# A rights-based approach to statelessness

Swider, K.J.

**Publication date**
2018
**Document Version**
Other version
**License**
Other

# 4 Nationality as a contract

## 4.1 Introductory remarks

This section discusses the understanding of state membership as a form of contract or free association based on consent and agency of nationals. I consider to what extent this thinking is embedded in contemporary laws, policies and scholarship on nationality and statelessness. I also emphasize that even though contractual elements may be present in some forms of entering into and existing state membership, the definition of nationality under international law is not affected by it. In particular, there is no general requirement in international law that an individual needs to consider him- or herself to be a national in order for the nationality to be valid. Under international law, nationality remains a unilateral act of the state concerned, and therefore cannot be defined as a contract between free consenting parties. At the same time, normative ideas of state membership as a voluntary form of expression of political agency of individuals is deeply rooted in academic and political discourses on nationality. Political theories, and even certain laws, underline the value of an individual's agency as a voluntary participant in a state project through nationality. This chapter explores influential ideas, as well as laws and policies that frame nationality as a contract. Those ideas, laws and policies that see the state and the person as equal participants in the existence of a nationality present the individual as an empowered agent who makes choices and expresses free will, on an equal footing with the state. Part II of this thesis relies on the ideals of a national as a free empowered agent to analyse policies on statelessness and suggest improvements to them.

## 4.2 Role of voluntariness in theories of state membership

The concept of citizenship as a contract, either between the state and its nationals, or among nationals of a state, or both,[208] is deeply rooted in Western understanding of state membership; it is traceable to Plato's *Crito* dialogue.[209] In this dialogue, Socrates after being unjustly sentenced to death explains his refusal to escape execution by the special relationship he has with the city of Athens. This relationship, which he willingly chooses not to terminate, obliges him to accept the laws of Athens, imperfect as they are. Numerous subsequent 'social contract' theories, developed among others by John Locke,[210] Thomas Hobbes,[211] and Jean-Jacques Rousseau,[212] relied on the idea of citizenship as a form of contractual relationship between the state and its people, with a strong emphasis on the individual's power to choose to become or to continue being a national.

Contemporary writers still assign great value to the idea of nationality as a contract or a free association. Peter Schuck and Rogers Smith, for example, use the notion of citizenship as a contract to argue that granting US citizenship to children born on US territory of undocumented migrants is unacceptable, since the existing citizens and the state cannot be seen as having expressed consent to form an association with undocumented migrants' children.[213] Costica Dumbrava argues that 'if we conceive of states as demarcating […] political communities, I think that it is essential to salvage the consensual element of membership'.[214] Hanjian relies on the notion of nationality as a free association to make a case for the right of every person to become or remain stateless.[215]

---

[208] John Locke in his 'Two Treatises of Government' of 1689 describes it as follows: '[…] any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government; or else when any one joins himself to, and incorporates with any government already made'. See J. Locke, 'Two Treatises of Government' in *Two Treatises of Government and a Letter Concerning Toleration. John Locke* by I. Shapiro (ed.), (Yale University Press 2003), p. 138 (book II, ch. VII, para 89).
[209] Plato, 'Crito' in *Five Dialogues. Euthyphro, Apology, Crito, Meno, Phaedo* (2nd edition) translated by G. M. A. Grube and revised by J. M. Cooper, (Hackett Publishing Company 2002), pp. 45-57.
[210] J. Locke, 'Two Treatises of Government' in *Two Treatises of Government and a Letter Concerning Toleration. John Locke* by I. Shapiro (ed.), (Yale University Press 2003).
[211] T. Hobbes, 'Leviathan, or The Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill, 1651' in *Leviathan. Thomas Hobbes. Authoritative text, Backgrounds, Interpretations* by R. E. Flathman and D. Johnston, (Norton 1997), pp. 1-262.
[212] J.-J. Rousseau, *The Social Contract, 1762*, edited and translated by C. Betts, (Oxford University Press 1994).
[213] P. H. Schuck and R. M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*, (Yale University Press 1985).
[214] C. Dumbrava, *Nationality, Citizenship, and Ethno-Cultural Belonging. Preferential Membership Policies in Europe*, (Palgrave 2014), p. 124.
[215] C. Hanjian, *The Sovrien: An Exploration of the Right to be Stateless*, (Polysipre, 2003), pp. 24-80.

The core feature of understanding nationality as a contract or a free association is the voluntariness of participation in state membership by all parties involved, the power they have at some point to either enter state membership or to terminate it. That power to choose subsequently justifies any obligations state membership may impose on nationals.

Social contract theorists disagree on how exactly consent to being a national needs to be expressed, and whether and how such consent can be withdrawn, but every author who theorizes nationality as a contract insists that participation in it is voluntary on the part of each individual involved, in one way or another. For example, John Locke discusses two different types of consent which can legitimize the state-citizen relationship: explicit and implicit consent.[216] The right to withdraw consent depends on whether membership in the state is based on an implicit or explicit consent. A group of individuals who initiate a new state are explicitly consenting to their citizenship by entering into a social contract with each other. Someone who chooses to join a state is also expressing an explicit consent. A person who has explicitly consented to membership in a state cannot opt out of it, unless the government of the state changes so significantly that it can no longer be considered the same government that was initially consented to.[217] Those who have been 'born' into the citizenship arrangement concluded by ancestors, on the other hand, are assumed to have consented to state membership implicitly if they obey its rules and enjoy its benefits. They can opt out of state membership at any moment by renouncing the claim to the benefits of the state membership contract.[218]

Even Thomas Hobbes, who argues for an absolute uncontrolled form of monarchy as the best possible governance, devotes considerable attention to the issue of consent of the individuals to become part of such a state. He considers coercion to be an acceptable way of becoming a citizen, but nevertheless insists that such a citizenship contract is voluntary, and based on

[216] J. Locke, 'Two Treatises of Government' in *Two Treatises of Government and a Letter Concerning Toleration. John Locke* by I. Shapiro (ed.), (Yale University Press 2003), pp. 151 – 154 (book II, ch. VIII, paras. 116-121).
[217] J. Locke, 'Two Treatises of Government' in *Two Treatises of Government and a Letter Concerning Toleration. John Locke* by I. Shapiro (ed.), (Yale University Press 2003), pp. 153-154 (book II, ch. VIII, paras 121) and p. 185 (book II, ch. XVI, paras. 191-192).
[218] J. Locke, 'Two Treatises of Government' in *Two Treatises of Government and a Letter Concerning Toleration. John Locke* by I. Shapiro (ed.), (Yale University Press 2003), pp. 153-154 (book II, ch. VIII, paras 121) and p. 185 (book II, ch. XVI, paras. 191-192).

consent.[219] According to Hobbes, everyone becomes a citizen out of fear of death, and therefore it does not matter much whether the death is feared from the state who coerces the person to become its citizen, or from fellow individuals with whom the state is initiated in order to reduce the risk of murdering each other. Consent, in Hobbesian theory, is still valid when expressed in fear of grave consequences of not consenting. Despite all that gloominess, he insists that people are all naturally equal and free, and subject themselves to the absolute power of a monarch by an act of their own free will.[220] As from the moment of concluding the citizenship contract among themselves they become 'authors' of all the acts of the dictator.[221] Thus, the citizens' consent legitimizes the absolute power of the monarch.[222] Consent plays a crucial role in the Hobbesian ethical defence of a dictatorship as the best form of governance and his understanding of state membership generally. These examples show that very different forms of governance are defended by social contract authors on the basis of, among other things, voluntariness and free will of those participating in the state project.

Similarly to individuals, states, if they are seen as parties to the social contract, need to consent to the membership of individuals, and, according to some authors, can end the citizenship relationship (sometimes subject to specific conditions). In older works on social contract we find references to banishment as a way for the state to end membership for one of its citizens.[223] In a

[219] T. Hobbes, 'Leviathan, or The Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill, 1651' in *Leviathan. Thomas Hobbes. Authoritative text, Backgrounds, Interpretations* by R. E. Flathman and D. Johnston, (Norton 1997), pp. 109-115 (ch. XX).
[220] T. Hobbes, 'Leviathan, or The Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill, 1651' in *Leviathan. Thomas Hobbes. Authoritative text, Backgrounds, Interpretations* by R. E. Flathman and D. Johnston, (Norton 1997), pp. 115-122 (ch. XXI).
[221] T. Hobbes, 'Leviathan, or The Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill, 1651' in *Leviathan. Thomas Hobbes. Authoritative text, Backgrounds, Interpretations* by R. E. Flathman and D. Johnston, (Norton 1997), p. 95-96 (ch. VII).
[222] T. Hobbes, 'Leviathan, or The Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill, 1651' in *Leviathan. Thomas Hobbes. Authoritative text, Backgrounds, Interpretations* by R. E. Flathman and D. Johnston, (Norton 1997), p. 96 (ch. VII), which reads: 'Soveraigne Power is conferred by the consent of the People assembled'; and p. 119 (ch. XXI), which reads: 'the Consent of a Subject to Soveraign Power, is contained in these words, *I Authorise, or take upon me, all his actions*; in which there is no restriction at all, of his own former naturall Libery'[emphasis in the original].
[223] T. Hobbes, 'Leviathan, or The Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill, 1651' in *Leviathan. Thomas Hobbes. Authoritative text, Backgrounds, Interpretations* by R. E. Flathman and D. Johnston, (Norton 1997), p122 (ch. XXI).

more recent study, Aleinikoff takes an interesting perspective on deprivation of nationality, namely as a state unilaterally ending the citizenship contract with one of its nationals.[224]

The concept of consent, similar to the concepts of free will and power, is not easily defined, yet alone implemented.[225] Despite differences in understanding consent, it is important to note that authors who see nationality as a contract assign a central role to the individuals' and states' freedom to decide whether or not to enter and remain in the state-citizen relationship. They normatively justify their extremely divergent preferences for the form of governance by looking at whether that freedom is respected.

## 4.3 Nationality as a contract and as a right

It is interesting to consider how the approach to nationality as a contract relates to the approach to nationality as a human right. Both emphasize, albeit in different ways, the freedom, choice and agency of the individual to be or become a national. Right to a nationality implies the empowerment of the right-holder to choose whether, when and how to exercise the right.[226] Viewing nationality as a contract is strongly rooted in the assumption of the freedom of the individual to decide whether to enter into, or remain bound by the contract, or both.

The main difference is that nationality as a right entails an obligation on the part of a state to secure state membership and entitlement on the part of an individual to be a member of a state. Nationality as a contract assumes initial freedom from any such rights and obligations, and the ability of each party freely to choose to enter or not to enter in an agreement with each other through which subsequent citizenship rights and obligations may be established.

---

[224] T. A. Aleinikoff, 'Theories of Loss of Citizenship', *Michigan Law Review*, Vol. 84, No.7, (June 1986), pp. 1471-1503.

[225] Costica Dumbrave, for example, discusses the problem of 'serial consent' where the perfect application of consensual membership inevitably leads to global membership, as well as the problem of absence of *vacuis locis* that challenges conceptualizing membership in any existent states as fully based on consent. See C. Dumbrava, *Nationality, Citizenship, and Ethno-Cultural Belonging. Preferential Membership Policies in Europe*, (Palgrave 2014), p. 124.

[226] As discussed in chapter 3, section 3.3.3.

Aleinikoff, formulates the difference between his understanding of citizenship as a contract and the concept of right to a nationality in the following way:

> *Citizenship is not a right held against the state; it is a relationship with the state or, perhaps, a relationship among persons in the state.*[227]

Hanjian rejects the notion of citizenship as a human right based on the presumption that citizenship is a form of free association:

> *I could not reasonably claim a fundamental right to be a citizen of at least one state because such a right would oblige certain others to associate with me regardless of their essential human interest in freedom of association.*[228]

Statelessness, being the lack of a nationality, is also affected by whether nationality is perceived as a contract or as a human right. Statelessness seems to be less inherently negative if nationality is a contract that arises upon mutual agreement of all parties involved. In social contract theories statelessness is often described as 'the state of nature', and indicates merely the absence of an agreement, the default situation:

> *[A]ll men are naturally in [the state of nature], and remain so, till by their own consent they make themselves members of some politic society.*[229]

The contract-approach does not imply a normative judgement about the existence of either statelessness or nationality; it is simply the presence or absence of a specific type of a legal arrangement between or among free parties. The content, not the mere existence, of the contract determines its normative value, as well as how it normatively compares to the absence of such a contract. This is different from the approach that treats nationality as a right, where involuntary statelessness is a violation of a human right, and therefore a negative phenomenon, while

[227] T. A. Aleinikoff, 'Theories of Loss of Citizenship', *Michigan Law Review*, Vol. 84, No.7, (June 1986), p. 1488.
[228] C. Hanjian, *The Sovrien: An Exploration of the Right to be Stateless*, (Polysipre, 2003), p. 31.
[229] See J. Locke, 'Two Treatises of Government' in *Two Treatises of Government and a Letter Concerning Toleration. John Locke* by I. Shapiro (ed.), (Yale University Press 2003), p. 106 (book II, ch. II, para. 15).

voluntary nationality is a realization of that right, and therefore presumed to be positive. Voluntary statelessness, however, is not objectionable from either approach.

## 4.4 Nationality as a contract in nationality laws and practices

Elements of understanding nationality as a contract can be observed in some aspects of how nationality is regulated in legal and political practice. Particularly in the context of norms and practices regarding naturalization of adults, acquisition of nationality recalls the process of entering a contractual relationship. The naturalization candidate is often required to express the wish to join the state in some formal way, either through signing a document or pronouncing an oath of allegiance, or both.[230] States have wide discretion to elaborate conditions for access to naturalization, and in many legal systems can deny naturalization even if the individual complies with legal requirements to become a citizen,[231] thus exercising its freedom not to enter into a contractual relationship with a given candidate. Involuntary naturalizations of adults are uncommon and often treated as unacceptable.[232] It is generally accepted that persons who qualify for naturalization but choose not to naturalize for whatever reasons, should be allowed to refrain from naturalizing. An interesting exception under international norms and practice to the rule that adults cannot acquire a new nationality against their will seems to occur in the context of state succession. According to the International Law Commission, it is acceptable to impose a new nationality of a successor state on adults who previously possessed nationality of the

[230] See more in GLOBALCIT, *Global Database on Modes of Acquisition of Citizenship*, Version 1.0, (Robert Schuman Centre for Advanced Studies, European University Institute 2017).
[231] Some states have distinct procedures for acquiring nationality after birth, where one procedure implements the entitlement of qualified individuals to a nationality and where the discretion by state authorities to reject the application is often limited, and another discretionary procedure where the state authorities can choose to grant someone a nationality not as a matter of an individual right of that person, but as a matter of state's freedom to grant nationality as its discretion. The Netherlands, for example, has an option (in Dutch - *optie*) procedure which is fairly non-discretionary, and a naturalization (in Dutch - *naturalisatie*) procedure where the state authorities enjoy wider discretion to reject a naturalization request as the criteria for granting nationality are formulated in broader terms, see Dutch Nationality Law of 1984, arts 6-13. In Poland there is a widely discretionary procedure of conferral (in Polish – nadanie) of Polish citizenship by the Office of the President with barely any formal pre-requisites for applying, where the President *can* confer nationality on an applicant, and a less discretionary procedure of recognition (in Polish – uznanie) of Polish citizenship, where a person complying with a list of specified requirements *is* recognized as a Polish citizen, see Law on Polish Citizenship of 2 April 2009, Arts. 18, 30-31.
[232] R. Donner, '*The Regulation of Nationality in International Law*', 2nd edition, (Transnational Publishers 1994), pp. 128-150, 160-165.

predecessor state if they would otherwise become stateless as a result of state succession.[233] Another exception to the rule that adults cannot be forcefully naturalized used to be the case of married women, whose nationality used to change automatically into the nationality of the husband, regardless of their will.[234] Nowadays, however, most states have abandoned this practice in the process of abolishing discrimination against women generally, and in nationality laws specifically.[235] Foreign women in most countries are no longer forcefully naturalized upon marriage with a national, and women do not lose their nationality automatically upon marriage with a foreigner.

It is also common to allow individuals to renounce their nationality, sometimes after meeting specific conditions, such as having fulfilled certain duties to the state, or having secured a different nationality in another state, which in some way resembles the ending of a contractual relationship. Very few states do not accommodate the individual's will to renounce their citizen-state relationship in any way at all.[236] Termination of a nationality relationship unilaterally by a state is, however, usually heavily restricted to very specific circumstances or prohibited altogether.[237] Thus, while the will of an individual to terminate the citizenship contract with a state is generally respected, even though sometimes made subject to some conditions, the state's

[233] See International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries*, (1999), in particular Arts. 7, 8 (comment No. 5) and 11 (comment No. 6). See also UN General Assembly Resolution A/RES/55/153 of 30 January 2001, Art. 8(2). See also G. Marrero González, *Civis europaeus sum? Consequences with regard to Nationality Law and EU Citizenship status of the Independence of a Devolved Part of an EU Member State*, (Wolf Legal Publishers 2016), pp. 58-63; and M. O. Hudson, Special Rapporteur of the International Law Commission, report 'Nationality, Including statelessness', *Yearbook of the International Law Commission*, Vol. II, Doc. No. A/CN.4/50, (1952), p. 9.

[234] It must be noted that even then scholars attempted to explain 'acceptable' automatic conferrals of nationality on adults (including on married women) in light of the voluntariness of the indirect acts leading to naturalizations (such as voluntary entering a marriage). See, for example, M. O. Hudson, Special Rapporteur of the International Law Commission, report 'Nationality, Including statelessness', *Yearbook of the International Law Commission*, Vol. II, Doc. No. A/CN.4/50, (1952), p. 8.

[235] See, for example, UN Convention on the Elimination of all Forms of Discrimination Against Women of 1979, art. 9; Council of Europe European Convention on Nationality of 1997, art. 4(d). See also Z. Albarazi and L. van Waas, 'Towards the abolition of gender discrimination in nationality laws', *Forced Migration Review*, No, 46, (2014), pp. 49-51.

[236] Some states do not allow voluntary renunciation under any circumstances: these are Argentina, Bhutan, Congo Kinshasa, Costa Rica, Dominican Republic, Egypt, Equatorial Guinea, Guatemala, Honduras, Kuwait, Lesotho, Liberia, Libya, Nepal, Niger, North Korea, Oman, Thailand, Qatar, Saudi Arabia, United Arab Emirates, Uruguay, and Yemen, according to a global database of citizenship laws: GLOBALCIT, *Global Database on Modes of Loss of Citizenship*, Version 1.0, (Robert Schuman Centre for Advanced Studies, European University Institute 2017). See more on voluntary renunciation of nationality in chapter 7, section 7.3.2 below.

[237] See more in GLOBALCIT, *Global Database on Modes of Loss of Citizenship*, Version 1.0, (Robert Schuman Centre for Advanced Studies, European University Institute 2017).

will to terminate the citizenship arrangement with a specific individual is often heavily restricted or made impossible.

The asymmetry in the state's and the individual's right to terminate the citizenship relationship with each other is nicely reflected in the Universal Declaration on Human Rights, which declares that

> *No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*

Here, the state's ability to end the citizenship arrangement with one of its citizens is formulated in terms of a prohibition (not an absolute prohibition, but merely a prohibition of arbitrariness, but a prohibition nevertheless). At the same time the individual's ability to end the citizenship arrangement is formulated in terms of a right (not an absolute right to renounce, merely a right to change, thus conditional upon securing a different nationality, but a right nevertheless). This provision combines approaches to nationality as a right and as a contract. The language of 'right' of an individual to change nationality, and the language of prohibition on a state from withdrawing that right, suggests that nationality is a right. However, both the right and the prohibition are conditional, creating a sense of certain contractual duties that the state and its nationals have vis-à-vis each other, so they cannot unconditionally end their relationship. The state is merely prohibited from withdrawing nationality arbitrarily, thus in a manner not prescribed by the conditions of having a nationality in that state in the first place. The individual is allowed to 'change' his or her nationality, thus is only free not to be a member of a state if he or she manages to secure membership in another state.

Bulgarian nationality law offers an interesting example of understanding the concept of nationality as a right and as a contract at the same time, by proclaiming that '[e]verybody shall have the right to choose his citizenship' (in Bulgarian – '[в]секи има право на избор на гражданство').[238] The difference between the use of the word 'change' and 'choose' in the

[238] *Law for the Bulgarian Citizenship (last amended February 2013),* 5 November 1998 [accessed 27 June 2016], art. 7(2).

UDHR and Bulgarian law respectively is noteworthy. While 'change' implies the existence of the initial default nationality which can be exchanged for something else, 'choose' seems to allude to the initial 'state of nature' default situation, whereupon a choice can be made from a position of freedom to participate in a(ny) specific state project. The emphasis on choice introduces elements of contract-based understanding of nationality, upholding the ideal of agency, but also perhaps contributing to a misleading perception that every citizen is a citizen of his or her state by choice. The focus is on the freedom of the national, and not of the state. There is no provision, for example, declaring the right of the (Bulgarian) state to choose its nationals. Such a provision would feel intuitively unfair, even though it would reflect the reality of what nationality is and continues to be under international law.[239] The language of a *right* features prominently in this provision, and reflects the international discourse on the right to a nationality.

Finally, it is important to note that most people acquire their nationality at birth and never consciously consent to having it. The element of consent is therefore rather limited in such cases, and can perhaps only be manifested to the extent a given individual may have alternatives for the acquisition of another nationality, and whether he or she chooses to make use of those alternatives. Nevertheless, despite the empirical and theoretical evidence to the contrary, nationality is often presumed to be voluntary.[240]

## 4.5 Concluding remarks

It is important to note that regardless of whether the acquisition or loss of nationality *do* or *should* take consent into account according to international norms or common practices, the consent of the individual does not play a role in the constitutive definition of a national under international law. In contrast to the UDHR and perhaps the Bulgarian nationality law,[241] only the perspective of the state on whether the nationality bond exists is relevant for establishing whether such a bond in fact exists, and not the perspective of the relevant individual. Despite the established individual's legal right to (choose or change) a nationality and the lack of a codified

[239] See chapter 2 section 2.4 on the definition of a national under international law.
[240] See T. Bloom, 'Members of colonised groups, statelessness and the right to have rights' in *Understanding Statelessness* by T. Bloom, K. Tonkiss, and P. Cole (eds.), (Routledge 2017), p. 162.
[241] See section 4.4 above.

right of a state to choose and exchange nationals, only the state's unrestrained arbitrary decision on whether an individual is its national matters for establishing whether a nationality bond exists under international law. International norms and practices may dictate that under certain circumstances the will of the individual must be respected, but the implication of a state violating such norms is merely a violation of an international norm, which does not invalidate (illegitimately) established or non-established nationality bonds.[242]

To sum up this chapter: the contract-based approach to nationality is rooted in scholarly works on state membership, and the footprint of such an approach is still prominently visible in scholarship on nationality, as well as in some laws and practices with regard to regulating access to it. Understanding nationality as a contract is theoretically distinct from the idea of nationality as a human right, in particular with regard to the obligation on states to offer a nationality to individuals. Under the understanding of nationality as a right, there is at least a collective obligation on all states to offer each individual access to at least one nationality, while if nationality is understood as a contract between free parties, states are like individuals free to enter or not to enter into contracts with each other. There are also similarities between approaches to nationality as a right and as a contract; in particular both emphasize the importance of the freedom, agency and consent of the individual.

Ultimately, however, while states may grant access to nationality to some individuals as a matter of right, and may respect the individual's will in some modes of acquisition and loss of nationality, the 'decisions about citizenship are taken by a State and not by an individual'[243] and nationality, unlike many other types of membership, is not by definition voluntary. Assuming that nationality is inherently largely a voluntary status can be misleading, and similarly to misleading assumptions with regard to nationality and rights discussed in the previous chapter, may lead to problematic policy-making, as discussed in the next part.

[242] See more section on recognition in chapter 2, section 2.5 above.
[243] T. Bloom, 'Members of colonised groups, statelessness and the right to have rights' in *Understanding Statelessness* by T. Bloom, K. Tonkiss, and P. Cole (eds.), (Routledge 2017), p. 162.