BOOK REVIEW

THE HUMAN RIGHT TO CITIZENSHIP: SITUATING THE RIGHT TO CITIZENSHIP WITHIN INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW BY BARBARA VON RÜTTE (BRILL NIJHOFF 2022) 480 PAGES. PRICE €177.00. ISBN 9789004517516

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In 1948, the *Universal Declaration of Human Rights* ('*UDHR*') declared the right to a nationality and the right not to be arbitrarily deprived of a nationality.[1] Hannah Arendt's early critique revealed that the membership of a political community, ie, citizenship, was crucial to having access to the full gamut of rights.[2] The right to belong to a nation — to have a nationality — is thus perhaps the most important right.[3] It is all the more significant since instances of deprivation of nationality have resurfaced across the world in recent times.[4] However, neither the *UDHR* nor the other key human rights instruments provide for the enforcement of this right against states. This is a result of the conventional international law position on state sovereignty which translates into absolute discretion in regulating nationality. Scholars often rely on the 100 year old Permanent Court of International Justice advisory opinion, *Nationality Decrees Issued in Tunis and Morocco*, to support this argument.[5] International law has significantly evolved in a century and reading nationality solely from the perspective of state sovereignty is no longer tenable as international human rights law imposes limits on state discretion in nationality matters.[6]

The question of how an individual can realise their right to a nationality is far from settled. The right of everyone to a nationality has not been disputed, but indeterminacy exists in relation to the accountability of states when applying their

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1 *Universal Declaration of Human Rights,* GA Res 217A (III), UN Doc A/810 (10 December 1948) art 15 ('*UDHR*').

2 Hannah Arendt, *The Origins of Totalitarianism,* (2nd edn, Meridian Books 1958) 296–97.

3 Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1/2) *International Journal of Refugee Law* 156, 159–60.

4 Guy Goodwin-Gill, 'Statelessness is Back (Not That it Ever Went Away...)', *EJIL Talk!* (Blog Post, 12 September 2019) <https://www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away>, archived at <perma.cc/F95Y-BFT7>. See generally Neha Jain, 'Manufacturing Statelessness' (2022) 116(2) *American Journal of International Law* 237.

5 *Nationality Decrees Issued in Tunis and Morocco* (*Advisory Opinion*) [1923] PCIJ (ser B) No 4 ('*Nationality Decrees*').

6 See Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1–2) *International Journal of Refugee Law* 156. See also William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children under Customary International Law' (2019) 27(3) *Michigan State International Law Review* 441 ('Customary International Law'); William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law' (2019) 24(2) *Tilburg Law Review* 204.

own criteria for a grant of nationality to an individual.[7] This issue can also be framed in another way — when is a state obligated to enforce an individual's right to a nationality? When conceived in this manner, analysing the right to a nationality demands a paradigm shift to examine the right from an individual-centred perspective, rather than a state-centred perspective.

Barbara von Rütte argues this position in her monograph, *The Human Right to Citizenship: Situating the Right to Citizenship Within International and Regional Human Rights Law*. It is a compelling contribution to the discourse on the human right to a nationality.[8] The book presents the argument for a moral and legal right to citizenship with robust normative analysis of various issues related to citizenship, such as sovereignty, the position of vulnerable groups and rules regarding acquisition and deprivation of nationality, to name a few. The book will certainly prove to be a valuable resource for lawyers and civil society organisations, who can utilise the extensive breadth of case law and scholarship in advocacy for citizenship rights. The jurisprudential imaginings of the right to citizenship in this work will authoritatively support academic scholarship seeking to understand citizenship attribution beyond the clutches of sovereignty.

After a brief introduction, von Rütte traces the historical and theoretical understandings of citizenship before delving into the genealogy of citizenship as a moral right. The discussion of the normative positions of Arendt, Seyla Benhabib, Ruth Rubio-Marín, Joseph Carens, Ayelet Shachar and David Owen not only puts together a comprehensive picture of the fundamental significance of citizenship but more importantly provides the moral framework to resolve the legal indeterminacy of citizenship.[9] Each scholar has argued for a moral right to citizenship with different characteristics and conditions, ranging from long-term residence, non-discriminatory access to membership, and genuine connection and attachment. The author later extensively relies on Shachar's work on *jus nexi* to develop her thesis on how individuals can have their right to nationality enforced against a state with which they can demonstrate connections.

Chapter Three explains statehood and sovereignty and presents the traditional conception of nationality falling into the *domaine réservé* of states. Michelle Foster and Timnah Rachel Baker have written that the 'sovereign fortress of nationality laws still seems somewhat impervious to direct attack [from the individual rights-dimension of citizenship]'.[10] von Rütte argues that the nature of sovereignty is not frozen in time, rather, it has been 'constantly changing' with the development of international law.[11] While international law instruments and institutions largely continue to hold that nationality falls within the *domaine réservé*

7 Human Rights Committee, *Views: Communication No 2001/2010*, UN Doc CCPR/C/113/D/2001/2010 (19 May 2015) ('*Q v Denmark*').

8 The author has used both terms, nationality and citizenship, interchangeably for most of the book. Citizenship is used wherever the author argues for a more inclusive, rights-based understanding of the legal status between an individual and a state. See Barbara von Rütte, *The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law* (Brill Nijhoff 2022) 17–18.

9 ibid 44–54.

10 Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11(1) *Columbia Journal of Race and Law* 83, 86.

11 von Rütte (n 8) 63.

of states,[12] von Rütte argues that the sovereignty of states regarding nationality law is 'not and in fact, never was, unlimited'.[13] State sovereignty vis-à-vis nationality has always been contingent on the development of international law and one must look into the extensive range of human rights obligations upon states. The exact nature and limits on sovereignty in nationality matters is examined later.

Chapter Four illustrates how the universal and regional human rights treaties impose obligations on states concerning nationality. The author categorises the human rights instruments as: first, recognising the right to nationality as a general principle (*International Covenant on Civil and Political Rights* ('*ICCPR*'), *Convention on the Rights of the Child* and the *American Convention on Human Rights*);[14] second, addressing nationality without guaranteeing a right (*Convention on the Elimination of All Forms of Discrimination against Women*, *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention relating to the Status of Stateless Persons* and the *Convention on the Reduction of Statelessness*);[15] and third, instruments which do not recognise the right to nationality but have been interpreted to indirectly protect its components (*European Convention on Human Rights* and the *African Charter on Human and Peoples' Rights*).[16] Here, von Rütte argues that the customary international law character of the right to a nationality is disputed as state practice and *opinio juris* are inconsistent.[17] However, specific aspects of the right to a nationality have acquired the status of customary international law, namely, the prohibition of arbitrary deprivation of nationality, the prohibition of discrimination in nationality matters and the obligation to grant nationality to stateless children born in the territory.[18] The chapter demonstrates that the right to a nationality is a core,

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12 *Nationality Decrees* (n 5) 23–24; *Nottebohm Case (Liechtenstein v Guatemala) (Judgment)* [1955] ICJ Rep 4, 23 ('*Nottebohm Case*'); *Convention on Certain Questions Relating to the Conflict of Nationality Law*, opened for signature 13 April 1930, 179 LNTS 89 (entered into force 1 July 1937) art 1.

13 von Rütte (n 8) 74–75.

14 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

15 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 30 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

16 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 5 (entered into force 3 September 1953); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

17 The African Court on Human and Peoples' Rights in *Anudo v Tanzania* held that art 15 of the *UDHR* is now customary international law. One could argue that this recognition practically translates the right to a nationality into a norm of customary international law since art 15(1) also states that '[e]veryone has the right to a nationality'. However, there are some concerns regarding the Court's identification of customary international law, as it did not provide any reasons for its holding. See generally *Anudo Ochieng Anudo v United Republic of Tanzania* (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018). See also Bronwen Manby, '*Anudo Ochieng Anudo v Tanzania (Judgment)* (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018)' (2019) 1(1) *Statelessness & Citizenship Review* 170, 175.

18 See von Rütte (n 8) 205–9. See also *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009); Worster, 'Customary International Law' (n 6).

fundamental right which enjoys growing international support as a general concept, as well as broad consensus concerning interpretation and application of certain aspects of the right.

In Chapter Five, von Rütte traces the scope and content of the right to a nationality, focusing on the rights of individuals and the obligations of states in this context. The chapter pieces together several characteristics of possessing a nationality and argues that there exist a number of positive and negative obligations imposed upon states of varied normative character.[19] The characteristics specified have the status of customary international law, while the obligations have been developed by the author by analysing jurisprudence and legal instruments in different areas. The key sections of this chapter delve into rights and obligations relating to acquisition, effective enjoyment, change and involuntary loss of a nationality in addition to procedural obligations and lawful interference with the right. Through piecing together these obligations, von Rütte persuasively argues that the right to a nationality involves identifiable and practicable rights and obligations, therefore dispelling the notions that actionable obligations do not emerge from the right to a nationality and that the content of the right is left to the states to implement domestically.

This chapter also outlines the challenges in enforcing the right to a nationality. One of the key challenges remaining concerns sovereignty and the reluctance of states to accept the imposition of international obligations on internal decisions concerning nationality, as argued in Chapter Three.[20] Furthermore, there is no international organisation tasked with the enforcement of the right to a nationality. The United Nations High Commissioner for Refugees has been tasked with the protection of stateless persons but their mandate does not extend to protecting the right to a nationality.[21] These conditions have led to the lack of effective enforcement of the right at the international level. International courts and tribunals have examined the rights and obligations pertaining to nationality in a limited number of cases.[22] Finally, von Rütte analyses the issue of indeterminacy, ie, the difficulty in identifying the duty-bearing state when vulnerable persons seek to enforce the right to a nationality. Her first response is that the framing of this right is no different to other universal civil rights insofar as neither specify which state is obligated to guarantee their respective rights.[23] In this context, it is important to recall the fundamental concern with nationality, ie, that only states can grant nationality and hence, one must affix the responsibility on a state or states to guarantee an individual's right to a nationality. To this end, she argues that it would be easy to identify the duty-bearing state where the state is obligated to refrain from interfering with an individual's rights. However, it may be difficult to identify which state is obligated to 'protect or fulfil the right to nationality, especially when it comes to the acquisition of nationality where the individual and the state concerned are not already linked through the bond of nationality'.[24]

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19 von Rütte (n 8) 326.

20 See Caia Vlieks, Ernst Hirsch Ballin and María José Recalde-Vela, 'Solving Statelessness: Interpreting the Right to Nationality' (2017) 35(3) *Netherlands Quarterly of Human Rights* 158.

21 *Question of the Establishment, in Accordance with the Convention on the Reduction of Statelessness, of a Body to Which Persons Claiming the Benefit of the Convention May Apply*, UN Doc A/RES/3274(XXIX) (10 December 1974).

22 See *Nationality Decrees* (n 5); *Nottebohm Case* (n 12) 23; *Question Concerning the Acquisition of Polish Nationality (Advisory Opinion)* [1923] PCIJ (ser B) No 7.

23 von Rütte (n 8) 324.

24 ibid 327–28.

Finally, Chapter Six provides what von Rütte calls a 'novel reinterpretation' of the right to nationality, with *jus nexi* as the theoretical foundation. The *jus nexi* principle, as conceived in Shachar's work, takes into account the genuine connections of an individual seeking to affirm nationality in the form of social attachments and the factual (political) membership an individual builds with society in a state.[25] Hence, nationality understood with the *jus nexi* principle becomes a question of both fact and law.[26] According to von Rütte, this principle allows one to identify 'the state to which a person has the closest connection and, for that reason, bears the obligation to protect, respect and fulfill the right to citizenship'.[27] The question here becomes why *jus nexi* should be resorted to when there are existing modes of citizenship attribution, and how it should be used.

Shachar has argued that the dominant *jus soli* and *jus sanguinis* modes for determining nationality are arbitrary since the former is based on 'the accident of birth' and the latter on 'the sheer luck of descent'.[28] These automatic modes of attribution are labelled as over-inclusive by von Rütte since they do not take into account the will of the individual, rather, citizenship is imposed upon them.[29] Here, von Rütte also argues that a *jus nexi* conception of the right to citizenship would mean that citizenship would be granted only on application by the concerned individual and would be 'an entitlement based on a person's circumstances of life'.[30]

The conflict between *jus soli* and *jus sanguinis* can exclude a person from citizenship status and does not provide reliable access to membership to migrants who develop genuine connections with their host state.[31] On this issue, von Rütte suggests that *jus nexi* would be used as a subsidiary mechanism of citizenship attribution in circumstances where a person cannot acquire citizenship at birth through *jus soli* or *jus sanguinis* and is at risk of statelessness, or when the citizenship acquired at birth is incongruent with the 'person's actual connections and center of life'.[32] This idea of attributing citizenship based on connections with the state is not new as states mainly grant citizenship based on particular connections recognised through *jus soli* and *jus sanguinis*.[33] Other than this, von Rütte argues that *jus nexi* would also act as a shield against citizenship deprivation leading to statelessness since every person would have at least one genuine connection to a state, and deprivation of citizenship would violate their *jus nexi* right to citizenship.[34]

Non-citizens who develop a genuine connection with a state can also be ensured citizenship through a *jus nexi* right as it would take into account their social, cultural, professional and political ties with the state.[35] This *jus nexi* framing of the right to citizenship also acknowledges the modern, transnational forms of mobility where an individual may forge genuine connections with more than one state, rather than the conventional view which examined allegiance to a state.[36]

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25 Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009) 165, 168.
26 See Vlieks, Ballin and Recalde-Vela (n 20) 160.
27 von Rütte (n 8) 383.
28 Shachar (n 25) 7.
29 von Rütte (n 8) 388.
30 ibid 388.
31 ibid 333–34.
32 ibid 383.
33 ibid 363.
34 ibid 391.
35 ibid 364–78. See also ibid 339–41.
36 ibid 367.

Such a connection would not be solely based on permanent residence (*jus domicili*) since a person may have genuine ties with a state despite not residing there.[37] The author argues that if and when such a genuine connection is close, the person shall have the legal entitlement to apply for citizenship in that state.[38]

In the appraisal of international human rights obligations, von Rütte addresses art 12(4) of the *ICCPR*: the right to enter one's own country. By establishing that everyone can enter their *own country*, this right allows persons to remain in and develop close connections — *jus nexi* — with the country.[39] These connections could then contribute to acquiring citizenship. Similarly, von Rütte examines the jurisprudence on the right to a private life and the concept of social identity. In a string of judgments, the European Court of Human Rights ('ECtHR') has analysed a person's social, economic and cultural ties with a member state, including the identity of non-citizens in their state of residence.[40] This is the social identity approach, which takes into account a person's right to a private life. von Rütte argues that this approach — looking into a person's close ties with the state, shaping their identity — is related to the *jus nexi* principle.[41] Hence, both the 'own country' principle and the concept of social identity indirectly contribute to the *jus nexi* conception of the right to citizenship. The jurisprudential analysis of private life and social identity raises concerns regarding its universal applicability to the *jus nexi* principle. In the chapter, von Rütte has exclusively relied on robust ECtHR jurisprudence on the issue, which arguably does not have universal character. This begs the question of how the *jus nexi* right to citizenship should be understood in other jurisdictions without the assistance of this hefty European jurisprudence.

The *jus nexi* analysis shapes the legal entitlement to citizenship if there are demonstrable close and genuine connections between an individual and a specific state, as von Rütte has aspired to confirm in this book. In the penultimate chapter, she argues that the *jus nexi* principle 'implies a right to acquire the citizenship of the state to which one has the closest connection'.[42] However, it is imperative to note that this persuasive argument does not entirely eliminate state discretion in nationality matters. A careful reading reveals that discretion of the state would be limited to 'a mere examination of connecting factors [and] citizenship must be granted if the links are strong enough'.[43] Certainly, the argument is still impressive but the legal contours of state discretion vis-à-vis *jus nexi* are vague. For instance, as von Rütte writes, in assessing a person's entitlement to citizenship, the state should adopt a flexible approach towards the individual's circumstances and may not exclude persons 'with a sufficient nexus from citizenship'.[44] The legal obligation on the state is not entirely defined, which may put vulnerable persons at risk. There is also no concrete sense of the due process obligations binding the state.

In recent times, states have abused procedure to manufacture statelessness, not through explicitly discriminatory laws and unequal treatment, but by manipulating

37 ibid 36–37.
38 ibid 378.
39 ibid 359–62.
40 See, eg, *Üner v The Netherlands* (European Court of Human Rights, Grand Chamber, Application No 46410/99, 18 October 2006); *Maslov v Austria* (European Court of Human Rights, Grand Chamber, Application No 1638/03, 23 June 2008); *Hoti v Croatia* (European Court of Human Rights, First Section, Application No 63311/14, 26 April 2018).
41 von Rütte (n 8) 358.
42 ibid 387.
43 ibid 388.
44 ibid 389.

the seemingly neutral qualifications for nationality, putting the citizenship status of marginalised communities at risk.[45] Therefore, areas relating to the discretion of states must be tackled to avoid setbacks to the larger cause of eliminating statelessness and making citizenship status secure. This analysis should consider domestic, as well as international, obligations on nationality law to ensure that the precarious rights of citizens and migrants are safeguarded. Another point of critique of the book is the limited space devoted to the Asian practice on the right to a nationality. While the materials on Asian practice are modest, there is emerging scholarship from all corners of the region.[46] The prominent epistemic gap identified in the book could inspire scholars in Asia and beyond to contribute to the discourse. The Global South (and Asia in particular) is witnessing mass deprivation of nationality which is compounded by political challenges. Therefore, academics and experts in the Global South should be implored to develop the *jus nexi* conception of citizenship to accommodate the diverse lived realities of individuals in the region.

von Rütte's interpretation of the right to citizenship with *jus nexi* as the foundation lays the groundwork for implementing this right from an individual rights perspective, rather than squarely from the traditional state sovereignty perspective. It minimises the indeterminacy in citizenship law by enforcing the individual's legal entitlement and access to citizenship in a specific state based on close ties with that state. *Jus nexi* is an inclusive and expansive reimagination of the law on citizenship, which captures the dynamic lives of individuals and complex social identities. As the principle underlying citizenship law and complementing *jus soli* and *jus sanguinis* modes of attributing citizenship, *jus nexi* fully appreciates that an individual may develop strong connections with many states in their lives and thus be entitled to citizenship in those states if their depth of connection permits. Citizenship (or nationality) remains a slippery concept in our times and this study provides ways of strengthening the right to a nationality and realising effective nationality, especially for persons with a clear nexus with a state/states and yet facing the risk of arbitrary deprivation of nationality.[47]

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45 See generally Jain (n 4).

46 See, eg, Andrea Marilyn Pragashini Immanuel, 'The Customary Obligation to Avoid, Reduce, or Prevent Statelessness in South Asia' (2023) 13(2) *Asian Journal of International Law* 244; Centre for Public Interest Law, Jindal Global Law School, *Securing Citizenship: India's Legal Obligations towards Precarious Citizens and Stateless Persons* (Report, September 2020); Tan Kian Leong, '*Tanah Tumpahnya Darahku*: The "Genuine And Effective Link" in Establishing Malaysian Citizenship' (2021) 3(2) *Statelessness & Citizenship Review* 309; Christoph Sperfeldt, 'Legal Identity and Minority Statelessness in Cambodia: Recent Developments' (2021) 3(2) *Statelessness & Citizenship Review* 347.

47 See generally Rhoda E Howard-Hassmann and Margaret Walton-Roberts, *The Human Right to Citizenship: A Slippery Concept* (University of Pennsylvania Press 2015). See also Laura van Waas and Sangita Jaghai, 'All Citizens are Created Equal, but Some are More Equal Than Others' (2018) 65(3) *Netherlands International Law Review* 413.