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# REPORT ON CITIZENSHIP LAW: INDIA

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# Report on Citizenship Law

## India

*Ashna Ashesh and Arun Thiruvengadam*

### 1. Introduction

The text of the Constitution of India, 1950 recognizes the importance of issues of citizenship by according a privileged space to them in the founding document. Part II of the Constitution of India is titled ‘Citizenship’ and its six provisions precede the important provisions relating to Fundamental Rights that are housed in the next part. During the drafting process, which lasted from 1946-49, a considerable amount of discussion and energy were devoted to the concept of citizenship that would be enshrined within the constitutional text. The final text of the provisions relating to citizenship was decided after several rounds of revisions to drafts prepared by successive preparatory committees over a period extending to two years. Nevertheless, rights to citizenship in India are not ‘Fundamental Rights’, even as they remain constitutionally bestowed and recognized. This, as we shall see, has affected how much importance has been accorded to them relative to the fundamental rights including those relating to speech, assembly, personal liberty, etc.

Nationality and citizenship are often used interchangeably in general discourse in India. There is a certain ambiguity about these terms, especially in more recent times, when ‘nationality’ and ‘nationalism’ have once again become sites of strife. Several groups of citizens have been charged with ‘anti-national’ sentiments, even as their citizenship is seemingly accepted. We will focus on this in the concluding section of our report. In Indian citizenship law however – at least as courts have interpreted these concepts - there exists a clear distinction between citizenship and nationality. In a case decided in the 1960s, the Indian Supreme Court held that citizenship is applied only to natural persons and connotes a legal status that determines civil and political rights within the context of domestic law.<sup>1</sup> Nationality, on the other hand, can be applied to either natural persons or juristic persons and determines the civic rights of a person in the context of international law.<sup>2</sup>

Since citizenship debates are considerably impacted by questions of identity, it may be necessary to obtain some sense of the various identities that Indians inhabit, especially in relation to the marker of religion, which has decisively shaped the evolving contours of citizenship law in India. India’s population, according to the most recently conducted census in 2011, stands at 1.2 billion. The census, incidentally, has historically been a catalyst for

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<sup>1</sup> The State Trading Corporation of India Ltd. And Ors. v. The Commercial Tax Officer, Vishakhapatnam and Ors., 1964 SCR (4) 89.

<sup>2</sup> Ibid.

creating, transforming and sharpening identities in India. Introduced during the period of British Raj, the first census results in 1871 enabled the colonial authorities to ‘see’ and learn about their subjects along enumerated categories. In the process, the colonial subjects had to learn to adopt some identities, which were new for them as well. The process of ‘classification’ and ‘counting’ contributed to the sharpening of identities, which were more fluid and less clear than was evident in the precise and clean-cut figures of the census results. Scholars have noted how the categories of ‘religion’, ‘caste’ and even a category as ‘objective’ as age came to be viewed as ideologically charged and capable of both confusion and manipulation in census surveys and calculations.<sup>3</sup>

With these caveats in mind, we examine the categories of Indian identity in relation to religion. Of the 1.2 billion Indians, Hindus who account for nearly 80% of the population of India are at 966 million. Hindus are divided by the category of caste into five broad segments (the four *varnas* and the fifth unnamed category for the former Untouchables); these *varnas* are further divided into more than 3000 sub-categories (*jatis*). India’s 172 million Muslim citizens constitute its largest minority religion, accounting for 14.23% of its population. This makes India the country with the third largest Muslim population in the world. Indian Muslims are further divided into Sunnis, Shias, Bohras, Ismailis and Ahmadiyyas. The Hindu population is divided into even more sects. Other numerically significant religious minorities in India are Christians (27.8 million), Sikhs (20.8 million), Buddhists (9.25 million), Jains (4.4 million), and Parsis (57,264).

This report covers issues of citizenship in India from the colonial period onwards. The legal status of peoples in the Indian subcontinent was an important driver of the anti-colonial, nationalist movement. Since the emergence of India as an independent nation in 1947, the terrain of citizenship has continued to be characterized by multiple contestations, linked to different historical periods and to varying socio-political causes. The report seeks to map the main events and turning points in the narrative of India’s changing citizenship regime. The focus is on the following specific periods and groups: i) the context of the partitioning of British India that led to the creation of the new nation states of India and Pakistan in 1947; ii) the further creation of the state of Bangladesh in 1971 and the turmoil which followed that led to consequent shifts in Indian citizenship laws; and finally, iii) the long-simmering issue of ‘estate/plantation Tamils’ in Sri Lanka, which dates back to the inflow of large populations of Tamils, who were sent from the Madras Presidency in undivided India by the British to the erstwhile colony of Ceylon to service the colonial plantation economy, and have been the subject of several accords and agreements between heads of state of India and Sri Lanka from the 1950s to this new century.

Citizenship in India, then, has been deeply marked by colonial continuities and ruptures. It is, at the same time, being transformed by demographic and political shifts. In recent years, the rise of Hindu majoritarian parties at regional and national levels has added a further level of complexity to these trends. Niraja Jayal has persuasively argued that the substantive character of Indian citizenship has changed over time, from *ius soli* to *ius sanguinis* (Jayal 2016, 2017). At the time of the commencement of the Constitution, Jayal argues, the organizing principle was *ius soli* i.e. on the basis that birth on the soil of India

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<sup>3</sup>From among the vast literature, see generally, Kevin Walby and Michael Haan, ‘Caste Confusion and Census Enumeration in Colonial India, 1871-1921,’ *Histoire sociale / Social History*, vol. XLV, no 90 (Novembre / November 2012), pp. 301-18 (showing that for the census reports between 1871-1921 epistemological problems with envisioning and enumerating caste were the rule rather than the exception); Barbara D. Metcalf and Thomas R. Metcalf, *A Concise History of India* (Cambridge University Press: Cambridge, 2002) (challenging the notion that a continuous meaning can be applied to social categories such as ‘caste’, ‘Hindu’, ‘Muslim’, or even ‘India.’).

would confer citizenship rights although this was mixed with other bases. More recently, however, the organizing principle of Indian citizenship has, in Jayal's view, leaned more towards *ius sanguinis*, i.e. based on descent or through the citizenship of parents, and expressly disfavours those who are Muslims. We argue that alongside this shift, there are other changes afoot, because although there has been a shift towards the privileging of Hinduism in matters relating to citizenship laws more recently, this movement has not been uniform as Hindu Tamils from Sri Lanka have not benefited much from this trend. So, religion is not the sole explanatory factor for the complex trajectory of citizenship laws in India. The terrain of citizenship laws continues to be a shifting, evolving space that will no doubt see further change in the future, in response to agonistic contests between different groups of Indian citizens.

The paper is organized as follows. The second section of this paper sets out the historical context of the legal framework of Indian citizenship. It examines, through a temporal lens, both the colonial history and the constitutional history of citizenship law, as well as the relevant constitutional provisions. The third section details the current legal regime of citizenship. It focuses both on a textual reading of the statutory provisions as well as the legal and political context informing the various provisions and related amendments. The fourth section provides an overview of some recent political debates and is followed by the Conclusion to the report.

## **2. Historical Background: Colonial and Post-colonial contexts**

It is undisputed that the Indian polity is indelibly marked by colonial rule. It should not come as a surprise then that the current legal regime of citizenship in India was unable to escape the trappings of its colonial history. In order to gain a better understanding of the current regime and to appreciate the evolution of citizenship law, its historical context needs to be examined closely. This historical evolution of citizenship law in India can be charted across two broad temporal registers – the period of colonial rule, and the post-Independence period. The traumatic moment of India's independence deserves special focus for its continuing impact on post-Independence policies of citizenship.

### **2.1. The colonial period**

There is some debate over the exact period across which India was a colony. The British presence in India was established through the East India Company, which had been created through a charter of the English Parliament in 1600 as a mercantile body that was to possess a trading monopoly in the East. India was formally governed by the East India Company from 1757-1858. Especially in the nineteenth century, the Company had to share sovereign power with the British Crown, which took over formal power in 1858 to become the direct legal authority over British India. From 1858-1947, India was a formal colony of the British government and was ruled directly by it. The East India Company was initially granted certain limited powers of a legislative character, including the power to impose penalties, to enable it to perform its commercial functions (Keith 2010: 5-6). As the Company's

operations expanded, it demanded and obtained greater legislative, executive and ultimately, judicial powers. Over time, the Company officials obtained powers similar to legislators for India, but continued to deny the responsibilities that came with exercising effective state authority in India.<sup>4</sup> For nearly a century before its formal control over India ended, from about the middle of the eighteenth century till the middle of the nineteenth century, the Company conducted itself as a proxy for the British government, and the foundation of the colonial legal order was established in India during this period. So, while technically speaking the British government directly ruled India only between 1858-1957 (spanning nearly 90 years), scholars and historians would count the overall period of colonial rule in India as extending to at least a century before that date. This extends the period of colonial rule in India to nearly two full centuries.

There were two phases during colonial rule that are of particular significance in the context of the trajectory followed by citizenship laws. The first phase was characterized by a mode of administration known as ‘double government’ where power was shared by both the East India Company and the British monarch (Sinha 1962: 69). Although no comprehensive citizenship statute existed at this point, the relevant legal instruments in this period were the *Regulating Act of 1773* and the *Charter of 1774*. Both instruments were applicable to British subjects (Sinha 1962: 69). However, neither of these defined the term ‘subject’, meaning it was unclear whether these instruments were referencing only European British subjects or had an ambit expansive enough to include the inhabitants of the territories the British had acquired from the Mughals (Sir Charles Grey as cited in Sinha 1962: 72). Consequently, there was ambiguity regarding the status of native Indians and the nature of their rights and obligations.

It is important to obtain a sense of the territorial sub units within South Asia under imperial rule. The regions, which had been ‘Presidencies’ within Company rule became ‘Provinces’ under the direct rule of the British Empire in India. From 1858 onwards, India was divided into two broad political units: the much larger British India (which accounted for 54% of the territory and 70% of the population; was administered directly by the British government; and was further divided into Provinces) and the Princely States (which consisted of 565 separate and geographically widely disseminated units that were governed by local princes, kings and feudal lords who were allowed limited internal autonomy in exchange for accepting British suzerainty). At the time of independence in 1947, British India consisted of 17 Provinces, while the Princely States numbered 565. The latter were not nation-states as we understand them, but sought to mimic some of the characteristics of a nation, while strongly retaining the role of a hereditary monarch. For the purposes of external affairs, while the formal protection of British subjecthood was granted to all those inhabiting the Indian territory, internally, there was a distinction between the residents of the Indian princely states and the subjects of British India (Sinha 1962: 69). The term ‘British subject’, as can be gathered from these legal instruments and the scholarship surrounding them, was used in a restrictive, formalistic sense in the context of native Indians (Sinha 1962: 73). The denizens of the Princely States were not entitled to the status of British subjects.

The coterminous administration of the Company and the Crown ended in 1858 with the Crown assuming sovereignty as per the provisions of the *Government of India Act, 1858* (Sinha 1962: 70). This marked the beginning of the second phase. Towards the end of this

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<sup>4</sup> See generally, Ramkrishna Mukherji, *The Rise and Fall of the East India Company: A Sociological Appraisal* (Monthly Review Press: New York, 1974); Cyril Henry Philips, *The East India Company, 1784-1834* (Manchester University Press: Manchester, 1961); and Tirthankar Roy, *The East India Company: The World's Most Powerful Corporation* (Penguin Books: 2012).

phase, specifically in the year 1914, there was a significant change in the conception of British Nationality. The passage of the *British Nationality and Status of Aliens Act, 1914* signified the replacement of the common law notion of nationality with a codified conception of the same and as such was the first citizenship law the British era witnessed (Sinha 1962: 76). In yet another first, the Act defined the term British subject to include two classes of people – ‘natural born British subjects’ and persons who had obtained certificates of naturalization from colonial authorities (Sinha 1962: 76). It should be remembered that persons of Indian origin had travelled to several parts of the world, including Malaya, Myanmar, Fiji and Guyana. At least some of them hoped to return to India after independence.

Though the text of the statute reflected the principle of *ius soli* in keeping with the secularizing influence of modernity, the conception of ‘subject’ was undoubtedly informed by race. This was evidenced in the differentiation in privileges and rights of the European British subjects from those of native Indians. The implication of the codification of racial discrimination was that while a native Indian was formally recognized as a British subject, a corresponding substantive recognition was lacking. A native Indian thus was relegated to the rank of a second class citizen.

## **2.2. The moment of Independence, its aftermath and constitutional provisions relating to citizenship**

In 1947, after a concerted and sustained effort on the part of Indian nationalists to end the subjugation of the native Indians by the colonisers, India emerged as an independent nation. The *Indian Independence Act of 1947* repealed the *Government of India Act, 1935* thereby nullifying the ban imposed on the Indian legislature in respect of enacting laws impacting British nationality and sovereignty.

The emergence of India as a sovereign entity meant a change in the political identity of its population from colonial subjects to that of citizens. While India’s political integration was critical to the creation of the category of citizens, it has to be placed in the broader context of the disintegration of British India giving rise to another nation state – Pakistan. This disintegration, referred to in South Asia as ‘Partition’, had a significant impact on the conceptualizing of Indian citizenship and the framing of Indian citizenship legislation as will be discussed subsequently.

Partition caused a massive displacement of people on both sides of the border, and was accompanied by large-scale violence and homelessness (Jayal 2013). From the time of independence in 1947 till the adoption of the Constitution of India in November 1949 by the Constituent Assembly, there existed a lacuna as far as Indian citizenship law was concerned (Sinha 1962: 77). This in effect meant that there was no way to ascertain who was and was not an Indian citizen at a time when there was both a humanitarian crisis of epic proportions as well as a crisis of national identity. It was to mitigate this uncertainty occasioned by the ingress of people from the other side of the border that the Indian government put in place the *Influx from Pakistan (Control) Ordinance, 1948* (Jayal 2013: 61). The framers of India’s constitution had, as noted earlier, to also look beyond the Indian subcontinent, and consider the claims of citizenship of large numbers of Indian populations that were living in Burma, Malaya, Guyana, Fiji and Ceylon (Jayal 2013).

In light of the heightened identity politics stemming from Partition, addressing questions of citizenship - which had been initially overlooked by the Constituent Assembly - became unavoidable (Jayal 2013: 57). At this juncture the framers were more concerned with citizenship being a formal requirement that acts as a proof of identity than citizenship as a substantive concept (Sinha 1962: 78). Consequently, the relevant provisions of the Constitution focused more on the formal aspects of citizenship and only concerned themselves with determining citizenship at the time of commencement of the Constitution (Sinha 1962: 78). The framers recognised that these provisions were a stop-gap measure and accordingly provided the Parliament with plenary powers to enact citizenship laws of a more perennial character, subsequent to the commencement of the Constitution (Sinha 1962, Jayal 2016).

The Constitution of India came into effect on 26 January 1950. It is important to note however, that the provisions pertaining to citizenship came into force on the day the Constitution was adopted, i.e. 29 November 1949. These provisions were applicable to all of India with the exception of the State of Jammu and Kashmir. The Constitution provided for a singular mode of citizenship – national citizenship. There was no concept of a separate state-based citizenship existing alongside the national citizenship.

In order to comprehend the import of the constitutional provisions relating to citizenship it is important to supplement a textual reading of the provisions with a reading of the debates surrounding these provisions so as to glean the framers’ intent. While the term citizenship is not defined in the Constitution, Part II of the Constitution - specifically Articles 5-11 - provides the framework for citizenship at the time of commencement of the Constitution. The relevant provisions detail the modes of acquiring citizenship – birth, domicile and descent, circumstances that bars a person from acquiring Indian citizenship, plenary powers of the Parliament, and the status of those displaced on account of the Partition.

Article 5 deals with the issue of ‘citizenship at the commencement of the Constitution.’ It stipulates a two-fold requirement for conferring citizenship. The requirement of being ‘domiciled’ in India was the first criteria. In addition, anyone who fulfilled one of the following three criteria would also be a citizen of India:

- “(a) who was born in the territory of India; or
- (b) either of whose parents was born in the territory of India; or
- (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement” (The Constitution of India, 1950, Art. 5).

Although this reflects a combination of factors, the criteria of descent and domicile are meant to be complementary, while the primary character is closer to the *ius soli* conception, since the emphasis was on physical presence in the territory of India (Jayal 2013: 57). This provision reflects the intention of the framers to move towards a modernist understanding of citizenship (Jayal 2013: 57).

Article 6 focused on the “Rights of citizenship of certain persons who have migrated to India from Pakistan” (The Constitution of India, 1950, Art. 6). It provided that “a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if

- “(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b)(i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or (ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government” (The Constitution of India, 1950, Art. 6).

A precondition for the registration was that he or she should have been resident in India for at least six months prior to the date of the application (The Constitution of India, Art. 6).

Article 7 deals with “Rights of citizenship of certain migrants to Pakistan” (The Constitution of India, Art. 7). It provides that “a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India” (The Constitution of India, Art. 7).

A plain reading of the text of Articles 6 and 7 gives the impression of a homogenous intent on part of the framers to commit to *ius soli* as the governing principle of citizenship. However, the secular wording should not detract from the religious undercurrents that informed the debates surrounding these provisions. Much like the British colonisers whose modernist understanding of subject-hood was influenced by the race factor, the framers of the Constitution of India too were influenced by communal factors in their conceptualisation of the category of ‘citizen’. The debates among the framers are telling of the polarizing differences that existed amongst them. Articles 6 and 7 were drafted with two specific target groups in mind. Article 6 spoke to the Hindus who fled Pakistan and sought refuge in India (Jayal 2013: 58). Article 7, on the other hand, was drafted in the context of the Muslims who had fled to Pakistan and may want to return to India at a future date (Jayal 2013: 58). It is interesting to note that in the debates within the Assembly, the term for the Hindu groups was *refugees*, reflecting certain sympathy for their plight (Jayal, 2013: 58). The Muslims though, were characterized as *migrants*, imputing a certain intentionality to their action of leaving India during the chaos of the Partition (Jayal, 2013: 58). The implication of this difference in narrative, as can be witnessed in the debates and jurisprudence that subsequently evolved, was that for the ‘migrant’ Muslims there was an invisible prerequisite of loyalty that had to be determined before they could be entitled to citizenship (Jayal 2013: 59). Similar lines of questioning about motives and allegiance were not imposed on their Hindu counterparts.

The determination of citizenship in the time period immediately following Partition was a rather polarized exercise. Citizenship operated as a tool of exclusion, seeking to exclude a specific demographic, in this case Muslims. It sought to define who was and was not Indian based on communal factors. The Indian judiciary’s dockets saw an increase in disputes arising in connection with determination of citizenship during this period as well as in the years to come (Jayal 2013: 8). Adjudication on issues of citizenship in this period was characterized by a preoccupation with the intentionality to migrate in order to ascertain loyalty and thereby citizenship, and continued to reflect the tendency to view issues of citizenship through a communal lens.<sup>5</sup>

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<sup>5</sup> See Niraja Jayal, ‘Citizenship’ in Sujit Choudhry, Madhav Khosla and Pratap Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford: New York, 2016), pp. 168-170, 173-5, 178 for a discussion of a range of cases decided by the superior courts in India relating to citizenship. Due to space and time constraints, this report does not cover the case law on this question in detail.

During Partition, citizenship also operated as a tool of control in ascertaining the national identity of women. In the year 1949, the *Abducted Persons (Recovery and Restoration) Act* was passed by the Constituent Assembly (Jayal 2013: 75). The title of this legislation was its only gender neutral attribute. The Act was enacted to give effect to the patronizing political arrangement between the governments of India and Pakistan that sought to ‘restore’ Hindu women to India and Muslim women to Pakistan (Jayal 2013: 75). Needless to say, women were not stakeholders in this agreement, and their choice was not taken into consideration (Jayal 2013: 76). Women’s bodies became sites of contestation of sovereign authority. They were branded as ‘naturally’ Indian or Pakistani (Jayal 2013: 76). The Partition, as can be seen here, indubitably had a significant impact on the way people and leaders in post-colonial South Asia conceived of national identities and citizenship.

Article 8 details the rights of citizenship of persons who reside outside India but are of Indian descent (The Constitution of India, 1950, Art. 8). This category of people, unlike those referred to in Article 5, are required to register to become citizens. Article 9 imposes a limitation on people who have voluntarily become citizens of another State and bars them from acquiring Indian citizenship (The Constitution of India, 1950, Art. 9). Article 10, while titled “Continuance of the rights of citizenship”, is a provision detailing the power of the parliament as a limitation to the right of citizenship, rather than a provision that confirms a right (The Constitution of India, 1950, Art. 10).

Article 11 is a significant provision in that it vests in Parliament plenary power to enact legislation on citizenship and its related aspects (The Constitution of India, 1950, Art. 11). It specifically empowers Parliament to enact provisions in relation to the acquisition, loss and other matters related to citizenship without being constrained by the constitutional provisions and the principles that underlie them (The Constitution of India, 1950, Art. 11). As we shall see, Parliament has exercised its powers of legislation and amendment to such legislation with precisely such a self-understanding.

As mentioned above, the constitutional provisions were only meant to determine citizenship at the time of commencement of the Constitution. The substantive framework for citizenship was put in place by the *Citizenship Act of 1955*, which was enacted by the Parliament in accordance with the powers detailed in Article 11. This Act was supplemented by the Citizenship Rules of 1956, which were repealed by the Citizenship Rules, 2009 (The Citizenship Rules, 2009, Rule 43). As of now, the Act and the Citizenship Rules of 2009 constitute the current legal regime of citizenship in India. This legal regime is discussed in the section that follows.

### **3. Current Citizenship Regime: The Citizenship Act of 1955**

The ‘constitutive outsider’, (Mouffe as cited in Roy 2010: 5) is a shadowy presence recurring in the legal narrative on Indian citizenship. As noted earlier, it is argued in relevant scholarship that the current legal regime of citizenship in India is a product of a sustained transformation, over a period of time, from a predominantly *ius soli* regime to a regime heavily influenced by *ius sanguinis* (Jayal 2013, Jayal 2016). One plausible explanation for this transformation is that it was catalyzed by the presence of this ‘constitutive outsider’ or

the ‘other’, that in response to the massive influx of foreigners<sup>6</sup> whose offspring would be able to claim citizenship merely by being born on Indian soil, the *ius soli* regime was watered down by mandating the presence of kinship ties. These measures however, have had significant implications not just for foreigners but also for those living on the margins of citizenship, the ‘peripheral citizens’ as Jayal (2013: 78) terms them. As will be demonstrated, while charting out the relevant provisions and amendments of the current legal regime of citizenship, this tightening of regulation has been a consistent response to the presence of the ‘other’.

While the Constitution dealt with citizenship at the time of its commencement, the *Citizenship Act, 1955* sought to sketch out the substantive contours of citizenship after the commencement of the Constitution. Certain provisions of the Act have been made retrospectively applicable (Sinha 1962: 89). This is where the peculiarity arises. These provisions have been made retrospectively applicable from January 1950, whereas the citizenship related provisions in the Constitution are said to commence in November 1949. This anomaly creates a situation of indeterminacy of citizenship in the time period between November 1949 and January 1950 (Sinha 1962: 89-90).

The Act details modes of acquisition and loss of citizenship as well as other miscellaneous matters. Section 2 defines various terms thus aiding in the interpretation of the statute. Sections 3 to 7 deal with the acquisition of citizenship. Sections 8 to 10 deal with loss of citizenship. Sections 11 to 18 deal with matters of administrative import, offences under the Act, and prior to the 2003 amendment, with the concept of Commonwealth citizenship.<sup>7</sup> There are three schedules appended to the Act. The First Schedule concerning Commonwealth citizenship has been repealed.<sup>8</sup> The Second Schedule contains the oath of allegiance that potential citizens have to take. The Third Schedule spells out the requirements for naturalisation while the Fourth schedule lists out the specific countries whose citizens of Indian origin are eligible to apply for overseas citizenship of India.

In this section of the report, we first lay out the provisions dealing with modes of acquisition, followed by those dealing with modes of loss, and finally, we briefly look at the supplemental provisions. Since the most significant amendments have been limited only to the provisions relating to the modes of acquisition, we have provided a relatively detailed overview of this aspect.

While detailing the modes of acquisition we have not discussed the provisions in chronological order. The reason is that the amendments to these provisions have not been made in observance of the sequence of these provisions. For instance, one of the first significant amendments was made to Section 6 in 1985 followed by another amendment to Section 3 in 1986. Furthermore, as is the case with Sections 3 and 6, the narratives of these

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<sup>6</sup> After Partition the ingress of people – both illegal immigrants and refugees - was not limited to Pakistan. There was a large scale movement of people from Nepal and Bangladesh to the Indian states of Assam and Arunachal Pradesh. According to data presented in the Memorandum of the All India Assam Student Union to the P.M. there was a population increase of up to 34.95% in Assam. This exponential increase could only be explained by factoring increase in illegal immigrants. For instance according to data in the memorandum, ‘The percentage of increase of the Nepali population is higher by about 13% than the percentage increase in the general population during the period 1951-1971’. Down south, the state of Tamil Nadu was witnessing a massive influx of refugees, the first wave of which arrived between 1983-1987. During this period, it is estimated that 1,34, 053 Tamil refugees entered India.

<sup>7</sup> Commonwealth citizenship as envisaged by The Citizenship Act, 1950, Sec. 11 meant ‘Every person who is a citizen of a Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of a Commonwealth citizen in India’.

<sup>8</sup> Repealed by The Repealing and Amending Act, 1960.

amendments are so intertwined that they warrant being discussed together in the interest of maintaining narrative coherence.

### 3.1. Modes of Acquisition

The different modalities of acquiring citizenship under the Act are: birth, descent, registration, naturalization and incorporation of territory. In its original form, Section 3 provided that ‘every person born in India on or after 26 January 1950 shall be a citizen of India by birth.’<sup>9</sup> There are two notable exceptions to this provision. The first is if a person’s father enjoys diplomatic immunity and is not a citizen of India; the second is if a person was born in a territory occupied by enemies and his father was an enemy alien.<sup>10</sup>

In this form of Section 3, the *ius soli* principle of citizenship is seen as being consonant with the constitutional regime of citizenship. As a general rule, a person, regardless of the citizenship of his or her parents, was automatically an Indian citizen by virtue of having been born in India. The principle of *ius soli* is reflected in yet another related provision – Section 2(2) – which stipulates the citizenship of a person born in transit aboard a ship or an aircraft.<sup>11</sup> The implication is that if a person is born in a ship or aircraft that is owned by the government of India, he or she is deemed to have been born in India even if the ship or aircraft is in international waters or flying over international airspace (Sinha 1962: 91).

In the years that followed, Section 3 was amended twice – in 1986 and 2003. It has been argued that the trajectory of this section is indicative of a shift in the legal regime from the *ius soli* to the *ius sanguinis* principle (Jayal 2013, Jayal 2016). The genesis of the tectonic shift, however, goes as far back as the period between the late 1970s to the early 1980s. In order to better appreciate the origins of this trend, one must examine the relevant portions of the text and context – both political and legal – of the 1986 amendment. The context of the 1986 amendment can be gleaned from the *Citizenship (Amendment) Act, 1985* and the factors responsible for it. The narratives of these two amendments are inextricably linked, in that the 1985 amendment informed the framing and conceptualization of the 1986 amendment.

A perusal of the statement of objects and reasons of the 1986 amendment reveals that one of its stated objectives was “preventing automatic acquisition of citizenship of India by birth”.<sup>12</sup> The 1986 amendment signified the first codified attempt directed specifically at diluting the *ius soli* character of section 3 of the Citizenship Act. Accordingly, Section 3(1) was amended to read:

“Except as provided in sub-section (2), every person born in India -

- (a) on or after the 26<sup>th</sup> day of January, 1950, but before the commencement of the Citizenship (Amendment) Act 1986,
- (b) on or after such commencement and either of whose parents is a citizen of India at the time of his birth,

shall be a citizen of India by birth.”<sup>13</sup>

<sup>9</sup> The Citizenship Act, 1955.

<sup>10</sup> The Citizenship Act, 1955.

<sup>11</sup> The Citizenship Act, 1955.

<sup>12</sup> The Citizenship (Amendment) Act, 1986, Statement of Objects and Reasons.

<sup>13</sup> The Citizenship (Amendment) Act, 1986.

This version of Section 3 puts in place two limitations. The first is in the form of the time-frame in clause (a) by which only persons born before the commencement of 1986 will qualify automatically for citizenship by birth. The second limitation, which is triggered on or after the 1986 amendment commences, is that in addition to being born in the territory of India, a person should also have some nexus with the territory through descent, i.e., either of his or her parents should be Indian citizens when he or she was born. It is through this added requirement of nexus by descent that persons born after the stipulated time period are precluded from automatically acquiring Indian citizenship. The amended provision sat rather uneasily with the constitutional regime of citizenship. As we saw in Part II, in the debates concerning the framing of the constitutional provisions on citizenship, the framers were, for the most part, following the secularizing impulse of modernity in codifying the principle of *ius soli* as the governing principle of citizenship.

A plausible explanation for the incongruity between the constitutional regime and the statutory regime can be found by examining the socio-political context that gave rise to the 1986 amendment. In 1979, a by-election held in Mangaldoi constituency of the Indian state of Assam revealed that the electoral roll was comprised substantially of foreigners. In the subsequent mid-term Parliamentary election, electoral rolls all over Assam reflected names of foreigners as registered voters. These findings were indicative of a massive influx of foreigners from neighbouring countries such as Nepal and Bangladesh.<sup>14</sup> From 1979 – 1985, the All Assam Students Union (AASU) engaged in mass mobilization and their efforts culminated in the signing of the Assam Accord (Jayal 2016). A more detailed account of this movement and the amendment relating to the Accord – the 1985 amendment - will be dealt with in later paragraphs.

It is important to note that unlike the 1986 amendment, the 1985 amendment made no changes to the text of Section 3. What is relevant in the context of Section 3, however, is that the political developments surrounding the 1985 amendment informed how the problem was framed in the legal context of the 1986 amendment. The framing of this problem as the foreigners' issue in the statement of objects and reasons of amending legislation lent itself to serving as a justification for incorporating elements of *ius sanguinis* in the statutory regime.<sup>15</sup>

While the Assam Accord and the resultant amendment in 1985 undoubtedly catalyzed the shift to a *ius sanguinis* regime, they were not the only factors responsible for this shift. The influx of foreigners was not confined only to Assam. The Indian state of Tamil Nadu was contemporaneously witnessing an influx of refugees who were fleeing Sri Lanka.

A brief overview of the conflict plaguing the Sri Lankan polity is warranted so as to provide context. It should be noted however, that owing to the paucity of space, this is a rather simplified account of a rich and nuanced history. India and Sri Lanka have more in common than their shared colonial past. Akin to India, Sri Lanka too is a multiethnic country comprised mainly of the Sinhalese, Tamils and the Sri Lankan Moors. The Sinhalese, who

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<sup>14</sup> According to data presented in the Memorandum of the All India Assam Student Union to the P.M. there was a population increase of up to 34.95% in Assam. This exponential increase could only be explained by factoring in the increase in illegal immigrants (All Assam Students' Union, Memorandum to the Prime Minister of India, 1980, available at

[http://www.assam.gov.in/documents/1631171/0/Annexure\\_9B.pdf?version=1.0&t=1444717499000](http://www.assam.gov.in/documents/1631171/0/Annexure_9B.pdf?version=1.0&t=1444717499000))

<sup>15</sup> The term 'foreigner's issue' was first used in the Memorandum of Understanding signed between the Central Government and the All Assam Students Union. (Assam Accord, 1985, available at [http://www.assam.gov.in/documents/1631171/0/Annexure\\_10.pdf?version=1.0](http://www.assam.gov.in/documents/1631171/0/Annexure_10.pdf?version=1.0)). Subsequently, the same term found its way into the Statement of Object and Reasons of The Citizenship (Amendment) Act 1986. Given that the legal framework identified the 'foreigner' or the outsider as the problem, the resulting response was to temper down *ius soli* requirements by introducing elements of a *ius sanguinis* regime.

are Buddhists, constitute 74% of the Sri Lankan population and form the majority.<sup>16</sup> The Tamils, who are primarily Hindus, constitute two related but different categories – the plantation or the Indian Tamils, who constitute 4.1% of the Sri Lankan population, and came from India to work on the plantations in the central highlands of erstwhile Ceylon (now, Sri Lanka), and the Jaffna or the Sri Lankan Tamils who constitute 11.2% of the population and have a much longer presence in the island.<sup>17</sup> The Sri Lankan Moors who are Muslims constitute 9.3% of the population.<sup>18</sup> It bears noting at this point that the longstanding ethnic conflict between the Sri Lankan Tamils and the Sinhalese severely impacted the plantation Tamils. The conflict reached a flashpoint in 1983 as a result of which a significant number of Tamil refugees had fled to India. It is estimated that as many as 100,000 Tamil refugees came to India in the aftermath of the onset of the civil war in Sri Lanka in the early 1980s. This inflow of Tamil refugees continued in a phased manner till 04 April, 2012.<sup>19</sup> Official sources claim no Tamil refugees arrived in India after this date.<sup>20</sup> As of 01 November 2016, the estimated number of Tamil refugees in India, specifically in Tamil Nadu which is where the refugees are predominantly settled,<sup>21</sup> was 1,01,219.<sup>22</sup> The Tamil refugees constitute one of the largest groups of refugees in India; the other group is the Tibetan refugees.<sup>23</sup> Indian policy pertaining to Tamil refugees however, has been anemic in its prescriptions for the most part, as will be highlighted in Part IV of this paper.

Returning to our narrative, what needs to be emphasized is that it was against this backdrop of the mass movement of aliens from Bangladesh, Nepal and Sri Lanka that the 1986 amendment was enacted.<sup>24</sup>

In 2003, further limitations were worked into Section 3 to the effect that anyone born before 2003 would acquire citizenship if either of his or her parents were born in India.<sup>25</sup> However, anyone born after 2003 would acquire citizenship only if both of his or her parents are Indian citizens or if one his parents is not an illegal migrant at the time of birth.<sup>26</sup> This is to be read in conjunction with the 2003 amendment to Section 6.

Section 6 deals with the acquisition of citizenship by naturalisation.<sup>27</sup> The original, unamended version of this Section provided that any person of ‘full age and capacity who is not a citizen of any country specified in the First Schedule’ can apply for citizenship, and the Central Government after determining whether such a person satisfies the qualifications spelt

<sup>16</sup> Department of Census and Statistics, Sri Lanka, *Census of Population and Housing*, 2012, 141, available at <http://www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/FinalReportE.pdf>

<sup>17</sup> Department of Census and Statistics, Sri Lanka, *Census of Population and Housing*, 2012, 141, available at <http://www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/FinalReportE.pdf>

<sup>18</sup> Department of Census and Statistics, Sri Lanka, *Census of Population and Housing*, 2012, 141, available at <http://www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/FinalReportE.pdf>

<sup>19</sup> Department of Rehabilitation, Tamil Nadu, Data on Tamil refugee population available at <http://www.rehab.tn.nic.in/camps.htm>.

<sup>20</sup> Department of Rehabilitation, Tamil Nadu, Data on Tamil refugee population available at <http://www.rehab.tn.nic.in/camps.htm>.

<sup>21</sup> HRLN, *Report of Refugee Populations in India*, 2007, available at [http://www.hrln.org/admin/issue/subpdf/Refugee\\_populations\\_in\\_India.pdf](http://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf)

<sup>22</sup> Department of Rehabilitation, Tamil Nadu, Data on Tamil refugee population available at <http://www.rehab.tn.nic.in/camps.htm>.

<sup>23</sup> This is an observation sourced from the website of the United Nations High Commissioner of Refugees and is available at [http://www.unhcr.org.in/index.php?option=com\\_content&view=article&id=18&Itemid=103](http://www.unhcr.org.in/index.php?option=com_content&view=article&id=18&Itemid=103).

<sup>24</sup> Citizenship (Amendment) Act, 1986, Statement of Objects and Reasons.

<sup>25</sup> The Citizenship (Amendment) Act, 2003.

<sup>26</sup> The Citizenship (Amendment) Act, 2003.

<sup>27</sup> The Citizenship Act, 1955.

out in the Third Schedule, may grant a certificate of naturalisation.<sup>28</sup> However, a person does not become a citizen merely by acquiring this certificate. He or she is required to take an oath of allegiance as per the Second Schedule and it is only after swearing to this oath that he or she will qualify as an Indian citizen.<sup>29</sup> Section 6 does provide for an exception – where the government is of the opinion that the applicant is an eminent person who has made integral contributions to “science, philosophy, art, literature, world peace or human progress”, all or any of the requirements of the Third Schedule can be waived.<sup>30</sup>

The 2003 amendment replaced the words ‘First Schedule’ in Section 6 with the phrase ‘illegal migrants’.<sup>31</sup> The story of the origins of this phrase goes back to the 1985 amendment. What the statement of objects and reasons of the 1985 amendment describes as the foreigners’ issue is a reference to the problem of mass influx of these illegal migrants. It was to redress this persisting problem that Section 6A was introduced by the 1985 amendment.

Section 6A sought to create two categories of people – people who had been residing in Assam before 1 January 1 1966 and people who came to Assam from Bangladesh “on or after the 1st day of January, 1966 but before the 25<sup>th</sup> day of March, 1971” and were detected as foreigners.<sup>32</sup> The first category of people were deemed to be citizens of India merely by ordinarily residing in Assam and because their names featured in electoral rolls for the purposes of the General Election held in 1967.<sup>33</sup> The second category of people would have to register as per the rules made under Section 18.<sup>34</sup> This second category of people were entitled to the same rights as ordinary Indian citizens with one notable exception. The people in this category would not be able to exercise their right to vote for en years following the date on which they were detected as foreigners.<sup>35</sup> This phased extension of rights in the sphere of franchise is a rather peculiar choice given how inextricably franchise is tied to the idea of citizenship.

There are a couple of oddities in this provision that remain unexplained till date. A detected foreigner who had entered Assam between January 1966 and March 1971 can, through a declaration, submit that he or she does not wish to avail of the rights and recognition stemming from Indian citizenship, and thereby be exempted from registering. The legislation and surrounding discourse is, however, silent on what the status of such a person will be. A similar declaration, but one declaring intent to *not* be a citizen, can be submitted by people in the first category – i.e. those who entered Assam before January 1966. Yet again, the Act and surrounding literature we have surveyed are silent on how the intent to *not* be a citizen is different from the intent to *not* avail of rights.

This provision has often been criticized for being a codification of popular resentment. As set out in its Statement of Objects and Reasons, the 1985 amendment was enacted to give effect to the provisions of the political settlement that is known as the Assam Accord. While this express acknowledgement, or the practice of giving legislative effect to a political settlement in itself is not problematic, many take issue with specific provisions such as the one stipulating the cut-off date of 1971, as arbitrary. Critics further claim that the AASU and other concerned parties’ arbitrary demands received the blind sanction of legitimacy by being enacted as a legislative provision.

<sup>28</sup> The Citizenship Act, 1955.

<sup>29</sup> The Citizenship Act, 1955.

<sup>30</sup> The Citizenship Act, 1955.

<sup>31</sup> Citizenship (Amendment) Act, 2003.

<sup>32</sup> Citizenship (Amendment) Act, 1985.

<sup>33</sup> Citizenship (Amendment) Act, 1985.

<sup>34</sup> Citizenship (Amendment) Act, 1985.

<sup>35</sup> Citizenship (Amendment) Act, 1985.

As mentioned earlier, the Assam Accord signified the culmination of years of political struggle. In 1980, following the discovery of foreigners' names on electoral rolls, the All Assam Students' Union submitted a memorandum to the erstwhile Prime Minister of India, Indira Gandhi. Agitations against the influx of foreigners had begun as early as in 1974. The state of Assam witnessed mass mobilization in the form of various non-cooperation movements to voice concerns against the participation of foreigners in the Indian electoral process. However, the AASU claimed that no action was taken on this front. In light of the situation where foreign participation was determining the fate of the polity and impacting the "political, social cultural and economic life of the State"<sup>36</sup>, this memorandum was drafted and submitted. The memo provided context and evidence regarding the issue at hand. It presented data to demonstrate the massive increase in the population of Assam between 1951-1971.

Till this point, the AASU movement had been non-violent. In fact, the AASU stressed the importance of nonviolence in its memorandum as well.<sup>37</sup> However, contemporaneous with the controversial elections of 1983, where several illegal migrants were included in the electoral rolls, the peaceful agitations took a turn for the worse. On February 18, 1983, an indigenous Assamese tribe that was predominantly Hindu attacked the village of Nellie where a minority of Bangladeshi migrants had settled. These migrants were predominantly Muslim women and children.<sup>38</sup> The official death toll stood over 2000, while unofficial sources maintained that the actual toll was closer to 10,000. This communal clash irrevocably changed the character of the Assam agitation and weakened its support base considerably (De 2005: 59-60). It is claimed that the agitation was on hiatus between 1984 to 1985 on account of the Nellie massacre and the sudden death of Prime Minister Indira Gandhi (De 2005: 59-60). In 1985, however, negotiations resumed between the Central government of India and AASU with Rajiv Gandhi as the new Prime Minister (De 2005: 59-60). These negotiations came to fruition in the form of the Assam Accord – a political settlement between the AASU, the *All Assam Gana Sangram Parishad* (a regional political party), the state government and the central government. Both the Assam Accord and the resulting Section 6A introduced by the 1985 amendment have had a far reaching impact in that they still inform current debates on citizenship.

While Sections 6 and 6A dealt with naturalisation and the regularization of foreigners respectively, Section 4 provides for acquisition of citizenship by descent. It caters to persons who were not born in India but whose parents are Indian citizens. Until the amendment in 1992 this provision only recognised patrilineal descent. The 1992 amendment sought to reframe this gendered provision in an egalitarian fashion (Jayal, 2016). Consequently, in its current form, Section 4 provides that for any person who was born on or after the commencement of the 1992 act, a claim to kinship is governed not just by patrilineal descent but could also be governed by matrilineal descent. It further provides that in cases where either the mother or father was a citizen of India by descent, the person would not automatically qualify for citizenship but would have to register.

Section 5 details the acquisition of citizenship by registration. This provision caters only to specified categories of people.<sup>39</sup>

<sup>36</sup> All Assam Students' Union, Memorandum to the Prime Minister of India, 1980, available at [http://www.assam.gov.in/documents/1631171/0/Annexure\\_9B.pdf?version=1.0&t=1444717499000](http://www.assam.gov.in/documents/1631171/0/Annexure_9B.pdf?version=1.0&t=1444717499000).

<sup>37</sup> All Assam Students' Union, Memorandum to the Prime Minister of India, 1980, available at [http://www.assam.gov.in/documents/1631171/0/Annexure\\_9B.pdf?version=1.0&t=1444717499000](http://www.assam.gov.in/documents/1631171/0/Annexure_9B.pdf?version=1.0&t=1444717499000).

<sup>38</sup> 1983: Hundreds die in Assam poll violence, BBC, [http://news.bbc.co.uk/onthisday/hi/dates/stories/february/20/newsid\\_4269000/4269719.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/february/20/newsid_4269000/4269719.stm)

<sup>39</sup> The Citizenship Act, 1955.

Section 7 deals with the status of people in territories that were not originally part of Independent India but were/are subsequently acquired, in effect becoming part of the territory of India. Section 7 confers on the Central Government the power to pass orders that specify which persons in the acquired territory would qualify as Indian citizens.<sup>40</sup> In accordance with these powers, subsequent to the ceding of the French and Portuguese colonies of Pondicherry, Daman and Diu, Goa, and Dadra and Nagar Haveli, relevant citizenship orders were passed in 1962.<sup>41</sup> It should be noted that the citizenship orders pertaining to the territories of Goa, Pondicherry and Daman and Diu allowed for the retention of previous citizenship (Ko 1990: 102). However, the territory of Dadra and Nagar Haveli was not afforded this option (Ko 1990: 102). After the state of Sikkim was annexed to the Indian territory in 1975, a citizenship order was issued in the state to determine the status of the people of Sikkim (Lama 1994: 78).

Both Sections 5 and 7 have been the subjects of significant amendments in 2003, 2005 and 2015.

As noted earlier, the framers had, while considering the claims of Indians living in other parts of the world, chosen to explicitly deny claims of dual citizenship at the founding (Jayal 2013). However, the demand for dual citizenship has gained more traction in recent times with overseas Indians – who are estimated at being approximately 20-25 million in number - looking to maintain ties with India (Jayal 2013). In light of this demand, the government set up a committee in September 2000 to assess the situation and submit recommendations with respect to fostering a constructive relationship between India and the Indian diaspora.<sup>42</sup> The Committee stopped short of making a recommendation for automatic dual citizenship. The rationale for not advocating automatic acquisition of dual citizenship is provided in the executive summary of the Committee's report. The relevant portion of the summary reads "The Committee recommended that dual citizenship should be permitted for members of the Indian Diaspora *who satisfy the conditions and criteria laid down in the legislation to be enacted to amend the relevant sections of the Citizenship Act, 1955*". The Committee made detailed recommendations in this regard, being deeply conscious of the heightened security concerns following the series of terrorist attacks, especially the attack on India's Parliament on December 13, 2001. The Committee therefore did not recommend automatic conferment of dual citizenship, which would have to be acquired by following the procedure laid down in the Parliamentary legislation and the rules framed under it."<sup>43</sup>

In light of these recommendations, the *Citizenship (Amendment) Act, 2003* sought to grant overseas citizenship of India to persons of Indian origin subject to the fulfilment of the prerequisites laid down in the amended legislation.<sup>44</sup> This led to the creation of the category of persons of Indian origin (PIO). Subsequently, *the Citizenship (Amendment) Act, 2005* sought to expand the framework of overseas citizenship and reduced the requisite period of residence in India for these persons from two years to one year.<sup>45</sup> The 2005 amendment led to

<sup>40</sup> The Citizenship Act, 1955.

<sup>41</sup> See the Pondicherry (Citizenship) Order, 1962 available at <http://www.refworld.org/docid/3ae6b52dc.html>; Goa Daman and Diu (Citizenship) Order, 1962 available at [http://www.pib.nic.in/archive/docs/DVD\\_42/ACC%20NO%20824-BR/HOM-1962-03-29-5009.pdf](http://www.pib.nic.in/archive/docs/DVD_42/ACC%20NO%20824-BR/HOM-1962-03-29-5009.pdf); Dadra and Nagar Haveli (Citizenship) Order, 1962, available at <http://www.refworld.org/docid/3ae6b4ee1c.html>.

<sup>42</sup> Report of the High Level Committee on the Indian Diaspora, 2002, Foreword, available at <http://indiandiaspora.nic.in/contents.htm>.

<sup>43</sup> Report of the High Level Committee on the Indian Diaspora, 2002, Executive Summary, xxxvii, available at <http://indiandiaspora.nic.in/contents.htm>.

<sup>44</sup> The Citizenship (Amendment) Act, 2003, Statement of Objects and Reasons.

<sup>45</sup> The Citizenship (Amendment) Act, 2005, Statement of Objects and Reasons.

the creation of the status of Overseas Citizenship of India (OCI). The two categories of POI and OCI were merged in 2011 as per the policy of the then government.<sup>46</sup>

The *Citizenship (Amendment) Act, 2015* replaced the term ‘Overseas Citizen of India’ with the term ‘Overseas Citizen of India Cardholder’.<sup>47</sup> It further diluted the requirement of residence, mandating that a person has to ‘ordinarily’ reside in India.<sup>48</sup> This in effect means that prior to this amendment a person who wished to be registered as an overseas citizen of India could not leave India for a year. However, under the amending act of 2015, this requirement has been relaxed to allow such persons to travel on account of exigent circumstances for a stipulated period of time during the duration of the year of ordinary residence.<sup>49</sup>

### 3.2. Modes of Loss

The different modalities of loss of citizenship are addressed by Sections 8, 9 and 10. Section 8 provides for the renunciation of Indian citizenship.<sup>50</sup> In the 1955 version, a person had to be an adult, of full capacity, as well as a national of another country to be eligible. The 2003 amendment removed the requirement of being a national of another country.<sup>51</sup> It further omitted Section 8(3) which read “For the purposes of this section, any woman who is or has been married shall be deemed to be of full age”.<sup>52</sup> No such corresponding requirement was stipulated for a man, nor can one glean any rationale for this differential treatment in determining the attainment of majority. Akin to 8(3), Section 8(2) also reflects elements of a gendered narrative. In the 1955 version, the minor child of a *male* person who had renounced his citizenship would cease to be a citizen of India. However, such a minor could, within one year of attaining majority, apply for Indian citizenship. In 1992, Section 8 was amended to usher in a gender neutral turn of phrase wherein ‘male person’ was substituted by *any* person.<sup>53</sup>

Section 9 speaks to the termination of Indian citizenship.<sup>54</sup> As we saw earlier, Article 9 of the Constitution provided for automatic termination of the Indian citizenship of those who had voluntarily acquired citizenship of other countries before 26 January 1950.<sup>55</sup> However, it was silent on the status of voluntary acquisition on or after 26 January 1950. (Sinha 1962). Section 9 sought to remedy this and provides that any person who voluntarily acquires the citizenship of another nation, or has acquired such citizenship between January 1950 and the commencement of the Act, will automatically cease to be a citizen of India either upon such acquisition or on the commencement of the Act.<sup>56</sup> Section 10 provides for the deprivation of citizenship.

The changes orchestrated in the legal regime of citizenship in India have predominantly been informed by the existence of the ‘other’ be it in the form of migrants

<sup>46</sup> PM announces merging of OCI, PIO Cards, Indian Express (daily newspaper) 08 January 2011.

<sup>47</sup> The Citizenship (Amendment) Act 2015.

<sup>48</sup> The Citizenship (Amendment) Act 2015.

<sup>49</sup> The Citizenship (Amendment) Act, 2015.

<sup>50</sup> The Citizenship Act, 1955.

<sup>51</sup> The Citizenship (Amendment) Act, 2003.

<sup>52</sup> The Citizenship (Amendment) Act, 2003.

<sup>53</sup> The Citizenship (Amendment) Act, 1992.

<sup>54</sup> The Citizenship Act, 1955.

<sup>55</sup> The Constitution of India, 1950.

<sup>56</sup> The Citizenship Act, 1955.

from Bangladesh, Nepal or Tamil refugees from Sri Lanka. The legal and political context sought to identify this ‘other’, assess the impact persons belonging to this category would have on social, economic, and political spheres of the nation, and then mitigate the perceived damage or take adequate preventive measures by enacting more stringent laws. These attempts are congruent with scholars’ observations that the ‘other’ was not merely the polar opposite of a citizen but served to inform conceptions of citizenship, and thus was paradoxically constitutive of the citizenship regime (Roy 2010).

### 3.3. Supplementary Provisions

As mentioned earlier, the supplementary provisions of the Citizenship Act, for the most part, deal with matters of administrative support and import. A couple of points bear mentioning in this regard. The first, is that the Central Government is the final and binding authority, as well as the appellate authority in relation to its own decisions (The Citizenship Act, 1955, Sec 14, Sec 15, Sec 15A). Even in cases of delegation, the Central Government still has the final say as the appellate authority (The Citizenship Act, 1955, Sec 16). Second, the Central Government need not furnish any reasons for orders issued as per these provisions (The Citizenship Act, 1955, Sec 14).

The absolute power that is guaranteed to the Central Government by these provisions raises thorny issues regarding the observance of principles of natural justice. For instance, the Central Government acting as an appellate authority reviewing its own orders potentially allows for bias to creep in, bias that will be unchecked since the Government’s decision is final. Additionally, orders furnished without reasons militate against the principle of fairness, and allow potential arbitrariness to go unchecked. That the provisions of the Citizenship Act, in general, subvert principles of natural justice was an issue raised by a litigant in the Bombay High Court.<sup>57</sup> The litigant was challenging the lack of provisions for pre-decisional hearings and orders rendered without reasons. Examining the provisions of the Citizenship Act leads to the realization that the only redress a person has in cases where his or her citizenship registration is cancelled is the filing of an application for review *after* the decision of cancellation is taken (The Citizenship Act, 1955, Sec 15). Thus, orders of cancellation, in the first instance, are passed without affording the concerned party an opportunity to be heard (The Citizenship Amendment Act, 2003, Sec 7D). The bench that heard the case surmised that legislative intent was to be given deference, which is to say that where the Parliament provides for the observance of principles of natural justice in a statute, they are to be followed. However, the legislature may in cases requiring expedient action waive these requirements. The bench further observed that in cases where legislative provisions explicitly exclude principles of natural justice in matters concerning national security or sovereignty, it was advisable that the Court exercise judicial restraint in reviewing administrative decisions taken as per these provisions.

Be it the hands-off approach of the judiciary, or the constitutional provisions that grant the Parliament unfettered powers to enact citizenship legislation – either of these could potentially allow for authoritarian excesses. The next part of this paper takes a closer look at the implications of parliamentary supremacy in the sphere of citizenship legislation through the lens of contemporary debates on citizenship.

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<sup>57</sup> Satish Nambiar v. Union of India 2007(5) BomCR 247.

## 4. Current Political Debates

### 4.1. A brief overview of the contemporary Indian political landscape

This report has so far concentrated on the context of citizenship laws in India from the time of formal independence in the middle of the twentieth century till the 1980s. During this entire period, the politics of India was dominated by the Congress party. The Congress was the leading vehicle for the anti-colonial, nationalist movement, and had also been the sheet anchor of the drafting process of the Constitution. In the post-independence phase, Congress governments under Prime Ministers Nehru, Shastri and Indira Gandhi had broadly adopted modernist and secular forms of governance. This changed from the 1970s onwards under Prime Minister Indira Gandhi who began to adopt strategic policies to court constituencies among religious minorities such as Muslims, Sikhs and other groups in particular regions and states. Several commentators expressed alarm at the overt or covert communalization of politics which, they argued, would invite a backlash from Hindu majoritarian groups which had remained marginal in the legislative sphere since Independence. In the 1990s, this came to pass and the Bharatiya Janata Party (BJP) became a significant party representing the interests of the Hindu majority at the national level. From having a mere 2 seats in the 540 member lower House of Parliament in 1984, the BJP became the single largest party in general elections held in 1996, 1998 and 1999, securing more seats than the Congress nationwide. It formed the government at the Centre in 1996, but governed only for 13 days. In 1999, the BJP-led coalition government was more successful and lasted for its full five year term, the first non-Congress government in India to do so. From 2004 to 2014, India was governed by a Congress-led coalition. In general elections held in 2014, the BJP was returned to power at the head of a coalition government. What is striking, however, is that Prime Minister Narendra Modi's government, although formally a coalition, can govern on its own as the BJP has a majority in the lower house of Parliament. At the time of writing in mid-2017, the BJP has been remarkably successful in state elections and is in power in 17 out of the 29 states in India. Since 2014, the BJP and Hindu majoritarian policies have clearly been on the ascendance in Indian politics, a context which frames the policy changes in the sphere of citizenship that we examine in this section.

### 4.2. An overview of recent changes in citizenship law in India

Some broad trends can be noted in successive attempts at amending citizenship laws by BJP governments (which have been in power in 1999-2004 and 2014-present) and in the case-law emanating from the Indian judiciary in recent years:

- i) a hostile attitude towards 'illegal migrants' who, it is argued, have swamped states neighbouring Bangladesh including Assam and Arunachal Pradesh since the 1960s and must be reined in through changes to citizenship laws. Paradoxically, the same attitude is not exhibited towards a similar trend in Western India where people from Pakistan have similarly run afoul of citizenship laws while crossing the border from Pakistan. As Jayal carefully documents, the difference may be that of religion. The 'illegal migrants' in East India are mostly Muslim while those in West India are largely Hindu.

- ii) An increasingly open and sympathetic attitude towards claims of citizenship advanced by Hindus, Buddhists, Jains, Sikhs and Christians, especially when made from the South Asian region, on the ground that being religious minorities, they face persecution in Muslim-majority societies. The same sympathy is not extended to persecuted groups like Ahmaddiyas and Shias or, for that matter, to Tamils from Sri Lanka. There is an actively hostile approach to claims advanced by Muslims generally (Gaubha-Singh, 2017).
- iii) an active pursuit of policies aimed at the eventual goal of dual citizenship for people of Indian origin (or the Indian diaspora). Though aimed at the overall diaspora, these policies seem aimed at benefiting groups located in particular regions of the world, including North America and the United Kingdom, which are more affluent and better placed to aid political parties and policies of foreign investment.

These trends are reflected in the body of two recent attempts at amending the Citizenship Act of 1955, introduced in 2015 and 2016. The *Citizenship Bill of 2016* was introduced in the Lok Sabha (the lower House of Parliament) and is pending before a Parliamentary committee.

The 2016 Bill has been criticised as being discriminatory against Muslims. One would be remiss however, in characterising this issue purely as one of religious bias. As mentioned, this Bill is also silent on the Tamil refugees from Sri Lanka, who are predominantly Hindu and constitute one of the largest refugee groups in India. Tamil refugees have not only been at the receiving end of the government's indifference but have also been subjected to differential treatment. As per the rules of a new fee regime of citizenship that was implemented in 2016, Hindus from Bangladesh and Pakistan, who were eligible to apply for Indian citizenship have to pay a nominal fee of Rupees 100.<sup>58</sup> Hindus from Sri Lanka, i.e. Tamil refugees however, are required to pay Rupees 10, 000.<sup>59</sup> Prima facie there seems to be no discernible rationale for this differential treatment.

These are but a couple of illustrations of the government's attitude towards Tamil refugees. The purpose of these illustrations of legislative and policy measures that exclude or allegedly discriminate against the predominantly Tamil refugee population legally residing in India was to complicate the claim that the shift in citizenship laws in India is shaped by religious and communal considerations alone. The story of the sustained neglect of Tamil refugees indicates religion, while undoubtedly an important factor, is not the only factor at play.

Beyond this, in the broader political landscape, the issue of nationalism has come to the fore in recent years. Right wing groups have charged that various groups of people harbor 'anti-national' sentiment. Typically, these charges are levelled at Muslims and other minority groups, but also at members of the Hindu majority who are academics, writers, artists, public intellectuals and anti-superstition activists who do not subscribe to the views of these right wing ideologues. What is worrying is that very often, these charges of fringe groups have resulted in state-sponsored charges of sedition and other criminal proceedings. Traditional symbols of nationalism, such as the national flag and the national anthem are being elevated in their symbolism by both state and non-state actors, and people who object to this trend are subjected to forms of abuse, from psychological to physical to murder in extreme cases. To understand these trends, one has to adopt a broader perspective. Laws that seek to prohibit cow slaughter and secure the banning of beef may seem, at first blush, to be about issues

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<sup>58</sup> Charu Kasturi, Unequal Fee for Citizenship, *Telegraph* (daily newspaper) 27 December 2016.

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other than citizenship. However, if we view citizenship as being about deeper issues of identity, including about what individual citizens can eat, read, think or do, then these laws do implicate aspects of citizenship. This is equally true about laws which seek to make the 'Unique Identification Document' or 'Aadhaar card' mandatory for all banking and tax transactions and for being able to use a cellphone. The latter promises to embed in the Indian legal regime, the largest system of State surveillance ever conceived and will undoubtedly have implications for the enjoyment of broader rights and privileges.

## 5. Conclusion

This report has sought to provide an overview of the historical circumstances and events that have shaped the constitutional provisions and legislative landscape relating to citizenship rights in India. As with many other nations, particularly in South and South East Asia, citizenship discourse in India has been affected by multiple factors: the history of practices of colonialism and the type of citizenship regime that was in place during the colonial period; the choice of the independence generation about the type of citizenship regime that would be enshrined for the post-colonial phase; the continuing legacy of colonial trends into the independence era as a result of forced migration and/or seclusion of groups of populations; the changing contours of identity politics which affects the evolution of the citizenship regime; the vision of citizenship adopted by leaders and major national parties; and the demands of practical politics which requires the building of political constituencies by pampering them and the 'othering' of particular groups.

The framers of India's constitution adopted a modernist, secular notion of citizenship by seeking to incorporate a broadly *ius soli* conception of citizenship in the Constitution. Over time, this has been modified to incorporate various elements of a *ius sanguinis* model of citizenship, with the insertion of notions of descent, common religious identity and common 'national' values into the discourse of citizenship. This is revealing cracks and tensions, which the judiciary is often called upon to resolve. The Indian judiciary's track record in playing the role of an umpire has been less stellar on this issue than on most other constitutional issues (Jayal 2016). This makes it imperative that other institutional actors step in to prevent a situation where this important constitutional terrain is captured by particular groups. Constitutional stability requires a balance among competing groups and their interests and current Indian citizenship laws exhibit a tendency to move towards an extreme end. When ordinary politics and the courts do not seem able to play a moderating influence, some other actors are required to step in to fill the gap. On this issue that is of vital interest, civil society groups and academics may have to play that role, at least in the short term. Raising the profile of these issues, which usually stay below the national radar, is therefore an imperative.

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