'if a person represents a threat to national security or public order, or if he or she has committed a serious crime and his or her criminal record has not expired'.¹⁷ As stateless persons they would not be able to challenge the removal of rights based on a claim that they were previously *de facto* citizens. Their *de facto* citizenship provides them with no protection, while those with ineffective citizenship, commonly referred to as the *de facto* stateless, still have this legal bond on which to base claims for protection and challenge its ineffectiveness. It was this legal bond and the claim that all citizens should be valued equally and have equally effective citizenship that was central to the criticism of the United States government in its response to Katrina. By comparison the Estonian government grant these rights more as a gift than as rights. *De facto* citizenship, though it may allow for the enjoyment of rights on a temporary basis, does not counter the incredible vulnerability that a person faces due to their *de jure* statelessness.

Second, by moving the understanding of citizenship (and by association statelessness) away from its legal base, and instead focusing on whether the stateless are enjoying *de facto* citizenship, we may not only be perpetuating *de jure* statelessness, but failing to reduce new cases. For example, 'at the end of 2011, there were about 1,500 stateless children under the age of 15 in Estonia'¹⁸ What this number of young *de jure* stateless persons in Estonia shows is the perpetuation of statelessness through to the next generation because, despite their *de facto* citizenship, their *de jure* statelessness has not been dealt with.

De facto citizenship does not resolve the central element of statelessness for the Estonians of Russian origin, their lack of a legal bond of citizenship to

17 UNHCR (n 15) 10.

18 Human Rights Europe (n 11).

any state. The effectiveness of a *de jure* stateless person's *de facto* citizenship does not therefore prevent future cases of statelessness and by focusing on their 'effective' citizenship there is a potential of either, the sidelining of their *de jure* statelessness, or governments using the *de facto* citizenship argument to justify the perpetuation of populations' *de jure* statelessness. Therefore, while it has been claimed the *de jure* definition is detrimental to the *de facto* stateless,¹⁹ here we can see how the opposite may also be true.

Finally those who promote *de facto* statelessness must accept the importance of the legal bond of citizenship, and the detrimental impact of not having one to any state, on the lives of the stateless. Otherwise, why would one advocate for the inclusion of *de facto* statelessness in this discourse at all? Yet, by trying to include those with ineffective citizenship within the statelessness discourse, there is a greater danger than just negating the importance of the legal bond of citizenship. Not only is 'the designation of *de facto* statelessness illogical, since nationality is after all a legal concept. Thus, instances of statelessness must always be *de jure*,²⁰ but by broadening the definition we would have to reject the only key defining factor of a stateless person - that they are not citizens of any state.

As the lack of citizenship of any state is the *only* defining feature of statelessness under international law, by broadening the definition to include *de facto* statelessness, statelessness ceases to be a standalone issue and we weaken one of the only means by which we have to challenge statelessness itself. This is the greatest long term danger, should the *de facto* statelessness project be successful. As, by trying to situate ineffective citizenship as another manifestation of statelessness, and thus deserving to be under the international protection regime created for *de jure* statelessness, the protection regime itself would cease to have any core definable purpose of whom it is meant to protect. The 1954 Convention was created to counter a specific phenomenon, that of not being a citizen of *any* state under the operation of its law. This was, and is, its only purpose, and by trying to manipulate a space for vague concepts of (in) effective citizenship, the potency, and even purpose, of the protection regime surrounding statelessness will be greatly diminished. If the protection regime fails to define who it is meant for, which would happen with the inclusion of *de facto* statelessness, no protection could realistically be offered to people with ineffective citizenship and even more worryingly to those who are *de jure* stateless. This is one of the most potentiality detrimental impacts of blurring *de jure* statelessness with notions of ineffective citizenship that has, as of yet

19 Stiller (n 6) 94.

20 Ibid 94.

not been adequately reflected upon by those advocating for this blurring. The case of the Estonians of Russian origin shows the lack of appreciation of the *de jure* statelessness of this population in the *de facto* debate, and how the failure to recognise the centrality of the legal bond of citizenship could have a significant detrimental impact on the wider statelessness discourse.

4 Conclusion

By looking at *de facto* statelessness through the prism of *de facto* citizenship, we can see the limitations of (in)effective citizenship being comparable to statelessness proper, when it is stretched to its equally illogical extreme – that *de facto* citizenship can nullify being *de jure* stateless. By considering a *de jure* stateless population whose members are effectively citizens, we can see that despite their *de facto* citizenship the lack of a legal bond of citizenship to a state is still crucial and should not be underestimated or marginalised.

What the example of the stateless Estonians of Russian origin shows is that the (in)effectiveness of citizenship cannot lead to the rejection of the centrality of the legal bond. It is this lack of legal bond that leads to the complex and dire situation the stateless face. Those who wish to situate persons with ineffective citizenship within the statelessness debate must recognise this; otherwise there would not be a call to use it to challenge the situation faced by those suffering from ineffective citizenship. Yet, they are not the same thing, with a nationality one can challenge ineffective citizenship using specific human rights conventions, laws and norms related to this ineffectiveness. It is as citizens that they are best placed to challenge the ineffectiveness of their citizenship. By labelling those who suffer from ineffective citizenship as stateless we could reduce the legitimacy of their claim as citizens deserving to be treated equally to their fellow citizens.

Stateless persons, having no nationality, have no such luxury. This is the reason behind the creation of the international protection regime surrounding statelessness. It is in recognition of the centrality of citizenship to the attainment of other human rights, which lead to the establishment of international law to resolve and reduce statelessness. By trying to broaden the definition of statelessness, to include those with ineffective citizenship, the central tenant of the international protection regime (protecting *de jure* stateless persons) could potentially be lost, and with it the potency of the regime itself and our ability to tackle statelessness. Therefore, the lack of a legal bond of citizenship to any state is not only crucial to defining and understanding statelessness

itself, but also in forging an appropriate international protection regime to counter the phenomena.

While there is great value in challenging ineffective citizenship, it should be done so using the plethora of human rights conventions, international, regional and national law geared around challenging such ineffectiveness. In so doing the ineffectiveness can be challenged more appropriately and the international law surrounding statelessness can be preserved and strengthened to assist those it was designed to help, namely those without citizenship of any state – the stateless.