

# The Rights Claims of the *Sans-papiers*: Transgressing the borders of citizenship

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## Abstract:

In *The Origins of Totalitarianism*, Hannah Arendt criticises the “abstract nakedness” of human rights and the dangers of statelessness. She invokes the “right to have rights” as the only universal right, identifying the fundamental aporia of human rights: despite the claim to universality, rights are only ever granted to those belonging to particular political communities. Through the case of the French *Sans-papiers*, this paper addresses the question of statelessness by situating theories of “acts of citizenship” within a broader theoretical understanding of law. The aim is to develop a model of citizenship, where status and practice are seen as mutual conditions of (im)possibility. The practice of making rights-claims reveals the constitutive tension inherent to citizenship, where the universal rights from which its sovereignty is derived and its laws flow, cannot be contained within its borders. The figure of the migrant, as citizen to-come, marks the mutual implication of ‘transgression’ and ‘belonging’.

## Keywords:

Citizenship; Rights; Migration; Law; Justice.

## DOI:

10.14324/111.2057-2212.073

## Introduction

The relationship between citizenship and universal rights has always been a fraught one, full of seemingly insurmountable paradoxes. When viewed through the prism of the border crossing migrant, it becomes the site at which transgression and belonging intertwine and even turn into their opposites. Hannah Arendt identifies the terrain for this aporetic relation through her analysis of the “right to have rights” that simultaneously critiques the “abstract nakedness” of universal human rights while also asserting the right to belong to a particular rights-bearing political community (citizenship) as the only universal right. For Arendt, human rights are rendered meaningless unless there is a political community willing to enforce them, where statelessness is tantamount to rightlessness, the culmination of which was the Holocaust (see Arendt, 1951). In a contemporary context, two opposing forces make the dangers of statelessness ever more acute and point towards a *crisis of citizenship*: on the one hand, accelerating levels of global migration and mass displacements of people; on the other, the retrenchment of nationalist policies in the form of right-wing populism(s). The purpose of this paper is to enact a critical intervention into the field of citizenship studies in

order to illuminate how the many paradoxes of rights should be seen as the site of radical politics and not contradictions that can be overcome.

I argue that by situating acts of citizenship within a Derridean understanding of the relationship between law and justice, the rights-claiming migrant comes to represent the idealised citizen. This dialectical reversal reveals the constitutive tension between rights and citizenship, where each makes the other possible. Consequently, the aporetic nature of Arendt's formulation of the right to have rights does not signify an outright contradiction but a structural feature of all political communities that are necessarily an ongoing project that must be bent towards justice. I aim to substantiate this thesis in three parts: *first*, through an engagement with Engin Isin's counter-narrative of citizenship and his account of acts of citizenship; *second*, by contextualising Isin's understanding of acts of citizenship through the example of the migrant-led *Sans-papiers* movement; *finally*, by rethinking the relationship of acts of citizenship to law to reveal both its limitations and political possibilities.

### Citizenship and its Others

In the historical imagination, citizenship operates as a metaphor for an idealised form of political belonging, as much as a concept or status, with a 'gradual and linear evolution from the ancient Greek polis towards an ever more inclusive basis for political practice' (McNevin, 2006: 137). The dominant understanding of citizenship deploys images of a coherent unitary concept, passing from the Greek city state to the Roman republic and culminating in the modern (neo)liberal variant, where it is tied to legal status within a given territory - primarily the nation-state. Running alongside this image of citizenship is a historically received idea of what it means to be a good citizen: the subject becomes a virtuous citizen through loyalty toward the polis which becomes a breeding ground for active citizenship and democracy' (Isin, 2002b: 309). However, in a modern globalised context, flows of goods, people and capital alongside the post-Cold War explosions of national and ethnic conflicts dramatically problematise the conceptual clarity of the unitary model of citizenship. While there may be very little in the way of a functional correlation between citizenship in modern nation-states and its ancient counterparts, the governing rationalities of citizenship are constantly invoked by contemporary governments. Historical images of citizenship are recoded onto the borders of existing political communities in an attempt to produce an untroubled and internally coherent model.

While this narrative of citizenship has a strong cohesive effect, what is occluded is the fact that citizenship and its practices necessarily produce others, who are both internally and externally excluded. The history of citizenship starts with 'Greek men... and extends over the centuries to include former slaves, the propertyless, the working classes, colonial subjects, women and indigenous populations' (McNevin, 2006: 137). However, every shift in membership produces new forms of exclusion, which leads Engin Isin to distinguish between "immanent others" and "external others": there are those "immanent others", such as slaves, women and migrants, who are, or have been, formally excluded yet citizenship privileges depend upon; and there are the "external others" marked by the construction of the polity's inside, who are 'those distant alien others whose incivility, backwardness and political immaturity marks, by contrast, the progress of citizenship's evolution' in the West (Ibid: 137). Despite the historical imaginary, citizenship is internally and externally differentiated and inherently produces others.

In *Being Political*, Isin offers a genealogy of citizenship that comes to recognise this agonistic dimension. For Isin, citizenship ‘does not necessarily imply formal membership of... a nation-state (though this is clearly one form of citizenship), but rather a position of inclusion in any measure of political community and the necessary exclusion of others from that same unit’ (Ibid: 137). In this reading, citizenship is more than just the state-centric mode of status but a form of political subjectivity that has become hegemonic. However, there is an *alternate* history of citizenship that is one of resistance: the history of citizenship is equally one of struggle over recognition of who can be included. These struggles take the form of processes of subjectification, where those who are excluded contest the terms of their exclusion, politicising their identity as those to whom the right to have rights is due in processes of *becoming political*. Isin contrasts “being political” to “becoming political”: “being political” means to be ‘implicated in strategies and technologies of citizenship as otherness. When social groups succeed in inculcating their own virtues as dominant’; in contrast, “becoming political”, is:

that moment when the naturalness of the dominant virtues is called into question and their arbitrariness revealed... [Throughout history] these acts [have] redefined the ways of being political by developing... [new] practices that enabled them to constitute themselves as political agents under new terms. (Isin, 2002b: 275–76).

Historical examples of which include the Civil Rights Movement, the Suffragettes and the *Sans-papiers* in France amongst others. All of these are processes and practices of *becoming political* through which *immanent others* reveal themselves as political subjects and lay claim to political membership and the rights from which they were excluded, redefining and reiterate the meaning(s) of the political community.

Isin’s genealogical approach shifts conventional understandings of citizenship. Rather than simply a legal status within nation-states, citizenship is an activity, through which rights claiming subjects constitute themselves as political and enact their status as citizens. In so doing, he - and many other citizenship theorists - differentiate between *formal* citizenship as a legal status and *substantive* citizenship which is an activity, where the latter is seen to be the condition of possibility of the former (Isin, 2008: 17). Starting from a substantive understanding, “acts of citizenship” is an emancipatory activity, constituted through ‘those acts that transform forms... and modes... of being political by bringing into being new actors as activist citizens... through creating new sites and scales of struggle’ (Ibid: 39).

While proponents of acts of citizenship are right to foreground an active dimension of citizenship, what remains under-theorised is the way in which acts may renegotiate the contents of formal citizenship. In principle, acts of citizenship are meant to attenuate the dangerous contradictions displayed in the right to have rights, through the *impossible activism* of those who are excluded but constitute themselves as citizens in substance - if not in status. However, all claims to citizenship, while not necessarily founded in law, appeal to citizenship as a status. To speak of citizenship is to speak of rights and these are dependent upon legal personhood within specific juridico-political communities. The next section will turn to a brief consideration of the French *Sans-papiers* movement as it demonstrates both the strengths and the weaknesses of acts of citizenship, particularly in relation to law.

### The *Sans-papiers*

On the 18th March 1996, 324 undocumented migrants, including 80 women and 100 children, occupied a church in Paris. The occupation marked the beginning of the *Sans-papiers* movement that was a response to increasingly restrictive immigration policies and laws that rendered many long-term residents of France illegal (Hayter, 2002, 149-150)<sup>i</sup>.

Following the initial occupation in Paris, the *Sans-papiers* movement spread countrywide, with more than 25 collectives set up around France. Simultaneously, the movement universalised its demands, calling for the legalisation of all so-called “illegal immigrants” and even for free movement and the opening of frontiers, in general. It was not just a campaign to stop the deportation of particular individuals, but rather for the “regularisation” of all immigrants who do not have the correct immigration documents’ (Ibid: 142). In making these demands, they challenged not only the French state but existing human rights as well. The Universal Declaration of Human Rights states that ‘[e]veryone has the right to the freedom of movement and to leave any country, including their own. Yet, this “freedom” is qualified by an omission: people may leave their own country, but the declaration is silent on their right to enter another one, unless they are able to prove that they are refugees<sup>ii</sup>. In no existing human rights law is it declared that states have an obligation to regularise undocumented immigrants. In making their claims the *Sans-papiers* challenged ‘not only the existing legal framework of human rights but also the moral universalism underlying it’, enacting a form of rights that are yet to exist (Gündoğdu, 2015: 191). But although they call into question existing laws and institutions, the *Sans-papiers* movement was not borne out of a complete rejection of citizenship and the rule of law but engaged with French history to expand and enrich its form of citizenship.

The opening of the *Sans-papiers* manifesto is exemplary of this form of engagement and how they position themselves and their movement to enact a form of *political* citizenship, despite the fact it remains a *legal* impossibility. They declare:

We the Sans-papiers of France, in signing this appeal, have decided to come out of the shadows. From now on, in spite of the dangers, it is not only our faces but also our names which will be known. We declare: Like all others without papers, we are people like everyone else. (Ibid: 142)

The reference to coming “out of the shadows” is tied to the creation of a name and the construction of a form of political subjectivity. The act of naming is important in two ways: first, it legitimises their claims, rendering them as political by acting on behalf of a group; second, the particular use of the term ‘*Sans-papiers*’ is revealing, as it positions them not as illegal immigrants but as those whose only lack is a document. The next line in the manifesto states, ‘[w]e declare: Like all others without papers, we are people like everyone else’, echoing the Declaration of the Rights of Man that asserts that “Men are born and remain free and equal in rights”. The sentence works performatively, reinforcing its content by demonstrating the equality of the *Sans-papiers* as speaking acting beings. In so doing, it juxtaposes a universal to a particular - a feature of all rights claims - where the claim itself reveals a supposedly universal conception of identity to be premised upon the exclusion of precisely those who are making demands for inclusion (Zivi, 2015: 81). The strength of this juxtaposition is supported through the linkage of their claims to French revolutionary history.

By situating their struggles within the French Republican tradition, the *sans papiers* appeal to the universality that lies at the heart of French identity. In so doing, they expand and deepen the meaning of citizenship, precisely because they lack the authorisation to appear -

proposing new rights, and push already existing rights beyond their instituted formulations' (Gündoğdu, 2015: 191).

### The Legality of Citizenship

In a short text titled *What We Owe to the "Sans-papiers"*, Etienne Balibar wrote that 'we owe them... for having recreated citizenship among us, since the latter is not an institution nor a status, but a collective practice' (2000).

The *Sans-papiers* were successful in shifting the discourse on undocumented migrants, repositioning themselves from illegal and criminal to potential citizens, while inspiring similar movements in other countries<sup>iii</sup>. The movement was also able to gain real concessions from the new socialist government in 1997, who announced that the regularisation of *Sans-papiers* would be fast tracked (Hayter, 2002: 145). However, of the 150,000 who applied only half were given papers and the other half were refused and had to go back into hiding or risk deportation. While the active dimension of citizenship is undoubtedly incredibly important and rights movements do have the potential to renegotiate the meaning(s) of citizenship - as is borne out historically - by privileging the active side of citizenship over the formal, theorists of acts of citizenship enter into a false dichotomy that negates some of its emancipatory potential. In what remains of this paper, I want to briefly situate acts of citizenship in a deeper theorisation of law to consider what this reveals about the potential for the political transformation of citizenship.

In a public address he gave on the *Sans-papiers*, Jacques Derrida asked:

What is being said, and what does one mean to say, when one says "Sans-papiers"?... What are they lacking, then, these "Sans-papiers"? What are they lacking, according to the authority of the French state and according to all the forces it represents today? (2002:135)

He concludes that, in principle at least, they do not lack anything; instead, they are the victims of rich neo-liberal nation-states' economic policies and legal projects to protect economic privilege. So, while the *Sans-papiers* may lack a paper, their real problem is what Derrida termed the French Government's 'dereliction of justice' (Ibid: 144): they are in dereliction of offering the right to justice in not just refusing to extend the universal right to hospitality but criminalising those who do. The charge of being in "dereliction of justice" opposes law - in the form of regularised legal status in a given territory - to the principle of justice. In so doing, Derrida hints at a dynamic and emancipatory understanding of law.

In *The Force of Law*, Derrida outlines the aporetic relationship between law and justice. Law exists in the form of prescription, rule, norm; '[l]aw is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it demands that one calculate with the incalculable' (1989: 244). Justice is irreducible to law because it is concerned with the realisation of the ethical relation to the Other and their absolute singularity. Yet, while justice is not and cannot be law, 'it cannot become justice legitimately ... except by holding force or rather by appealing to the force of law (Ibid: 237-238). The paradoxical relation is one of mutual possibility and impossibility: for law to be just it must appeal to a justice that necessarily exceeds all law, yet the realisation of justice requires recourse to force: the force of law. This undecidable relationship between justice and law manifests itself in acts of citizenship.

The 'third principle of theorizing acts of citizenship is to recognize that acts of citizenship do not need to be founded in law or enacted in the name of law [emphasis original]' (Isin, 2008: 39). In the case of the *Sans-papiers*, there is a contradiction: despite the fact that, in the eyes of the law at least, the *Sans-papiers*' are illegal and the fact that many of their direct actions are acts of illegal civil disobedience, their demands are based within the law and their approach engages with the French constitutional tradition. Hannah Arendt's writing on civil disobedience helps to illuminate these acts, as she theorised this exact paradox of law, wanting to find 'a constitutional niche for civil disobedience' (1969: 83). In contrast to criminality, civil disobedience is a political act taking place when the ordinary channels for justice to function are no longer operative, or simply not available to some. So, for Arendt, civil disobedience may not be in accordance with the *statutes* of law but may still be in accordance with its *spirit* (Ibid: 83). In the case of the *Sans-papiers*, rather than seeing their very beings and action as illegal, civil disobedience is the moment in which the excess of justice over law manifests itself in the form of action. These are not acts in contravention of citizenship but support and augment its meaning in upholding the constitutional principles of freedom and equality. The practice of making rights claims reveals the constitutive excess of citizenship, where the universal rights upon which it is premised overflow its borders. Rather than seeing the undocumented as illegal, the dereliction of justice exhibited by governments towards those who make rights claims calls into question the legitimacy of their own laws that are supposedly founded in the Rights of Man. Paradoxically, the rights-claiming migrant, who transgresses the borders of political communities, comes to represent the citizen *par excellence*, calling on the state to do justice to its universal foundations.

### Conclusion

Drawing attention to the paradoxes above does not mean that they can be overcome *or* that citizenship is a redundant category. Rather, the aim was to bring law back into the political arena and challenge an overly rigid distinction between citizenship as 'status' and as 'practice' that is often exhibited by theorists of acts of citizenship. As has already been discussed, law is not justice: justice is irreducible to law, yet also needs law to come into being. Similarly, universal rights cannot be reduced to citizenship: rights must extend beyond the borders of citizenship but without citizenship rights are just an abstraction. So, in the right to have rights, what started out as a contradiction should not be viewed as a conceptual problem but as a political invocation, calling into question the totality of any given political community and asserting the right to contest one's exclusion. The *Sans-papiers* enact this right by situating themselves in the liminal space between the universal and the particular, where the possibility of justice occurs in the transgression of the border between the two and this is the moment of the *political*.

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### Endnotes:

<sup>i</sup> In particular, the Pasqua Laws of 1993. See Hayter (2002).

<sup>ii</sup> This was reinforced by the principle of *non-refoulement* in the Convention Relating to the Status of Refugees.

<sup>iii</sup> Examples of which are the Sin Papeles in Spain and Keim Mensch ist Illegal in Germany.