

INDIA AND THE CHALLENGE OF STATELESSNESS

A Review of the Legal Framework relating to Nationality



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A Review of the Legal Framework relating to Nationality

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FOREWORD

December 2, 2014

The issues that have a bearing on human rights and public policy have always been at the heart of National Law University, Delhi's work in the area of public law. I was therefore very happy for the opportunity and initiative that emerged through a dialogue between NLU, Delhi and the UNHCR Delhi office, which eventually became the current research study. With rapidly changing times and increasing mobility the issue of citizenship is both transforming from its conventional meaning and scope as well as making it simultaneously more vulnerable than ever before in human history. I hope this study report, though normative in its approach, will highlight and open up key issues upon which more in-depth socio-legal analysis could begin.

NLU, Delhi always engaged with national as well as inter-governmental institutions with great pride and enthusiasm. I am deeply pleased that the engagement with UNHCR began with a grant for conducting this study and I extend my sincere thanks to the UNHCR Delhi office. I do hope that this mutual institutional engagement and collaboration will grow further from strength to strength and contribute positively to the cause of better understanding of human rights in general and rights of those that of people who are in the nebulous state of statelessness in particular. NLU Delhi could benefit from these kinds of studies by bringing them into the classroom as specialist courses and special clinics. I am very hopeful of that possibility. Let me also congratulate the research team for conducting a serious study.

**Prof. (Dr.) Ranbir Singh**

Vice-Chancellor, National Law University, Delhi

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Sitharamam Kakarala

LIST OF ACRONYMS

AAGSP	All Assam Gana Sangam Parishad
AASU	All Assam Students' Union
CEDAW	Convention to Eliminate Discrimination against Women
CHT	Chittagong Hill Tracts
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Cultural and Social Rights
MEA	Ministry of External Affairs
MHA	Ministry of Home Affairs
NCT	National Capital Territory
NGO	Non-Governmental Organization
NHRC	National Human Rights Commission
NPR	National Population Register
NRIC	National Register of Indian Citizens
PIL	Public Interest Litigation
UDHR	Universal Declaration of Human Rights
UIDAI	Unique Identification Authority of India
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

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EXECUTIVE SUMMARY

The present report is a legal study attempting to analyse the core issues that interplay between nationality and statelessness in the Indian context. The study attempts at referring to all the relevant legal texts relating to nationality, published works relating to the issue of statelessness, and the available official reports of NGO organizations and UNHCR, for substantial examination of the issue at hand. Judicial decisions of the higher courts in India have also been referred. The study has sought to conduct a comprehensive analysis of legal framework concerning nationality in India, from the perspective of statelessness, based on a desk review of available material. In the study the term 'stateless' is as per the definition under Convention relating to the Status of Stateless Persons, 1954.

Nationality serves as a legal bond between an individual and the State, and brings along with itself a sense of identity and a set of rights. The commitment of the international community to prevent statelessness is reflected in the Universal Declaration of Human Rights, which affirms in Article 15 that “everyone has the right to a nationality”. The cornerstone for combating statelessness around the world is the 1954 Convention relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. However the prevention and reduction of statelessness would require a combined effort from all the States, as determination of a person's nationality is quintessentially a prerogative of State sovereignty.

Persons become stateless by falling in the gaps created by inconsistency between domestic nationality laws and the international framework. As a first step toward addressing this deprivation in the Indian context, this study has taken up a review of laws pertaining to nationality in the Indian legal framework, from the common structure put forth mainly by the 1954 and 1961 Conventions. While India has not yet acceded to the aforementioned Conventions of 1954 and 1961, there are several international instruments which India is party to, that are of further importance in protecting and promoting human rights, as well as for efforts to combating statelessness.

Who is a citizen of India?

Constitution of India is the primary legal instrument that lays down who is deemed to be a citizen of India. Article 5 of the Constitution of India, titled as 'Citizenship at the Commencement of Constitution of India', provides that any such person, who was or either of whose parents was, born in the territory of India, or who has been ordinarily resident in India for at least five years before the commencement of the Constitution, shall be deemed to be a citizen of India, if he had domicile in territory of India at such commencement. The Article is however silent on the definition of 'domicile' and has left the matter for Courts to interpret. By power under Article 11 of the Constitution of India to make laws for acquisition and termination of citizenship, the Citizenship Act was enacted in the year 1955. This Act, along with the Constitution, forms the epicentre for question of acquiring citizenship in India.

Citizenship of a child

One of the ways of acquiring citizenship under Citizenship Act, 1955 is by birth in India, if one of the parents is a citizen of India, while the other is not an illegal migrant. The Citizenship Act falls short of encompassing the position of a child born in the territory of India, where both parents may not be citizens of India or either of the parents may be without a nationality. The present provisions of the Citizenship Act do not provide nationality to children born in India who would otherwise be stateless, as given in Article 1 of the 1961 Convention on the Reduction of Statelessness. Further the term 'parent' has not been explained anywhere in the Citizenship Act to clarify whether it includes different sets of parents of a child, like 'unmarried parent', or 'adoptive parents', or 'biological parents' or 'surrogate parents', all of which are very much important in the scenario of conflict of nationality laws of different countries.

Further the citizenship of such children in India who are foundlings of unknown parentage poses a challenge in the light of existing provisions of Citizenship Act. The 1961 Convention on Reduction of Statelessness has laid down in Article 2 that in case of no proof to the contrary, a foundling found in the territory of a Contracting State shall be considered to be born in that country, to parents with nationality of that country. Citizenship Act does not cover such children who are found in India. As there are, in most of such cases, no ways in

which parentage as well as their nationality may be ascertained, the question of how nationality must be conferred to such children remains unanswered by the Citizenship Act.

Citizenship and Marriage

The report further analysis Sec 5 which makes provision for the persons who wish to acquire Indian citizenship on account of being married to an Indian citizen. According to Section 5 it is mandatory for such persons to be residing continuously in India for at least a period of seven years including twelve months immediately preceding the application for such registration. However, the Act is silent on position of such spouse of Indian citizen, where the marriage may have been dissolved before the stated period of seven years and the person may be left without any nationality. Further, the precondition for registration under this provision is that the person must not be an illegal migrant. It excludes, in effect, a person who may not have any documents to prove her/his nationality, and even after fulfilling all other criteria under this provision cannot get citizenship by registration under this provision.

Citizenship by Registration

The Citizenship Act provides for registration as Indian citizens, to such persons who are not citizens by any other provision of this Act or the Constitution of India, including a minor, a spouse of an Indian citizen, and a person generally. Such registration has to conform to the requirements laid down in this respect in Section 5 of the Citizenship Act. One such requirement is that the applicant should not be an illegal migrant. The report finds that this very condition erects an obstacle to assimilate those persons who may fulfil all other conditions under the provision, but may lack a previous nationality.

The registration of a minor as citizen of India requires that the parents of such minor must be Indian citizens. The Rules in this behalf given in the Citizenship Rules, 2009 require a declaration from the parent of such minor child stating that s/he is the legal guardian of the minor. However, the term 'parent' has not been explained to clarify the inclusion of a biological parent and an adoptive parent alike. This leaves a gap in understanding whether an adopted child can obtain registration as citizen under this provision or not. The provision also does not

clarify position of such a minor child in India, only one of whose parents is an Indian citizen, and the other may be stateless, or of unknown nationality.

Citizenship by naturalization

Citizenship by naturalization is envisaged under Section 6 of the Act. It puts forth that a person who is not an illegal migrant and has attained majority, may apply for naturalization in the prescribed form. However the Act as well as the Rules is silent on whether a stateless person may have the option of applying for the naturalization process under the Act so that s/he may become a citizen. The mention of 'illegal migrant' in this Section also practically rules out the probability of allowing a stateless person to apply for naturalization.

Renunciation of citizenship

The report also analyses the provisions relating to voluntary renouncement of citizenship by an Indian citizen of full age and capacity. Once such declaration renouncing the citizenship is registered, such a person ceases to be a citizen of India. The entire process happens notwithstanding that the person may or may not have acquired nationality of another nation. This creates a likelihood of statelessness and the current provision requires reconsideration bearing in mind Article 7 of the 1961 Convention. Further such renunciation under Section 8 of the Citizenship Act has a direct consequence on the citizenship of the minor child of such person which under the law also comes to an end. This provision appears to be skewed considering cases where one of the parents retains the India nationality and the other renounces, the benefit of retention of the Indian nationality through the other parent has not been indicated in the provisions.

Deprivation of citizenship

Section 10 of the Citizenship Act mentions circumstances under which the Central Government may deprive a person of Indian citizenship. These include fraud to obtain citizenship certificate or citizenship registration, disloyalty to the Constitution of India, imprisonment in any country within five years of registration or naturalization as Indian citizen, and residing outside India for seven years. The section further provides that before depriving a citizen of his citizenship a notice shall be served upon him, and that the Central Government shall refer the case to an Inquiry Committee. The report finds that neither the Act

nor the supplementing rules lay down any procedure or provision for ensuring that persons who are deprived of their nationality do not become stateless. This gap poses a risk for creation of statelessness, in respect of a person who is being deprived of his nationality under this section. Article 8 of the 1961 Convention is a reference point to be incorporated in the Indian Citizenship Act to prevent statelessness.

Identification of stateless persons

The protection of human rights of a stateless person, and the standard of treatment to which they may be entitled, is spelled out in the 1954 Convention relating to Status of Stateless Persons. For meting out the rights to a stateless person as per the international legal framework, as well as to devise legal and policy solutions for prevention and reduction of statelessness, a first step is to make identification of stateless persons possible.

The census in India, which is carried out under the Census Act, 1948, along with the Census Rules, 1990, is the only framework for creating a social, economic, demographic and numerical profile of India. However, this framework omits to take into consideration such population that may be without a nationality, or having unknown nationality.

An important step that may assist in identifying a newborn in India as stateless is registration of birth. In India the registration of birth of any child is governed by the Registration of Births and Deaths Act, 1969. While the Act makes the registration of all births in India mandatory, there is no mention in the Act about ascertaining the nationality of parents of a child, or even about the effect of nationality of parent(s) on the registration of birth of a child.

In India the Foreigners Act, 1946 is the primary law to regulate the entry, presence and departure of foreigners from India. Section 2(3)(a) of the Foreigners Act defines a foreigner as- “a person who is not a citizen of India”. The report finds this definition to not be clear about inclusion of stateless persons within it. A person who may be in possession of nationality of another nation but is present in India is as much a foreigner under this definition as is a person with no proof of identity on him to prove his nationality. The Foreigners

Act lays out the procedure for determination of nationality of a foreigner, in case a foreigner is recognized as a national of more than one foreign country, or his/her nationality is uncertain. The provision is silent about categorizing such a foreigner as stateless, even if s/he appears to be having no nationality after the determination process is over.

In India the Passports Act, 1967 governs the issuance and withdrawal of passports to Indian citizens as well as 'other persons'. While the Preamble to the Act mentions the term 'other persons', yet the Act does not explain it. Further, under the Passports Rules, 1980, a 'Certificate of Identity' may be issued to a stateless person residing in India, or a foreigner whose country is not represented in India, or a person whose national status is in doubt. In India the Passports Act and framework of Rules under it, is the only law which recognizes a category of persons by the term 'stateless' for issuing of certificate of identity. This is the only Act which caters to an extent, to the needs of the stateless person to have a record of their identity.

Assam Accord, 1985

In addition to the above legal provisions, the report attempts to understand, from the available literature, in the Indian perspective the position of persons covered under the Assam Accord, 1985. Sec 6A of the Citizenship Act has been inserted especially as a consequence of, and a supplement to, the Assam Accord. Under subsections (4), (5) and (6) of the Section, a person who has been detected to be a foreigner shall have the same rights and obligations as an Indian citizen for ten years from the date of detection, except for inclusion of his name in any electoral roll. After the said expiry of the ten years s/he was deemed to be a citizen of India for all purposes, unless s/he does not wish to be a citizen of India and makes such declaration under the Citizenship Act. The provision further states that the name of such person was to be re-enrolled in the respective electoral list. This appears a welcome provision, to facilitate prevention and reduction of statelessness on a large scale in India.

The Accord as well as the Citizenship Act leaves in limbo the nationality of persons who were found to have entered India after 25th march, 1971. Such 'foreigners' were to continue to be detected, deleted from electoral roll and expelled. The provisions governing such persons also does not provide for

determination of nationality of such persons, before deporting them to a country which may or may not accept them or naturalize them as citizens, thus putting them at the risk of becoming stateless.

Indo-Ceylon Pact, 1964

India shares its border with various countries, but the only bilateral treaty between India and a neighbouring nation on the issue of nationality, is the Indo-Ceylon Pact of 1964. This Pact was signed to ameliorate the conditions of a large number of persons who have been living without nationality in India as well as in Sri Lanka (Indian Tamils). The terms of the pact sought to give nationality to such people by either India or Sri Lanka, but the criteria for granting Indian or Sri Lankan citizenships to persons covered under the Pact was not stated clearly. Even after the abrogation of the Pact there have been a large number of such people applying for Indian citizenship but have not been granted the same. After demonstrating an affirmative approach to reduce statelessness through the Indo-Ceylon Pact, the actual effective implementation of the Pact in addressing the question of nationality of such persons is still in question. The follow up mechanism of the Pact on the question of repatriation has been slow and requires deeper deliberation on both sides of the border to amicably reduce statelessness.

Judicial trends in the approach towards statelessness

Even as glaring gaps exist in Indian nationality laws that pose a risk of creating statelessness or failing to prevent it, yet the Indian courts have witnessed fewer cases that discuss the potential of Indian nationality laws *vis-à-vis* statelessness. The report has traced the judicial approach on the question of nationality in certain cases where the potential creation of statelessness has been discussed. However the courts have refrained from defining or explaining the concept of statelessness in the cases. It is also pertinent to note that the 1954 and 1961 Conventions have not been used as a reference point for understanding statelessness, or the principles laid down in them have not been incorporated in any guidelines for subsequent cases where lack of nationality may lead to statelessness. The Courts have, however, taken a proactive and different approach to avoid the occurrence of statelessness by applying principles of equity and justice.

After attempting a comprehensive review of the legal framework that is in place on the issue of nationality, it seems that India is lacking the legal framework that would protect rights of stateless persons, though upholding of human rights has been an essential facet of India's commitment to international law. India still lacks a policy regime aimed at preventing and reducing statelessness, in line with the international framework. The two major gaps in the Indian legislative framework, reflected from the analysis of Indian laws from perspective of preventing and reducing statelessness, are (a) determination and identification of stateless persons, and (b) legislative provisions to further reduce and prevent statelessness.

The positive steps that have been taken in this respect may lack direction, as India is yet to accede to the 1954 and 1961 Conventions that form the backbone of the existing international framework on this issue. For ameliorating the conditions of stateless persons, the legislative framework has to take specific steps, directed at reducing statelessness, by adopting changes to assimilate stateless persons in mainstream community. In addition to that, specific legislations need to be introduced with the aim to prevent any further situations of statelessness. It must be reiterated that creation of positive obligations on India under international framework, by accession of the two Conventions, would be beneficial to this cause.

Based on the analysis of the legal framework relating to nationality in that have a bearing upon existing stateless persons and future statelessness, the report makes focused recommendations for adoption of suitable changes in India's legal and policy framework, so as detection, reduction and prevention of statelessness may be made possible. The recommendations proposed have been located as short-term and long-term initiatives, for amendments in the Indian legislative fabric relating to citizenship, as well as for laying groundwork for streamlined policy objectives on combating statelessness.

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