

BOOK REVIEW

*THE RIGHT TO LEGAL PERSONHOOD OF
MARGINALISED GROUPS: ACHIEVING EQUAL
RECOGNITION BEFORE THE LAW FOR ALL* BY ANNA
ARSTEIN-KERSLAKE (OXFORD UNIVERSITY PRESS
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Anna Arstein-Kerslake's ambitious monograph seeks to extend her existing important scholarship on the legal personhood of disabled people, the mentally ill, women, and gender minorities to members of other marginalised groups.¹ In previous works, Arstein-Kerslake developed the argument that the foundational role that the autonomy of individual rational human beings has played in liberal political theory has led to an acceptance of discrimination against groups deemed not to have legal or mental capacity. Therefore, extending legal personhood to categories of person previously denied recognition of capacity is central to achieving equality and justice. In *The Right To Legal Personhood of Marginalised Groups*,² she takes this analysis further, bringing insights from the work of the United Nations ('UN') Committee on the Rights of Persons with Disabilities (in particular, a General Comment to which she contributed)³ to the legal personhood of members of groups whose exclusion has been based not on questions of mental capacity, but rather on the citizen/non-citizen divide, or racial or ethnic discrimination.

The title of the book suggested to me that the content would largely be about the rights of 'groups' to legal personhood as such; that is, the corporate legal personality of certain minorities. This impression was reinforced by the table of contents, with specific chapters on 'migrant groups and stateless peoples' and on

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¹ See, eg, Anna Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities: Realising the Right to Equal Recognition Before the Law* (Cambridge University Press 2017); Anna Arstein-Kerslake, *Legal Capacity & Gender: Realising the Human Right to Legal Personhood and Agency of Women, Disabled Women, and Gender Minorities* (Springer 2021).

² Anna Arstein-Kerslake, *The Right to Legal Personhood in Marginalised Groups: Achieving Equal Recognition Before the Law for All* (Oxford University Press 2024) ('*The Right to Legal Personhood*').

³ Committee on the Rights of Persons with Disabilities, *General Comment No 1, Article 12: Equal recognition before the law*, UN DOC CRPD/C/GC/1 (19 May 2014).

‘racial minorities and indigenous peoples’.⁴ The text itself frequently refers to the legal personhood of ‘peoples’, and the chapter on human rights law has a significant focus on state sovereignty and the legacy of European colonisation.⁵ The book is not, however, concerned with the tension between collective and individual rights, nor the right to self-determination and political recognition for those demanding autonomy, especially in a (post)colonial context. Its focus is the rights of individual members of those groups in relation to existing states, rather than their right to participate in the identity of the group as a collective, or to demand the recognition of new states or new forms of collective legal personality. That is, it adopts the framing of the international human rights system around the rights of persons belonging to minorities, rather than more maximalist claims for the right to self-determination.

The book does not establish the criteria used to select some minorities for attention; for example, in the text accompanying a table of marginalised groups set out in the preface.⁶ For me, it was surprising that religious minorities were not included, since limitations in relation to legal capacity and personhood have been commonly justified on the basis of religion, with sharply gendered impacts on individuals.⁷ Of particular significance for scholars of statelessness are the challenges of recognition and certification of religious marriages, and the status of children from such marriages.⁸

The opening chapters of the book consider questions of definition: what is ‘legal personhood’? For Arstein-Kerslake, the term legal personhood describes ‘the right to equal recognition before the law, which includes both legal standing (entitlement to be a rights holder) and legal agency (entitlement to recognition as a legal actor)’.⁹ She discusses the nuances of meaning in these three terms, and their relationship to mental capacity and moral personhood: first, as their meaning has evolved in both common law and civil law jurisdictions; and then in the UN human rights treaties. In international law, her starting points are the *Convention on the Rights of Persons with Disabilities* (‘CRPD’)¹⁰ and the *Convention on the Elimination of All Forms of Discrimination Against Women* (‘CEDAW’),¹¹ with the analysis then extended to the *Universal Declaration of Human Rights*

⁴ The full list of chapters are: 1. Defining Legal Personhood; 2. Human Rights Law and the Individual; 3. Legal Personhood and Marginalised Groups; 4. Legal Personhood and Disability; 5. Legal Personhood, Migrant Groups, and Stateless Peoples; 6. Legal Personhood, Racial Minorities, and Indigenous Peoples; 7. Legal Personhood and Gender: Women and Gender Minorities; and 8. Identifying Implications and Creating Solutions: Breaking Down the Barriers to Legal Personhood.

⁵ Arstein-Kerslake, *The Right to Legal Personhood* (n 2) ch 2.

⁶ *ibid* ix.

⁷ Mahdi Zahraa, ‘The Legal Capacity of Women in Islamic Law’ (1996) 11(3) *Arab Law Quarterly* 245, 246, 255–6; Mala Htun and S Laurel Weldon, ‘Religious Power, the State, Women’s Rights, and Family Law’ (2015) 11(3) *Politics & Gender* 451, 453.

⁸ One country where this issue is often highlighted is Indonesia: see, eg, Anne L Buffardi and Kwan Men Yon, *Realising the right to legal identity: A case study as part of an evaluation of the Australia-Indonesia Partnership for Justice* (Working Paper, Overseas Development Institute, July 2016).

⁹ Arstein-Kerslake, *The Right to Legal Personhood* (n 2) xii.

¹⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (‘CRPD’).

¹¹ *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) (‘CEDAW’).

(‘UDHR’),¹² and the *International Covenant on Civil and Political Rights* (‘ICCPR’).¹³

This is not a simple task of description. The different treaties use similar but not identical terms to cover these concepts: from ‘the right to recognition everywhere as a person before the law’,¹⁴ and ‘equal protection of the law’ or ‘equality before the law’,¹⁵ to a specific focus on equal legal capacity.¹⁶ In different contexts, these phrasings might have somewhat different meanings. The contribution that Arstein-Kerslake brings to these discussions is that for her, the definition of legal personhood must include the question of legal capacity addressed in *CEDAW* and the *CRPD* — and indeed, she uses legal capacity and legal personhood as synonyms throughout the book.¹⁷

The right of *everyone* to ‘recognition everywhere as a person before the law’ is both unqualified and non-derogable under the *ICCPR* and other treaties.¹⁸ Nonetheless, as Arstein-Kerslake highlights, laws on guardianship and similar types of oversight or substituted authority have been and are still applied to women, disabled people, and the mentally ill (and gender minorities deemed to be mentally ill) in ways that ‘specifically and intentionally remove legal standing and/or legal agency—in whole or in part—from the individual and vest it in someone else’.¹⁹ This, she says, is ‘the essence of legal personhood denial’.²⁰ Within this discussion, the element perhaps of most interest to readers of the *Statelessness and Citizenship Review* is the discussion of the legal recognition of gender identity, with the potential consequences for issue of identity documents.²¹

The centrality of capacity and agency to legal personhood is an often-missing element in discussions of statelessness — including, I recognise, in my own work. Conversely, the book does not engage with the related discussions around legal recognition of ‘identity’ in the literature with which I am more familiar. This scholarship and its linked policy discussions share the reference point of the right to recognition as a person before the law, as established by the *UDHR* and *ICCPR*,²² but then draw on different reference points in the international human rights treaties.

Article 8(1) of the *Convention on the Rights of the Child* (‘CRC’) establishes the right of every child ‘to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference’.²³ In this formulation, recognition of legal personhood relates rather to the state’s obligation to provide official recognition of the elements of a person’s identity that are most significant for the assertion of their other legal rights, whether as a child or future

¹² *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) (‘UDHR’).

¹³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

¹⁴ *UDHR* (n 12) art 6; *ICCPR* (n 13) art 16; *CRPD* (n 10) art 12(1).

¹⁵ *UDHR* (n 12) art 7; *ICCPR* (n 13) art 26; *CEDAW* (n 11) art 15(1).

¹⁶ *CEDAW* (n 11) art 15(2); *CRPD* (n 10) art 12(2).

¹⁷ Arstein-Kerslake, *The Right to Legal Personhood* (n 2) 24.

¹⁸ See, eg, *ICCPR* (n 13) arts 4, 6.

¹⁹ Arstein-Kerslake, *The Right to Legal Personhood* (n 2) 68.

²⁰ *ibid* 68.

²¹ *ibid* ch 7.4.2.

²² *UDHR* (n 12) art 6; *ICCPR* (n 13) art 16.

²³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8(1) (‘CRC’).

adult.²⁴ Article 7 of the *CRC* establishes the closely related rights to birth registration and to acquire a nationality, as does art 24 of the *ICCPR*.²⁵ These provisions are the foundation of much existing scholarship and policy on the importance of legal recognition of the elements of identity, listed by art 8 of the *CRC* for the realisation of the right to a nationality, as well as inheritance, custody and ownership of property.²⁶ There has also been an explosion of discussion around the importance of registration and recognition of identity for the functioning of any effective state and the rights of its residents.²⁷ Target 16.9 under the Sustainable Development Goals, committing states to ‘provide legal identity for all, including birth registration’,²⁸ then reframed this family of concepts from the perspective of international development, with impacts that are yet to be fully understood on statelessness and nationality rights, or on the recognition of ‘legal personhood’ and legal capacity as defined by Arstein-Kerslake.²⁹

The book also does not stray beyond the UN human rights system, which means that it does not engage with the jurisprudence of the Inter-American Court of Human Rights on the right to recognition as a person before the law, which art 3 of the *American Convention on Human Rights* refers to as ‘juridical personality’ (*personalidad jurídica*).³⁰ Important principles have been established in judgments concerning the Dominican Republic’s denial of civil registration and nationality to children born in the territory of Haitian descent, and in an advisory opinion on the rights of irregular migrants.³¹ There are also important cases from the African human rights institutions concerning the interpretation of the right to ‘legal status’ in art 5 of the *African Charter on Human and Peoples’ Rights*, deemed to include the right to a nationality, as well as the right to birth registration

²⁴ See, eg, United Nations (‘UN’) Children’s Fund (‘UNICEF’) Innocenti Research Centre, ‘Birth Registration: Right from the Start’ (Innocenti Digest No 9, March 2002); Jaap E Doek, ‘The CRC and the Right to Acquire and to Preserve a Nationality’ (2006) 25(3) *Refugee Survey Quarterly* 26, 28–31.

²⁵ *CRC* (n 23) art 7; *ICCPR* (n 13) art 24.

²⁶ See, eg, Douglas Hodgson, ‘The International Legal Protection of the Child’s Right to a Legal Identity and the Problem of Statelessness’ (1993) 7(2) *International Journal of Law, Policy and the Family* 255, 264; Florian Coulmas, *Identity: A Very Short Introduction* (Oxford University Press 2019) ch 7; Wendy Hunter, ‘Identity Documents, Welfare Enhancement, and Group Empowerment in the Global South’ (2019) 55(3) *Journal of Development Studies* 366; Bronwen Manby, ‘“Legal Identity for All” and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law’ (2020) 2(2) *Statelessness & Citizenship Review* 248, 252.

²⁷ For a foundational volume in these discussions, see Keith Breckenridge and Simon Szreter (eds), *Registration and Recognition: Documenting the Person in World History* (Oxford University Press 2012).

²⁸ UN Department of Economic and Social Affairs, ‘Target 16.9: By 2030, provide legal identity for all, including birth registration’ *UN Sustainable Development Goals* (Web Page) <https://sdgs.un.org/goals/goal16#targets_and_indicators>, archived at <perma.cc/PX46-J9VX>.

²⁹ Bronwen Manby, ‘The Sustainable Development Goals and “legal identity for all”: “First, do no Harm”’ (2021) 139 *World Development* 1, 1; Christoph Sperfeldt, ‘Legal Identity in the Sustainable Development Agenda: Actors, Perspectives and Trends in an Emerging Field of Research’ (2021) 26(2) *International Journal of Human Rights* 217, 222.

³⁰ *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 144 (entered into force 18 July 1978) art 3.

³¹ *Case of the Girls Yean and Bosico v Dominican Republic (Judgment)* (Inter-American Court of Human Rights, Series C No 130, 8 September 2005) [159]–[192]; *Expelled Dominicans and Haitians v Dominican Republic (Judgment)* (Inter-American Court of Human Rights, Series C No 282, 28 August 2014) [265]–[267], [302]–[329]; *Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion)* (Inter-American Court of Human Rights, Doc No OC-18/03, 17 September 2003) [97]–[101], [173].

and a nationality under art 6 of the *African Charter on the Rights and Welfare of the Child*.³² The European Court of Human Rights has considered rights dependent on recognition of a child's legal identity and personhood in its jurisprudence on art 8 (right to respect for private and family life) in the context of surrogacy, inter-country adoption, children born out of wedlock, and parental rights — although it has not established the direct connection to the right to a nationality.³³ The absence of this jurisprudence deprives the book of important insights into the commonalities and differences among different jurisdictions in their approaches to legal personhood.

Chapter 5 of the book, on 'migrant groups and stateless peoples', most obviously of interest to scholars of statelessness, makes the argument that 'the granting or denial of immigration status ... is effectively the granting and/or denial of legal personhood to varying degrees'.³⁴ Arstein-Kerslake puts forward the case that 'stateless people are generally not recognised as legal persons and do not enjoy legal standing or legal agency'.³⁵ This discussion I found a little frustrating, and also potentially problematic. There is a very large literature on the rights of non-citizens in public international law, which is not considered in this discussion;³⁶ literature on the basic mechanics of private international law and the

³² *The Nubian Community in Kenya v The Republic of Kenya (Judgment)* (African Commission on Human and Peoples' Rights, Communication No 317/20006, 28 February 2015) [74]–[81]; *Institute for Human Rights and Development in Africa ('IHRDA') and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya (Decision)* (African Committee of Experts on the Rights and Welfare of the Child, Communication No Com/002/2009, 22 March 2011) [97]–[101]; *Decision on the Communication submitted by the African Centre of Justice and Peace Studies ('ACJPS') and People's Legal Aid Centre ('PLACE') v The Government of Republic of Sudan (Decision)* (African Committee of Experts on the Rights and Welfare of the Child, Decision No 002/2018, May 2018) [54]–[89]; *Anudo Ochieng Anudo v United Republic of Tanzania (Judgment)* (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018) [63]–[88]; *Robert John Penessis v United Republic of Tanzania (Judgment)* (African Court on Human and Peoples' Rights, App No 013/2015, 28 November 2019) [74]–[103].

³³ See, eg, factsheets on children and parents produced by the European Court of Human Rights ('ECtHR'): ECtHR, 'Thematic factsheets' (Web Page, 2025) <<https://www.echr.coe.int/factsheets>>, archived at <perma.cc/7WFS-XC4T>. On the ECtHR's jurisprudence on the legal personhood of persons with disabilities, see Department for the Execution of Judgments of the European Court, *Rights of Persons with Mental Health Issues or Physical Disabilities* (Factsheet DG1, 27 September 2024).

³⁴ Arstein-Kerslake, *The Right to Legal Personhood* (n 2) 77.

³⁵ *ibid* 78.

³⁶ Recent contributions include: Christopher A Casey, *Nationals Abroad: Globalisation, Individual Rights, and the Making of Modern International Law* (Cambridge University Press 2020); Frédéric Mégret, 'The Changing Face of Protection of the State's Nationals Abroad' (2020) 21(2) *Melbourne Journal of International Law* 450; Tendayi Bloom, *Noncitizenship: Recognising Noncitizen Capabilities in a World of Citizens* (Routledge 2020); Molly Land, Kathryn Libal and Jillian Chambers (eds), *Beyond Borders: The Human Rights of Non-Citizens at Home and Abroad* (Cambridge University Press 2021); David Moya and Georgios Milios (eds), *Aliens before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection* (Brill Nijhoff 2021). At the UN, the human rights of non-citizens were the subject of extensive discussion by the Committee on the Elimination of Racial Discrimination, in its General Recommendation XXX on discrimination against non-citizens, adopted at its 65th session in August 2004, annexed to OHCHR, *The Rights of Non-citizens*, HR/PUB/06/11 (1 January 2006). See also *Declaration on the Human Rights of Individuals who are not nationals of the country in which they live*, GA Res 40/144 (13 December 1985).

transboundary recognition of legal personhood has also been overlooked.³⁷ Moreover, it seems to me unhelpful to conflate legal personhood with legal (immigration) status in a country.

It is an important principle of human rights law that a person's contested immigration status is not excluded from the right to a fair hearing. A child's right to birth registration applies regardless of the immigration status of the parents. The right to equal treatment by the law and recognition as a person before the law (as noted above) is not qualified and non-derogable under international human rights law. It is also specifically provided for by the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ('*Migrant Workers Convention*').³⁸ These principles are also encoded at a regional level. The European Union ('EU') Asylum Directive,³⁹ for example, directly binding on EU member states, provides that 'each adult with legal capacity has the right to make an application for international protection on his or her own behalf', with arrangements for applications on behalf of dependants or minors, and at least basic due process protections. Similar norms are set out in soft law documents adopted by the African and Inter-American systems.⁴⁰ These principles are important to hold onto even (especially) if they are not fully respected.

The chapter on migrants and stateless persons does not refer to these provisions from the *Migrant Workers Convention*, nor related provisions in conventions of the International Labour Organisation,⁴¹ nor the (admittedly very limited) protections provided for individuals in treaties related to trafficking in persons.⁴² While it does refer to the 1951 *Convention relating to the Status of Refugees*,⁴³ it

³⁷ Mariolina Eliantonio, Silvia Brunello and Hanno von Freyhold, *Life in Cross-Border Situations in the EU: A Comparative Study on Civil Status* (Report, European Parliament Directorate-General for Internal Policies: Policy Department for Citizens' Rights and Constitutional Affairs, 2013); Vincent Chetail, 'Les relations entre droit international privé et droit international des réfugiés: histoire d'une brève rencontre' ['The Relations between Private International Law and International Refugee Law'] (2014) 141(2) *Journal de droit international* 447; Sabine Corneloup, 'Can Private International Law Contribute to Global Migration Governance?' in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014) 301; Jinske Verhellen, 'Cross-Border Portability of Refugees' Personal Status' (2017) 31 *Journal of Refugee Studies* 427; Gerard-René de Groot and David de Groot, 'Recognition of civil status (certificates), with special attention to secondary recognition of documents already recognised in another Member State', in André Janssen and Hans Schulte-Nölke (eds), *Researches in European Private Law and Beyond: Contributions in Honour of Reiner Schulze's Seventieth Birthday* (Nomos Verlag 2020) 283.

³⁸ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3, (entered into force 1 July 2003) arts 18(1), 24.

³⁹ *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* [2013] OJ L 180/60, art 7(1).

⁴⁰ Inter-American Commission on Human Rights, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, Resolution 04/19, 7 December 2019, 9; African Commission on Human and Peoples' Rights, *African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers*, April 2023, 20.

⁴¹ For example, provisions on a fair hearing in relation to employment rights in the *Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143)*, ILO Doc C 143 (24 June 1975) arts 6(2), 9(2).

⁴² *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/RES/55/25 art 7.

⁴³ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

does not consider the specific obligations around recognition of personal status, access to the courts and provision of identity documents for refugees, nor the same protections established by the 1954 *Convention relating to the Status of Stateless Persons*.⁴⁴

The overall impact of these omissions was to leave me unconvinced that the violations of rights that have been inflicted on disabled people, women, and the mentally ill on the basis of deemed lack of capacity can be assimilated to the legal personhood of non-citizens or minority groups. To concede the potential argument from the side of the state that a lack of legal immigration status means a lack of legal personhood may make the problem worse, not better — including for stateless persons — for example, in relation to protection from crime or ability to be a witness in a court case. To conflate legal personhood and legal capacity is perhaps also to risk reducing necessary protections for the personhood of those considered by the state (even if unjustifiably) to lack capacity: better to be represented by a guardian than to have no recognition of legal personhood at all. The definitional problems highlighted by Arstein-Kerslake are complex because many intersecting types of status, elements of (non-legal) identity, and sets of rights are implicated. More clarity and consistency in the language used is a worthy ambition, especially between what have been referred to as the ‘active’ and ‘passive’ elements of legal personhood.⁴⁵ To blend all these elements together, however, may blur our vision rather than create a clearer focus, risking unintended and negative consequences.

Nonetheless, the emphasis that this book places on legal capacity as an element of legal identity and personhood is important for scholars of statelessness, calling us to explore these insights further through research into the many different justifications that may be given for the denial of citizenship — whether as legal status, or the broader rights to participate fully in society.

⁴⁴ *ibid* arts 12, 16, 27, 28; *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) arts 12, 16, 27, 28.

⁴⁵ Visa AJ Kurki, *Legal Personhood* (Cambridge University Press 2023).