

Statelessness and the right to citizenship

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The key claim that animates most discussions of statelessness is the principle that everyone should have the right to citizenship somewhere.

In a world where all human beings must live on the territory of one nation state or another, this is a fundamental principle of justice. Having a nationality is a gateway to other rights; it is not without justification that Hannah Arendt viewed the stateless as lacking the very “right to have rights”. Without citizenship or nationality somewhere a person lacks many fundamental rights, including perhaps most fundamentally the right to a place in the world where one’s opinions are significant and one’s actions effective.¹

For any individual to possess a genuine right to citizenship there must be a state with a corresponding duty to provide it. The stateless typically are not free-floating, deracinated individuals, moving aimlessly around the globe. They are usually people settled in particular societies, albeit lacking legal recognition of and appropriate protection for their status as residents. The primary injustice the stateless experience, then, is not that they cannot find a state to grant them citizenship but that the state which should grant them citizenship will, for various reasons, not do so.

On what basis should an individual have the right to claim citizenship in a specific state? Or, turning the issue around, to whom are states obliged to provide citizenship? I will approach this issue as a matter of morality rather than as an issue of international or municipal law. The value of a moral account is that it aspires to shed light on how the law might be reformed to better reflect our (sometimes implicit) conceptions of what is just.

If the question of who should be entitled to citizenship has obvious implications for both *de facto* and *de jure* stateless people, it is also germane

to what might be called ‘precarious residents’, the many millions of non-citizens, such as undocumented migrants, who live in states in which they have no right to stay. While not lacking in nationality altogether, the day-to-day lives of these men, women and children are often characterised by an inability to draw upon state protection to guarantee even their basic rights. The possibility of deportation and lack of formal status deprive them of effective political and social standing in the societies in which they work and live.

Moral problems with current practice

Some 98% of the world’s population acquired the citizenship they currently hold either by taking on the citizenship of one or both of their parents or by acquiring the citizenship of the state in which they were born. While almost all states also have procedures – that vary widely between states – for the acquisition of citizenship through naturalisation, considered globally it is where and to whom one is born that are overwhelmingly the determinants of the citizenship one will hold for the duration of one’s life.

The way states currently distribute citizenship is morally problematic from a number of different angles. First and obviously, variations amongst states in their use and interpretation of principles for acquiring citizenship, as well as provisions on the loss of citizenship, can lead to statelessness. Problems in demonstrating parentage or place of birth and conflicts of laws between states can put people in the situation

that no state recognises them as a citizen. Strict *jus sanguinis* laws, moreover, may pass on statelessness to the children of stateless people.

Second, assigning citizenship by birth also leads to huge inequalities in people’s life-chances on the basis of luck. If one is born a citizen of Sweden, one has won first prize in the lottery of life: a life expectancy of 78 with cradle-to-grave care in a stable and prosperous state. If, by contrast, one is born in Liberia, one is unlikely to live beyond 48 years of age, due to the hazards of a society that has been wracked by intense civil conflict. Given the restrictive immigration controls operated by wealthy countries and limited avenues for citizenship through naturalisation, it is hard to disagree with Joseph Carens that “citizenship in the modern world is a lot like feudal status in the medieval world. It is assigned at birth; for the most part it is not subject to change by the individual’s will and efforts; and it has a major impact upon a person’s life-chances.”²

Third, the principles of *jus soli* and *jus sanguinis* ignore other important moral claims to citizenship. Consider the case of Robert Jovicic, whom

the Australian government deported to Serbia in 2004. Jovicic was a non-citizen permanent resident of Australia who had over many years been repeatedly convicted of crimes related to

drug use. In many respects, he was an exemplar for the government’s policy of deporting foreign citizens convicted of criminal offences. But his deportation caused a huge public outcry, ultimately forcing the government to facilitate his return. What was the source of the outcry? Jovicic had lived in Australia for some 36 years prior to his deportation.

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He had arrived in Australia with his parents when he was two years old; he did not speak or understand Serbian or have any social network in Serbia. In the words of the opposition immigration spokesperson, “Even though ... [Jovicic] has not been a good member of our community, he is undeniably Australia’s responsibility.”

This suggests that our conceptions of who is morally a ‘member’ of a state may not be exhausted by birthright and discretionary naturalisation principles. The view that Jovicic was morally Australian seemed to derive from his years of continuous residence in Australia and therefore, notwithstanding his official nationality, Serbia could not really be considered his state. These years of residence even overrode his being a pretty lousy member of the Australian community. Jovicic, one might say, was an Australian citizen by *jus domicili*, by virtue of the reality of residence.

The case of Jovicic is far from an isolated one. Many states accept that different standards of treatment and rights are owed to long-term resident non-citizens. The states of the European Union, for example, have recently agreed a Directive outlining a special status for such people.

State obligations to grant citizenship

How can we make sense of this principle of *jus domicili*? Recent political thought offers three different ways of understanding its moral basis.

In a view which emphasises the idea of choice, like cosmopolitan liberalism, membership should be available to anyone who chooses to live in a particular state. This approach would recognise the moral right of people to reside wherever they wish. On the face of it, the principle of choice seems destructive of the very idea of citizenship: open borders globally would appear to take away from citizenship its legal role as the basis for differentiating between the rights of people. But this is deceptive. The principle of choice is consistent with forms of cosmopolitan federalism that attempt to retain different rights for citizens and non-citizens. In the US, for example, as a federal state, citizens (and legally

admitted non-citizens) may move freely around the country and yet the country’s 50 states have residency requirements that must be met before an individual can access certain local benefits. It is possible to imagine a similar arrangement at the global level. Free movement internationally could exist alongside a requirement of residency in a particular state in order to claim the full rights of citizenship, including the right to vote.

A second principle is that of subjection. In this account, common to both traditional liberal and radical democratic approaches, all people living under – or subject to – the laws of a particular state should be members of that state. The key idea here is that any state that rules over a group of people is legitimate only if the people consent to its rule, and decisions are only legitimate if those affected by them are consulted and involved in the decision-making process. This idea has long been a feature of liberal and democratic thought. A state that refuses to offer rights of political participation to all those under its rule is thus not a democracy but a tyranny. Everyone living in the territorial boundaries of the state should be able to access citizenship and its corresponding rights. In a legitimate democratic regime, membership should follow the contours of power rather than the happenstance of birth.

A third and final principle is that of societal membership. State membership should, in this view, held by some communitarians, include everyone with a significant stake in the development and direction of a particular state. The societal membership principle tends to highlight men and women’s roles as social and economic agents. The test of membership is the depth of one’s social and economic roots into a particular political community, tying an individual’s well-being to the common good.³ The idea of societal membership is implicit in most practical calls to regularise unlawfully resident immigrants or long-term asylum seekers: many amnesty programmes are informed by the idea that the state should recognise that migrants settled in the state over a period of years deserve formal status, particularly if they have not committed crimes. This

principle demands an alignment between the reality of people’s social existence and their legal status.

Each of these accounts of membership takes us beyond the principles of nationality based on birthright and discretionary naturalisation. But in some respects, these principles also offer competing answers. The idea of subjection, for example, seems more inclusive than societal membership, as its basis for inclusion seems to apply the moment a non-citizen sets foot in the territory of the state.

Outstanding questions

Other issues remain outstanding. If non-citizens have an entitlement to citizenship, what are their obligations? Should the fact of unlawful entry to a state make any difference to the state’s duty to grant citizenship? Finally, if citizenship is determined by societal membership or subjection, should lack of residence in the state, for example an extended period spent in another state, result in the loss of citizenship?

In practice, the responses of states to citizenship questions will be shaped as much (if not more) by the dynamics of politics, understandings of national interest and concerns about migration control as by conceptions of justice. But by demonstrating the problems with current arrangements, the plight of the stateless provides powerful practical and moral reasons for asking searching questions about citizenship. These questions are likely to grow in importance in the years ahead.

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1. Hannah Arendt, *The Origins of Totalitarianism*, p296-297

2. Joseph H Carens ‘Migration and Morality’ in B Barry and R Goodin (eds.), *Free Movement* (Harvester Wheatsheaf, 1992), p26.

3. Bauböck, Rainer (2005) ‘Changing Meanings and Practices of Citizenship’, *PS: Political Science and Politics*, Vol 28, No. 4, pp. 667-669

