

PROTECTING THE FORGOTTEN AND EXCLUDED

STATELESSNESS IN SOUTH ASIA

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I. DEFINING THE 'EXCLUDED'

- 1.1 The concept of 'statelessness' in international law and policy is an exercise in defining the 'excluded'. Concepts of 'exclusion' have always had a strong influence on social and political governance – both within and without the domain of the nation-state. Yet the phenomenon of 'exclusion' has different meanings in different settings. Socially, the excluded are denied rights and privileges calling for a responsive social justice to meet discrimination and disadvantage. Politically, exclusion connotes a denial of political rights in fact and law invoking the need for a responsible democracy that will enable the sharing of state power. Legally, 'exclusion' denotes a denial of status with consequential effects. It is, in that sense, a kind of no-right but which (like most exclusions based on status) is far more vicious in its consequences than the mere denial of a liberty.
- 1.2 Bearing in mind that we are concerned only with exclusions based on status, what then is our moral obligation when dealing with exclusions? Domestically, exclusions are usually taken seriously as giving rise to issues of social justice and democracy. International law has confronted issues of individual status-based exclusions on a variety of basis including awarding privileges, exemptions and restraints – no less in the field of diplomacy. But we are not concerned with "exclusions based on special privileges" resulting in preferred transparency but with "exclusions from protection" resulting in human vulnerability and hostile discrimination. The new emphasis of human rights in international law and policy is part of a growing concern and need to protect the vulnerable. Where vulnerability is profiled for specific recognition, powerful conventions have projected the need to combat vulnerability in the form of rules and principles to deal with anti-racism, gender injustice, torture and the like. But, amongst vulnerable, 'refugees' and the 'stateless' deserve more pointed attention and protection in a world which is generally hostile to both and promotes their interest with limited resources.
- 1.3 A realistic approach to 'statelessness' would entail rigour in identifying that causes that create "statelessness". It dilutes our understanding to simply think of 'stateless' persons as those who are accidentally deprived of belonging to a nation-state due to non-fortuitous circumstances that places them in some kind legal international limbo. The stateless are not just poor chaps who get left out because they were

overlooked! Statelessness is created by nation-states through deliberate policies whereby people are either rendered stateless in one state or unwelcome in another with guaranteed entitlements in neither. These policies are made fully conscious that their consequence would be to create, maintain or perpetuate statelessness. Thus, situations of statelessness are politically contrived and not simply a part of the mere accidental drift of historical events. In some situations, a state may deliberately create statelessness (e.g. Bhutan). In some cases, a situation of 'statelessness' may be created due to some extreme circumstances, but none of the nation-states may be willing to redeem the stateless from statelessness (e.g. Biharis-Pakistan-Bangladesh). In some cases, citizens are rendered *de facto* stateless because the country of which they are citizens refuses to allow them immediate entry in their own homeland (e.g. United Kingdom in relation to their East African Asians). There is a sense of paradox and irony in devising a humane approach to statelessness, in that such a humane appeal is made on behalf of the stateless to the very nation-states who created or sustained the statelessness complained of in the first place! This does not mean that the quest for humane treatment for the stateless will discontinue. It merely means that policies to address and ameliorate the predicament of the stateless must necessarily encounter stiff resistance by nations which will mind their own self interest with belligerence whilst agreeing, in principle, that statelessness is a moral anomaly about which something needs to be done.

- 1.4 To understand the phenomenon of statelessness, it is necessary to take a more realistic view of the concept of citizenship and its bearing on our subject. Citizenship is a very aggressive mechanism of national and international law based on a policy of inclusions and exclusions. The 'included' are the 'them'. This classification is associated with the rise of the nation-state. The inclusive nexus of a person with a nation-state is aggressively maintained because it simultaneously offers and negotiates protection for its 'citizens' while empowering the nation-state to act for such citizens and even go to war on their behalf for nationalist reasons! The annals of international law are full of instances of nation-states venturing to warn, threaten, coerce and make war against other nation-states that have failed to protect the citizens of the former. This doctrine has been much expanded in our times in an unprincipled way by the United States and others who conquer and subjugate nation-states that supposedly pose a threat to the American people and the peoples of the world! That said, the aggression of the concept of citizenship is manifested not just in policies of aggression but in aggressive defensive laws as well, and it continues to be used in policies relating to migration, immigration and citizenship. Expansive policies have given way to narrower ones so that people are excluded from immigration, emigration and citizenship to encroach on the human rights of misplaced individual persons. The more expansive the 'citizenship' or 'immigration' or refugee law, the greater the possibilities of such a law enabling greater protection for the unprotected refugee or stateless person. The narrower the law and policy in this regard, the greater the chances that it will generate and perpetuate statelessness.

- 1.5 There are usually four possible ways in which citizenship may be acquired (a) birth (b) descent (c) registration or (d) nationalization. A tentative dysfunction can be made between citizenship which is claimed as of right and citizenship by government discretion. In both cases, certain conditions have to be satisfied. However, in cases of citizenship as of right, once the pre-conditions are satisfied, the person in question is entitled to citizenship. In the citizenship by discretion cases, conditions have also to be satisfied but the conditions are more flexible – leaving it to the government to decide whether they really want the person in question to be their citizen. Citizenship by birth or descent was conferred on any person who was born in the territory of a nation-state of which whom he had an ancestral, parental or grandparental connection. In this tradition, citizenship by discretion was less difficult to obtain. But harsher dispensations of the laws and policies of citizenship are crafted to deny citizenship in all of the four categories of birth, descent, registration and naturalization to persons targeted for exclusion. This is no less true of South Asia – as we shall see later.
- 1.6 In our context, we need to make a distinction between refugees and the stateless. Refugees are persons who may or may not be citizens but who suffer from a well founded fear of persecution and cannot return to their originating country or the country of which they are citizens. This approach, too, has become stricter as new policies are being evolved to deny refugees asylum if they can get asylum in another “safe” country to which they have a right to entry or through which they have transited. Stateless persons are of a different genre, but may also have a well founded fear of persecution relating to the country from whence they came and of which they may have been citizens. Stateless persons have no where to go. The question is who should be responsible for them, in what way and to what extent?
- 1.7 The necessary precursor to that question is to ask how statelessness is, passively or actively, induced. Statelessness is created at the intersection of the legal citizenship regimes of countries in a region with supra-legal events in a region such as economic migration, refugee flows, territorial transfer and shifts in political attitudes. Exclusionist laws and ordinances may to respond to migrations, or it may be the other way around; political turmoil can generate migration, and vice versa; it is likely that most situations of statelessness are an interaction of all three. For the purposes of examining statelessness in South Asia, however, we examine how statelessness is created by the root causes of (a) citizenship law, (b) political turmoil and (c) the ambiguities of migration.

II. CAUSES AND CONTEXT OF STATELESSNESS IN SOUTH ASIA

A. *POTENTIAL FOR STATELESSNESS IN SOUTH ASIA*

- 2.1 South Asia is comprised of the states of Afghanistan, Pakistan, India, Nepal, Bhutan, Bangladesh, Myanmar, Sri Lanka and the Maldives. South Asia's population is highly heterogeneous with regard to ethnicity, language and religion; no single or dominant cultural theme binds South Asia together. Instead, the region's agglomeration is geographical, bounded on all sides by natural barriers that have historically only been bridged by invasions, South Asia exists within a geographically self-contained landmass. Within this region, South Asia is populated by approximately 1.6 billion people, resulting in an overall population density that is more than seven times the global average. The scale of the region's diversity is as impressive, with thousands of ethnic identities, languages and several major racial groups. South Asian borders, drawn by a departing colonial power, do not separate ethnic or culturally homogenous communities and the multiple group identities of the region's people often transcends political boundaries. The post-colonial demarcation of nation-states in South Asia has endeavoured, often violently, and rarely with success, to correspond to such groupings: the region is borderless with borders.
- 2.2 South Asia's nation-states coalesced in response to its colonisation, primarily by the British. While some areas were never put under direct colonial rule, the political impact of the British colonisation comprehensively changed the way South Asian kingdoms functioned and laid the basis for the anti-colonial nationalist movements that came in its wake. Modern Nepal was shaped in the eighteenth century when the territorial ambitions of the Gorkha kings, fuelled by a powerful army, spread across the region before encountering the British East India Company in the 1814-1816 Anglo-Nepalese war. The resulting 1816 treaty of Sugauli halted this expansion and laid down of boundaries of influence that have, in large measure, survived to become the international borders the Nepali nation-state today. Similarly, in Bhutan, the eighteenth and nineteenth centuries saw constant conflict between various warlords and chieftains. Bhutanese territorial claims soon met with the British East India Company's ambitions resulting in the Anglo-Bhutanese War. The 1865 treaty of Sinchula that ended the war saw the British occupy prime land in what is now India in return for an annual compensation to Bhutan. In 1910, the British signed the 1910 treaty of Punakha that made Bhutan a British protectorate. After the British left South Asia, Bhutan gained its independence as a sovereign nation-state and its border arrangements with the British were formalised.
- 2.3 Furthest away from the South Asian plains, Afghanistan's history of powerful rulers who invaded, ruled and exported their culture to South Asia binds it historically to the region. The Afghan nation-state began its existence in the eighteenth century under the powerful rule of the Durrani Empire. After the third Anglo-Afghan war that

ended in 1919, Afghan autonomy and territory was ceded to the British who then exercised a large influence on the region. During the period of British influence, Afghanistan's present borders were formalised with poor demarcation of the Durand Line that was drawn through Pashtun communities and villages, apparently with the intention of disuniting them. The divisive legacy of the Durand Line is of increased relevance today, with Pashtun communities opposing it and its ineffectiveness illustrated in the light of the porous border it forms with Pakistan. In contrast, Sri Lanka, formerly Ceylon, has the advantage of natural borders. Being an island, Ceylon was administered as a separate Crown Colony. In 1948 it became a British Dominion, and graduated to a republic in 1972 and was renamed. However, colonial rule also saw the importation of Tamil migrant labour into areas closest to the modern Indian State of Tamil Nadu. While Tamil presence in northern and eastern Sri Lanka goes further back into history, colonial economics required their labour on the country's tea plantations and the Tamil population was augmented and consolidated. Upon independence, Sri Lanka saw intermittent ethnic strife between its Sinhalese majority and Tamil minority populations that ultimately escalated into a full-scale war.

- 2.4 Until 1937, the territory now forming India, Pakistan, Bangladesh and Burma was the unified administration of British India, not including small areas controlled by the French and Portuguese, and the numerous princely states under the direct control of local monarchs. Burma was separated from British India and became a distinct Crown Colony in 1937. The remaining territory would be divided into the states of India and Pakistan by cleaving away, on the basis of a hurriedly-prepared report, two non-contiguous areas in which the majority of the population was Muslim. The newly-independent states of India and Pakistan utterly failed to protect the minority communities resident on their territory, resulting in enormous bloodshed and the largest population movement in history (approximately 7.25 million refugees moved in each direction). Two decades later, cultural and economic disparities between the two units of Pakistan culminated in a violent secession resulting in the creation of the sovereign nation-state of Bangladesh.
- 2.5 The newly independent states also developed different policies on migration in the region. The Government of India signed two bilateral treaties of perpetual peace and friendship with the Governments of Bhutan and Nepal (1949 and 1950 respectively), by which they permitted reciprocal free entry to nationals of the other state. Millions have crossed these borders in various capacities: as temporary migrants seeking seasonal employment, as migrants seeking permanent employment and as refugees. Nepalis and Bhutanese resident in India, and Indian national resident in those countries, retain practically the same rights as nationals. That apart, most borders in South Asia – with the obvious exception of the Indo-Pakistani border – are highly porous and unregulated. The United States' "war on terror" brought attention to the lack of border controls between Pakistan and Afghanistan, which enabled members of the Taliban to cross in and out of the Pashtun regions in

Pakistan. India's shares its largest border with Bangladesh, of which one third has fenced in spite of the Bangladesh Government's opposition. Authorities have been unable or politically unwilling to stem a steady inflow of illegal migrants and immigrants.

- 2.6 It is also a salient fact that very few contiguous South Asian states have entirely normalized relations with each other, usually on account of disputes concerning borders and cross-border movements, or histories of unwelcome intervention in each others' affairs. The inherent and massive heterogeneity of South Asian states has frequently given rise to militant resistance – often with a secessionist agenda – to the exercise of central power and the project of national consolidation. These resistances have usually obtained support and legitimacy from the governments or societies of neighbouring states. As threats to the project of national consolidation have accumulated over the last five decades – because of interstate conflict, border and territorial disputes, insurgencies, illegal migration, increasing competition for resources and unfavourable demographic drift – the resistance has intensified, and so has the tension of regional relations. It would not be amiss to say that an atmosphere of suspicion lies over South Asia, suspicion between traditional adversaries (such as India and Pakistan) and 'perpetual friends' (such as India and Nepal) alike. Suspicion has driven South Asian states to progressively tighten the strings on who may claim membership goods, thus creating growing pockets of statelessness at their cultural and geographical margins.

B. IMPACT OF CITIZENSHIP LAWS ON STATELESSNESS

- 3.1 Examining the changes that have been introduced to citizenship laws provides a clear narrative of how this tightening of strings has proceeded: largely by restricting the acquisition of citizenship by right in favour of granting citizenship at the government's discretion.

(a) India

- 3.2 Indian law provided relatively liberal access to citizenship in the early decades of independence. The right to citizenship by birth (*jus soli*) was fully recognized by Section 3 of the Citizenship Act 1955 at the time of its commencement:

"3. Citizenship by birth. – (1) Except as provided in sub-section (2) of this section, every person born in India on or after the 26th January, 1950, shall be a citizen of India by birth."

By current standards, this investiture of citizenship was magnanimous. It existed with only exceptions being made to any person whose father was a diplomat or an enemy alien. The question of descent and of connection to national identity was

inessential, rather, any person born on Indian territory after the promulgation of the Constitution was deemed to be a member of the Indian nation-state.

- 3.3 In 1985, in the wake of large-scale illegal Bangladeshi migration into India, specifically Assam, the Citizenship Act was amended. Between the late 1970s and early 1980s, disaffected Assamese youth, citing their displacement from land and economic opportunity as reasons, led a campaign of protest and agitation against the migrant influx and urged the government to take decisive measures to protect the interests of indigenous Assamese. Indeed, the issue fuelled enough resentment to swell the ranks and profiles of several violent insurgent organisations operating on migrant-receiving states, including the United Liberation Front of Asom (ULFA). Faced with a rising tide of Assamese opposition, the Central Government concluded a Memorandum of Settlement with the protestors, popularly known as the 'Assam Accord'. The Accord classified foreigners from Bangladesh into three categories based on the date of their entry into India and created a scheme for their status and treatment – (a) illegal migrants present in India before 1966 were to be granted citizenship, (b) illegal migrants who entered between 1966 and 24 March 1971 were to register as foreigners and stop claiming voting rights and other membership goods reserved for Indian citizens, and (c) illegal migrants entering India after the cut-off date of 24 March 1971 were to be treated in accordance with the stringent law relating to foreigners. The Citizenship (Amendment) Act, 1985 gave effect to the provisions of the Accord and inserted a new Section 6A to address Assamese alienation and to exclude some Bangladeshis from Indian citizenship. The Statement of Objects and Reasons of the Amendment of 1985 reflects the government's and Assamese people's concern:

"The core of the Memorandum of Settlement (Assam Accord) relates to the foreigners' issue, since the agitation launched by the A.S.S.U. arose out of their apprehensions regarding the continuing influx of foreign nationals into Assam and the fear about adverse effects upon the political, social, cultural and economic life of the State."

- 3.4 Subsequent events, including large scale immigration and security threats, would shake the confidence that enabled the generosity of the *jus soli* provision. The secession of Bangladesh and the uprising in Sri Lanka displaced millions of refugees and illegal migrants onto Indian territory in the 1970s and 1980s. Thirty years after the original drafting of the citizenship law, an amendment in 1986 restricted the application of *jus soli*. The traditional understanding of a right to citizenship solely on the basis of birth on national territory was retained only with respect to people born prior to the amendment of 1986. People born on Indian territory after the amendment could claim citizenship only if either of their parents was a citizen of India at the time of their birth [Section 3(1)(b) of the Citizenship Act, 1955]. This incorporated an element of *jus sanguinis*, or citizenship by descent, into a regime formerly reliant only on *jus soli*. The government's concern at the Indian national

identity being diluted by the foreign influx is reflected in the Statement of Objects and Reasons of the Amendment of 1987:

“A large number of persons of Indian origin have entered the territory of India from Bangladesh, Sri Lanka and some African countries and they are residing in India. Government has taken a serious view of the entry of persons clandestinely into India and with a view to making the provisions of the Citizenship Act relating to the grant of Indian citizenship more stringent it is proposed inter alia to make the following changes in the Citizenship Act, 1955...”

- 3.5 In 2004, an amendment further restricted the right to citizenship by birth by introducing a new Clause (c) into Section 3(1), which excluded any person whose parent was an illegal migrant at the time of his birth. Section 3(1)(c) now reads:

“...Every person born in India...on or after the commencement of the Citizenship (Amendment) Act, 2003, where –
(i) *both of his parents are citizens of India; or*
(ii) *one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth,*
shall be a citizen of India by birth.”

This restriction was plainly a response to the major refugee and migrant influxes from Sri Lanka and Bangladesh, which, it had become evident by that point, were likely to be intractable and long-term features on Indian territory, and thus needed to be barred from the membership of Indian nationality.

- 3.6 *Jus sanguinis* is an implicitly more nationalistic basis on which to grant citizenship by right, since it ensures that the only new nationals are those descended from existing nationals, and thus tenders Indian citizenship to people who are ‘inherently’ Indian. *Jus sanguinis* was recognized in Section 4 of the Citizenship Act which provided that a person born outside India shall be a citizen of India by descent if his father is a citizen of India at the time of birth. However, an individual of Indian descent could not claim Indian citizenship in the following of two circumstances:

- (a) if the father was not an Indian citizen,
- (b) if, in the event that the father was an Indian citizen by descent, the birth has not been registered in an Indian consulate.

In 2004, this provision was amended to include any person whose mother or father was an Indian citizen at the time of birth. The provision applied retrospectively to any person born after 10 December 1992. The only change with respect to *jus sanguinis*, then, was a liberalizing one.

- 3.7 Yet the problem of statelessness, while is perpetuated by the restriction of *jus soli*, has been sustained over stateless individuals by increasingly restrictive requirements for acquiring citizenship by registration. The Citizenship Act described several categories of persons who may apply for Indian citizenship, and may be registered as such at the discretion of the authorities. Two of these categories are:
- (i) persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration, and
 - (ii) persons who are, or have been, married to citizens of India.

[Sections 5(1)(a) and 5(1)(c) of the Citizenship Act].

It is explained that, for the purposes of the entire Sub-section (1), a person shall be deemed to be of Indian origin if he or either of his parents, or any of his grandparents, was born in undivided India.

- 3.8 With the 1986 amendment, firstly, these provisions were modified to require that persons of Indian origin who are ordinarily resident in India must have been so resident for five years immediately before they are eligible to apply for citizenship. Secondly, persons who are or have been married to citizens of India were now required to be ordinarily resident in India and to have been so resident for five years immediately before making an application for citizenship. Thirdly, the amendment also restricted the understanding of a “person of Indian origin” by stating that only the fact of his parents’ birth in undivided India, and not the birth of his grandparents, would be a consideration towards determining his origin. There is thus a dual movement in the law that is easy to read – the law is increasingly liberal with respect to gender neutrality, now including the husbands of Indian women as eligible applicants, but it is also increasingly restrictive in terms of residential qualifications. The implicit narrative is even easier to read – more people who are inherently Indian but outside the country must be permitted to become nationals, but fewer people who are inherently foreigners but inside the country must not be permitted to do so. As with the *jus sanguinis* provision, the Amendment of 2004 forthrightly excluded illegal migrants from applying for registration as a citizen. It increased the residential requirements of applicants for registered citizenship under Sections 5(1)(a) and 5(1)(c) from five years to seven years. It also introduced a new explanation that stringently defined the phrase “ordinarily resident in India,” which was previously left undefined.
- 3.9 Most strikingly, the 2004 amendment introduced ‘overseas citizenship,’ a form of dual citizenship with reduced political rights for individuals who are citizens of other countries but who were at one time citizens of India, or were at one time eligible to become so, or whose parents or grand-parents belonged to a territory that

became part of India after independence. Citizens of Pakistan, Bangladesh and any other country specified by the Central Government are excluded from registering for overseas citizenship, which is in agreement with this paper's analysis since Pakistanis and Bangladeshis are framed as the paradigmatic outsiders by Indian nationalist discourse.

- 3.10 Section 6 of the Citizenship Act provides a fourth mode of acquiring Indian citizenship, that is by naturalization, which is available to people with no prior connection to India by birth, descent or origin. The decision on such an application lies entirely at the discretion of the Central Government: certain residential and character conditions are specified in the Third Schedule, but the Government may waive any or all of them. The First Schedule listed eleven Commonwealth countries to the citizens of which the conditions of the Third Schedule did not apply. An amendment in 1987 made the residential requirements of Clause (d) of the Third Schedule more stringent, from nine years to twelve years. The 2004 amendment excludes illegal migrant from naturalisation, and the residential requirements of Clause (d) were further increased from twelve to fourteen years. The First Schedule, listing countries exempt from Third Schedule conditions, was omitted. Altogether, the amendments of 1987 and 2004 illustrate a new and building anxiety about the character of the Indian nation that required the progressive curtailment of the methods of acquiring its membership.

(b) *Pakistan*

- 3.11 Pakistani citizenship law provided similarly liberal access to citizenship after independence. Section 4 of the Citizenship Act, 1951 recognized the right to citizenship of every person born in Pakistan after the Act's commencement. Section 5 concerns citizenship by descent, to which any person whose parent is a citizen has the right (as in India, if the parent was also a citizen by descent, the birth must have been registered in a Pakistan consulate). Section 10 specifically lays out a woman's right to citizenship by marriage, including the wives of Pakistani citizens or persons who, but for their death, would have become citizens. Section 14B extends citizenship to subjects of the former princely state of Jammu and Kashmir who have migrated to Pakistan with the intention of residing there until the relationship between the States is determined.
- 3.12 In terms of discretionary citizenship, Section 9 of the Citizenship Act enables any person to apply for registration as a citizen after having received a certificate of naturalization under the Naturalisation Act, 1926. The Naturalisation Act specifies certain non-waivable residential and personal conditions for certification, but in any case, if it sees fit, the Federal Government may bypass the Act altogether and register any person as a citizen without them having obtained a naturalisation certificate.

- 3.13 Pakistan's principal citizenship law was amended in 1952, 1972, 1973 and 2000. Similar to the pattern of restrictions seen in Indian law, Pakistan's laws also changed in deference to political constructions of the Pakistani nationality. The cleaving of the two arms of the country in 1971 on the primary basis of linguistic and cultural difference left Pakistan further questioning the construction of its national identity. Yet, the legal shift in 2000 displayed formalistic gender concerns when it extended the right of citizenship by descent to the children of Pakistani women. There are also proposals to extend the right to citizenship by marriage to men who marry Pakistani nationals.

(c) Bangladesh

- 3.14 After the secession of East Pakistan, the Bangladesh Citizenship (Temporary Provisions) Order, 1972 was promulgated. Section 2 of the Order extended the right of citizenship to any resident who was, or whose father or grandfather was, born on Bangladesh territory, a highly inclusive combination of *jus soli* and *jus sanguinis*. Sub-section 2(ii) includes every person who was a permanent resident of the territory of Bangladesh on the 25th of March, 1971, and continues to be resident, and is not otherwise disqualified by law.

- 3.15 This generous sanction is qualified by Section 3, which states:

In case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order, the question shall be decided by the Government, which decision shall be final.

Section 3 creates the loophole by which the government assumes to itself the ability to selectively exclude unwelcome groups, such as the Bihari Muslims in Bangladesh in 1972. Additionally, sub-section 2A excludes any person who "owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state" (the exception being that the Government may grant citizenship to a citizen of Australia, any European or North American state or any state notified by the Government).

- 3.16 The Order was first amended by the Bangladesh Citizenship (Temporary Provisions) (Amendment) Act, 1973, which inserted a new sub-section 2A, stating that a person who would have applied but for their being resident in the United Kingdom, shall be deemed to be a permanent resident. The next amendment introduced was Ordinance VII of 1978, which removed Australia from the exceptional countries listed in sub-section 2

(d) Bhutan

- 3.17 Bhutan's citizenship law is the archetypal model of law creating statelessness. The first attempt to define nationality was the Nationality Law of 1958, which established a simple system of *jus sanguinis*. Section 3 states:

Any person can become a Bhutanese National:

(a) If his/her father is a Bhutanese National and is a resident of the Kingdom of Bhutan; or

(b) If any person is born within or outside Bhutan after the commencement of this law provided the previous father is a Bhutanese National at the time of his/her birth.

Under Section 4, any foreigner who is a major, owns agricultural land and has been in residence in the country for ten years is also eligible to be granted citizenship by the King. Any woman who is a major and is married to a Bhutanese national may be registered. It was under Section 4 that citizenship was understood to have been accorded to the Lhotshampas, ethnic Nepalese who had been resident in Bhutan since as far back as the eighteenth century. The Nationality Law of 1958 also provided for citizenship by registration for foreigners who have been resident in Bhutan for ten years and worked in the government service for five years.

- 3.18 The Bhutan Citizenship Act, 1977 increased the requirements to twenty years of residence or fifteen years of satisfactory government service. Additionally, applicants were required to possess “some knowledge of the Bhutanese language both spoken and written and the history of Bhutan.” In case this provision should be mistaken as constituting a right to citizenship, the Act states deliberately that “the power to grant or reject an application for citizenship rests solely with the Royal Government. Hence, all applicants who fulfil the above conditions are not necessarily eligible for grant of citizenship.” Under the 1977 Act, the children of a female Bhutanese national were required to go through the standard procedure for foreigners (citizenship by registration or naturalisation) if they sought Bhutanese citizenship, but in 1980, a new marriage law further stipulated that the wife of a male Bhutanese national was also required to go through the standard procedure. *Jus sanguinis* provisions for citizenship by descent existed only for the children of a male Bhutanese national who were deemed citizens.
- 3.19 In 1985, the Bhutanese government further updated its nationality laws. Article 2 of the Bhutan Citizenship Act, 1985 deems any person who was permanently domiciled in Bhutan before 31 December 1958 and whose name is registered in the relevant census register to be a registered citizen of Bhutan. Article 4 stipulated new conditions for naturalised citizens that included the need for an applicant to, *inter alia*,
- (i) have resided in Bhutan for fifteen years in the case of government servants and twenty years for all others;
 - (ii) speak, read and write Dzongkha – the language of the Drukpa majority – proficiently;
 - (iii) possess a good knowledge of Bhutanese culture, customs, traditions and history;

- (iv) have a good moral character without a criminal record;
- (v) not have a record of ever having spoken against the “King, country and people” of Bhutan; and,
- (vi) take an oath of allegiance to the King.

Needless to say, some of these conditions are discriminatory in the context of a country with a sizeable non-Drukpa population. They reflect a movement in Bhutan towards the consolidation of an imagined nationality. This law was enforced through a census in 1988 that was only conducted in southern Bhutan that forced claimants to produce an original copy of a pre-1958 land receipt, an almost impossible requirement. It resulted in tens of thousands of Lhotshampas being stripped of their citizenship, evicted from their homes and expelled from Bhutan. This is the current situation of citizenship law and its application in Bhutan.

3.20 The proposed Constitution of Bhutan includes a separate chapter on citizenship and is intended to replace existing Bhutanese citizenship laws. Article 6 of the proposed Constitution provides for citizenship in three ways:

- (i) Citizenship by birth to persons born of both Bhutanese parents [Article 6(1)];
- (ii) Citizenship by registration to persons domiciled in Bhutan before 31 December 1958 and whose names are officially recorded [Article 6(2)]; and,
- (iii) Citizenship by naturalisation to persons who fulfil the following criteria [Article 6(3)]:

- “(a) have lawfully resided in Bhutan for at least fifteen years;*
- (b) not have any record of imprisonment for criminal offences within the country or outside;*
- (c) be able to speak and write Dzongkha;*
- (d) have a good knowledge of the culture, customs, traditions and history of Bhutan;*
- (e) have no record of having spoken or acted against the King, the Country and the People of Bhutan;*
- (f) renounce the citizenship, if any, of a foreign State on being conferred Bhutanese citizenship; and,*
- (g) take a solemn oath of allegiance to the Tsawa-Sum as may be prescribed.”*

3.21 The proposed Constitution thereby retains the 31 December 1958 cut-off date that the 1985 law retrospectively introduced for citizenship by registration, as well as the requirement that official records prove the claimant’s domicile in Bhutan prior to the cut-off date. It retains conditions for naturalization that are culturally exclusive and that may penalize any history of democratic dissent. In the event that the Constitution is adopted, these statelessness-inducing provisions will be lent an even greater credibility and permanence.

(e) **Sri Lanka**

3.22 In contrast to India, Pakistan and Bhutan, the citizenship law of Sri Lanka was designed, from the very outset, to strategically exclude. The object of this exclusion was a group of Tamils who were moved by the British in the mid-nineteenth century to central Sri Lanka to labour on the plantations there. At the advent of the state of Ceylon, Sinhalese leaders feared that providing nationality to the nearly one million estate Tamils would threaten the State's Sinhalese identity, not to mention their own electoral majority.

3.23 The Ceylon Citizenship Act, 1948 declared in Section 2 that,

"A person shall be or become entitled to the status of a citizen of Ceylon in one of the following ways only:-

(a) by right of descent as provided by this Act;

(b) by virtue registration as provided by this Act or by any other Act authorising the grant of such status by registration in any special case of a specified description."

Citizenship by birth is conspicuously absent, even at a time when most recently independent countries in South Asia were making some provision for it.

3.24 Section 4 dealt with persons seeking citizenship who were born before the appointed date; that is, the first generation of nationals in a newly independent state. Citizenship by descent is provided to such a person if they were born in Ceylon and if their father, or alternatively their paternal grandfather *and* paternal great-grandfather, were born in Ceylon. If a person seeking citizenship was not born in Ceylon, their father and paternal grandfather, or alternatively their paternal grandfather and paternal great-grandfather, must have been born in Ceylon. Section 9 stated that if a child is born out of wedlock, citizenship will be granted on the basis of the mother, maternal grandfather, or maternal great grandfather instead of the paternal line. Section 5 concerned persons born after the appointed date, who shall be given the status of citizens if the father is a citizen of Ceylon at the time of their birth (if they are born outside the country, the birth must be registered at a consulate). Note that this provision caused statelessness in Sri Lanka to self-perpetuate, as it will in any country that denies *jus soli*. Section 7 is a provision that is absent in other South Asian citizenship legislations, although it would be included as Article 2 of the 1961 Convention on the Reduction of Statelessness, namely that all foundlings will be deemed to be citizens by descent.

3.25 With regard to Section 4, it is, of course, potentially difficult for an applicant to demonstrate that his father or grandfather or great-grandfather was born in Ceylon, even if that is in fact the case. For this reason, where such a doubt exists, Section 6

empowered the Minister to grant a certificate of citizenship at his discretion. In sum, it appears as if the requirement for citizenship by right is made demanding with the intention of returning the decision to grant citizenship to the discretion of the Minister. To that effect, a person lacking documentation would be profoundly vulnerable to arbitrary or discriminatory decisions although they would be appealing to a legal right. In point of fact, official birth registration was only instituted in Ceylon in 1897, making the proof of a grandfather's birth impossible in almost all cases. Most births among the estate Tamils were unregistered anyway, and many would return to Tamil Nadu to give birth to children, so the provisions of Section 4 and 6 were instrumental in rendering them stateless.

- 3.26 Citizenship by registration was provided for by Sections 11 – 14. Under Section 11, in addition to standard residential and personal conditions, applications are only open to persons whose mothers or fathers are, or were, citizens by descent but who were not themselves accorded citizenship at birth for certain reasons. Section 12 described the eligibility criteria for spouses, widows and widowers. Section 13 described the criteria for applicants who are neither children nor spouses of citizens, of whom not more than 25 people shall be registered in any year. Section 14 provided that an applicant may include the name of his minor child for registration as well. Applications under any of these sections may be rejected by the minister without any further appeal or contestation in court.
- 3.27 The Indian and Pakistani Residents Act No. 3 of 1948 was complementary to the Ceylon Citizenship Act in its effect of rendering the estate Tamils stateless. It required a seven or ten year period of uninterrupted residence as a condition of citizenship, whereas most estate Tamils had visited India in that period of time. It also imposed an income threshold on applicants, which disqualified most estate Tamils. The principal legislation currently governing citizenship in Sri Lanka is the Citizenship Act, 1972 that was amended in 1987. The new law still denies *jus soli*, but its provisions with regard to descent are more liberal across the board, retrospectively requiring proof of citizenship of the father or grandfather or great-grandfather (and analogously in the case of children born out of wedlock, the mother or maternal grandfather or maternal great-grandfather).
- 3.28 Sri Lanka makes an interesting counterpoint to India and Bhutan in this respect: India started out with a relatively inclusive citizenship law and subsequently moved towards exclusion. Sri Lanka started out with an intentionally exclusive law and a deliberately created statelessness problem, then apparently moved towards inclusiveness in its citizenship law and towards renationalizing those stateless persons. The renationalising of the estate Tamils was undertaken by special legislations – Grant of Citizenship to Stateless Persons Act, 1986; Grant of Citizenship to Stateless Persons (Special Provisions) Act, 1988; and, the Grant of Citizenship to Persons of Indian Origin Act, 2003.

3.29 Under Article 8 of the Constitution, India provided a very liberal regime for nationalizing persons of Indian origin residing outside India, but the Indian government was only willing to extend this protection to Tamils who first wanted Indian citizenship. It was not willing to automatically nationalise any Tamil who applied and failed to qualify for Sri Lankan citizenship. This left nearly 900,000 Tamils stateless in Sri Lanka. Over the next forty-five years, two Indo-Sri Lankan pacts would divide quotas of stateless Tamils for repatriation to India or local nationalisation, without any consultation of the estate Tamils themselves. A pocket of statelessness would continue to exist in the pinch between an agenda of nationalist identity on the Sri Lankan side, and resource constraints on the Indian side. In 1988, Sri Lanka granted citizenship to all but 75,000 of the remaining Tamils, and after the passage of the Grant of Citizenship to Persons of Indian Origin Act, 2003 the registration of all Estate Tamils was finally begun.

IV. POLITICAL TURMOIL

4.1 The second salient aspect of South Asian statelessness is its production as a result of political turmoil. In almost every case, such turmoil has manifested post-colonial South Asia's attempt to mould itself into culturally unique nation-states by favouring dominant national claims to cast out a minority; or, the attempt of a disgruntled minority to secede from the dominant majority to create their own uniform homeland. The two largest cleavages in independent South Asia occurred for precisely these reasons – the Partition of India in 1947 and the secession of Bangladesh in 1971. It follows, then, that these nation-building experiments created the ideal conditions for inducing statelessness.

(a) *Partition of India*

4.2 The Partition of India into two sovereign States of India and Pakistan on religious grounds displaced around fifteen million people who could not conform to the central religious identity of the new nation-states they found themselves located in. Hindus and Sikhs in Pakistan and Muslims in India began an *en masse* flight across the new border to the safety of their newly created religious homelands. In many cases, whole communities were simply evicted from their homes and forced to migrate or were driven by the threat of violence in the wake of a nationalistic communal frenzy that purged entire populations from their homes to render the new countries religiously contiguous within themselves. The flight across the new border, the largest population movement in recorded history, left over a million people dead in the course of only a few months. What distinguishes Partition, apart from the scale of brutality that accompanied it, is the fact that it created minimal conditions for statelessness. In fact, many refugees were entitled to compensation for abandoned property. The accommodation of Partition refugees was the result of manifest nation-wide sympathy for them and, of course, the fact that they belonged to the religious majority of the countries in which they arrived.

- 4.3 With large populations in flight, the newly-independent States of India and Pakistan introduced new laws to include and exclude displaced persons from the protection of their citizenship. Retrospective and highly inclusive provisions precluded statelessness by deeming most arrivals to be citizens of that country. Article 5 of the Indian Constitution, adopted in 1950 before the enactment of the Citizenship Act, provided a simple and inclusive mechanism to determine citizenship based on birth and descent that relied more on the *jus soli* inclusion. Article 6 granted citizenship rights to communities who had migrated from Pakistan because of the Partition and, in this manner, precluded statelessness by registering arriving displacees as nationals. However, Article 7 denationalised migrants leaving India for Pakistan; and, Pakistan, too, enacted a similar law. Together, these provisions created the potential for large-scale statelessness that was only averted by willingness of both countries to accept their religious and ethnic counterparts.
- 4.4 Pakistan did not promulgate its Constitution until 1972, but the Pakistan Citizenship Act, 1951 nationalised the arriving refugees under Section 3(b) by deeming citizenship upon any person born in undivided India who was domiciled in Pakistan at the commencement of the Act. Section 6 of the Act also provided for the registration of any migrant from anywhere in the Subcontinent until the 1st of January 1952. Section 7 excluded migrants from Pakistan to India from being citizens. In this manner, the passage of the reciprocal laws in India and Pakistan dealt with statelessness as soon as they created it. Almost all of the fifteen million refugees created by Partition were rehabilitated and locally integrated with success in both countries. The exceptions were the 20,000 Hindu families from Pakistan who crossed into the Indian state of Jammu and Kashmir after the Partition riots. On account of the special status given to Jammu and Kashmir by Article 370 of the Indian Constitution, which allows alternate provisions for, *inter alia*, registration and land ownership, these refugees remain stateless today.

(b) *Biharis in Bangladesh*

- 4.5 The secession of Bangladesh from the Pakistani federation provides a striking contrast to the legal hospitality extended to the stateless after Partition. During Partition, Muslims from Bihar had emigrated to East Pakistan and been recognized as full citizens. As Urdu-speakers, the Biharis profited from West Pakistani dominance of the new federation, but East Pakistan at large suffered from political and fiscal exclusion despite its larger population and higher export earnings. When, in 1970, the East Pakistan-based Awami League party won a majority in the parliamentary elections, but was denied governance by a military takeover, tensions reached a critical point and a campaign for secession began. In the severely repressive crackdown that followed, many Biharis collaborated with West Pakistani authorities, even forming military units to thwart the secession. After Indian military intervention and the creation of a sovereign Bangladeshi nation, Biharis were

accused of participating in the worst of the wartime atrocities. They were popularly targeted for retaliatory violence, forced out of their homes and into refugee camps in the vicinity of Dhaka.

- 4.6 Tripartite negotiations between Bangladesh, Pakistan and India resulted in the New Delhi Agreement, 1973 under which the States agreed on the return of prisoners of war and Pakistan agreed to repatriate 170,000 non-Bengalis who had been in the government service. 300,000 residual stateless persons remained. Their repatriation has been resolutely opposed in Pakistan by ethnic Sindhis, including former Prime Minister Benazir Bhutto. Since Sindh is the province into which most west-bound Partition refugees (*'Mohajirs'*) were integrated, it would likely be the principal destination of the stateless Biharis in Bangladesh. However, the intense political competition between the ethnic Sindhis and the Mohajirs, which has spilled into violent mobilization in the past, means that repatriating the stateless Biharis is a severe political and security liability for any Pakistani government. At present, 240,000 stateless Biharis await a resolution of which there is no sign.

(c) *Tamils in Sri Lanka and Sri Lankan Tamils in India*

- 4.7 Sri Lanka's two main ethnic groups have been in conflict with each other for many decades creating conditions that have produced both refugees and statelessness. The country, which gained independence in 1948, has always been ruled by a Sinhala dominated government, prompting displeasure from the country's Tamil minority. Constituting around 20 per cent of the population of Sri Lanka and settled mainly in the northern and eastern districts, the Tamil minority soon organized and took up arms against the government to secede and create a separate Tamil homeland. However, there are historical and religious divisions among the Tamil community. Particular concern has been expressed about the situation of Tamils of recent Indian origin who were brought by the colonial government to work on the island's plantations and tea estates.
- 4.8 Tamil tea plantation workers were believed to constitute about 5 per cent of the population of Sri Lanka. While the Sri Lankan state recognises the national membership rights of the country's general Tamil minority, it refused to recognise the 'estate' Tamils' claims to Sri Lankan citizenship. The Ceylon Citizenship Act, 1948 denied citizenship to estate Tamils and, thereby, deprived them of domestic civil rights. The stripping away of their citizenship by laws enacted soon after independence and their continued denial of citizenship demanded remedial action. In accordance with a 1964 agreement with India, Sri Lanka granted citizenship to 230,000 stateless Indian-origin Tamils in 1988. Under the pact, India granted citizenship to the remainder, some 200,000 of whom now live in India. Another 75,000 Indian Tamils, who themselves or whose parents once applied for Indian citizenship, now wish to remain in Sri Lanka. The government has stated these Tamils will not be forced to return to India, although they are not technically

citizens of Sri Lanka. In October of 2003, an Act of Parliament granted citizenship to approximately 168,000 of these estate Tamils.

(d) *Rohingyas in Myanmar*

- 4.9 Rohingyas are from Myanmar's troubled Arakan or Rakhine state. Whereas almost all of Myanmar's ethnic groups practice Buddhism or one of its local variants, the Rohingyas are Muslims. For historical and religious reasons, or perhaps in a belated attempt at nation building, the Myanmar government refuses to accept the membership rights of the Rohingyas to the Myanmar nation-state. At the end of 1977, the then government launched a military operation that degenerated into brutal attacks on Rohingyas by both the army and local Rakhines. This precipitated a mass exodus of Rohingyas out of Arakan, and by May 1978, over 200,000 Rohingyas had fled to Bangladesh. Within sixteen months, they were repatriated under a bilateral agreement between the Governments of Bangladesh and Burma, not as Burmese citizens, but as stateless people. Subsequently in 1982, the military junta enacted amendments to the citizenship law, clearly targeting the Rohingyas and making it almost impossible for them to be recognised as citizens.
- 4.10 Neglect by the central government in Arakan was marked by a lack of development projects, and exacerbated by the absence of planning to integrate the refugees who returned in 1978 and 1979, many of whom remained landless and without documentation. By 1991, the government needed a scapegoat, a distraction or common enemy to unite a populace disillusioned and angry at the regime's failure to implement the election results. They chose the Rohingyas. Forced labour, rape and summary executions followed a dramatic increase in the army presence in northern Arakan State and caused a new mass exodus of Rohingyas to Bangladesh. By March 1992 over 270,000 refugees were scattered in camps along the Cox's Bazar/Tefnak region of Bangladesh. In December 1992, the ruling military authorities announced that they still did not recognise the Rohingyas as Burmese citizens.

(e) *Conflict and Efflux in Afghanistan*

- 4.11 To understand the efflux of people from Afghanistan, the country's violent modern history must be examined. There have been four phases of violence in the Afghanistan's recent history. The first phase, marked by the Saur Revolution and the Soviet invasion, saw the King Muhammad Zahir Shah deposed in 1978 by his cousin Daoud Khan. The main Pashtun political party, which whose support the 1978 coup was organised, then deposed and killed Khan to set up a government that ruled through ruthless State terror. Faced with a disintegrating country on its southern borders, the Soviet Union airlifted troops into the country and killed the Pashtun leadership. A communist government was installed that continued persecute its political and ethnic opponents. The second phase saw the Soviets

withdraw from Afghanistan and the country descend into splintered anarchical violence. The Soviet withdrawal following the Geneva Accords of 1988 left the communist government exposed; and, in April 1992, Kabul fell to a coalition of Tajiks, Uzbeks and Hazaras known as the Northern Alliance. However, the mujahideen opposition to Soviet rule, comprised mainly of Pashtuns who were supported by Pakistan, Saudi Arabia and the United States, that was led, amongst others, by Gulbuddin Hikmatyar were excluded from the new government. Hikmatyar rejected the new government of Tajik leader Burhanuddin Rabbani and fighting continued amidst indiscriminate civilian deaths. The third phase saw Afghanistan and its fractured ethnic warlords fall before the organised and ruthless invasion campaign of the Taleban. Supported by Pakistan, which has an abiding historical interest in its northern neighbour, the largely Pashtun Taleban wrested Kabul in late 1996, implementing a harsh version of Islamic Sharia law in its wake. The religiously extremist Taleban were subsequently linked to bomb attacks on American interests in east Africa and the attacks on the World Trade Centre in New York in 2001. The fourth phase of Afghan violence has seen the United States'-led war in Afghanistan and the return of the Northern Alliance to power, albeit headed by the moderate Hamid Karzai.

- 4.12 The decades-old sustained conflict in Afghanistan has generated millions of refugees, the bulk of whom fled to Pakistan. Afghanistan's southern border with Pakistan, known as the Durand Line that was made while under colonial control to divide and weaken Pashtuns, has always been a very porous marker of territory. Between 1979 and 1992, over six million people fled Afghanistan in search of safety to neighbouring countries. While the Taleban takeover brought many Pashtuns back into the country, on the eve of the American war in 2001-2002, around three million Afghan refugees lived in Pakistan, primarily Pashtuns. The Taleban government also forced tens of thousands of people out of the country as a result of persecution based either on ideology or ethnicity; members of the Tajik, Uzbek and Hazara ethnic groups were subject to violence forcing their flight to neighbouring countries, especially those with congruous ethnicities.

V. MIGRATION

- 5.1 The third aspect of statelessness in South Asia is as a product of economic migration between states. Borders in South Asia, in the pre-colonial, colonial and post-colonial periods, have been unregulated or unsuccessfully regulated, engendering traditions of seasonal migration but also permanent minority settlements. Migrant populations are of all different vintage: Nepali migrants from as early as the seventeenth century in Bhutan, Tamil labourers from the nineteenth century in Sri Lanka, Chakmas from the 1960s and continuing flows of Bangladeshi Muslims in India. Since the advent of independent nation-states, however, majority leaders have argued for the disenfranchisement of such groups, which appear to have closer ties to the national identity of a neighbouring State than to the identity of the State of their residence.

The political centres have demanded the migrants' 'repatriation,' which has been refused by the neighbour State on account of resources constraints and political concerns of its own, leaving the group stateless.

(a) *Lhotshampas in Bhutan*

- 5.2 An example of a long- and well-established migrant population is the Lhotshampas, ethnic Nepalese resident in Bhutan. In the seventeenth and eighteenth centuries, rising principalities in Nepal asserted their influence in surrounding areas. Bhutan, as indeed India, received inflows of ethnic Nepalese communities seeking cultivable land. Before the British left the sub-continent in 1947, Bhutan's southern districts were already peopled by ethnic Nepalese who lived in relative peace with their neighbours. Bhutan's Nationality Law of 1958 granted Bhutanese citizenship to many ethnic Nepalese thereby recognising their stake in the Bhutanese nation. Three years later Bhutan began a planned infrastructure modernisation drive that was heavily reliant on skilled ethnic Nepalese labourers, many of whom remained in Bhutan.
- 5.3 Their growing numbers began to be perceived as a threat to the cultural and political uniformity of Bhutan. The southern Lhotshampas practice Hinduism, speak Nepali and observe the distinct cultural traditions of their non-Drukpa heritage. From the late 1970's, the Royal Bhutanese government embarked upon a project of cultural, linguistic and religious exclusion that discriminated against its Lhotshampa minority. In 1977, the King raised the bar for foreigners applying to be recognized as Bhutanese citizens, and then raised it once again in 1985. During the census of 1988, the Royal Bhutanese government enforced these new citizenship requirements through a census in 1988 that was only conducted in southern Bhutan. It resulted in tens of thousands of Lhotshampas being stripped of their citizenship, arbitrarily evicted from their homes and expelled from Bhutan.
- 5.4 The King also approved measures to homogenise the Bhutanese nation to force Drukpa cultural practices on the country's minorities. Lhotshampas were mandated to conform to a Drukpa dress code and the use of Nepali as a medium of instruction in Bhutanese schools was discontinued. By the early 1990s, these measures had fomented popular protests and large public demonstrations in southern Bhutan that were crushed by the government's security forces. Reports from several human rights agencies indicate that the systematic use of rape, torture and eviction against the Lhotshampas was intended to coerce them to leave the country. Refugees have testified that they were forced at gunpoint to renounce their citizenship in writing.
- 5.5 Most of the refugees who fled Bhutan as a result of the government's persecution of Lhotshampas arrived in Nepal where they were settled in camps. These refugees, who were arbitrarily evicted or fled following a well founded fear of persecution, have an inalienable right to return. Negotiations on their return led the Royal

Bhutanese government to evolve a convoluted four-fold categorisation of these refugees –

- (a) *bona fide* Bhutanese who were forcibly evicted,
- (b) Bhutanese who voluntarily migrated,
- (c) Bhutanese who have committed crimes, and
- (d) non-Bhutanese.

Of these categories, the Royal Bhutanese government has agreed to only accept *bona fide* Bhutanese who were forcibly evicted, the smallest of the four groups. Of the remaining three groups, the King's government has conceded that refugees belonging to two categories are of Bhutanese origin. However, the return of refugees in these groups will be prevented by the proposed Constitution, which injuncts the grant of citizenship to people who have voluntarily migrated [Article 6(5)] and to those who have committed crimes [Article 6(3)(b)]. In most cases, the 'crimes' that these people are alleged to have committed are directly linked to the protests against the discriminatory 1988 census and the King's racist 'Bhutanisation' measures. Even if these supposed criminals succeed in proving their innocence, their return to Bhutan will still be obstructed by Article 6(3)(e) of the proposed Constitution, which deals with speeches or actions against the King, that will operate to deprive them of Bhutanese nationality.

- 5.6 The royal agenda in Bhutan is to dispose of a long-settled migrant community, and it is an overtly racist response to an overtly racist national anxiety. A much subtler study of migration and statelessness is the situation of Bangladeshi refugees and migrants in India. Border crossings in Bengal are not new – until partitioned by the British in 1906, Bengal was a single province and administrative unit. The original division was along religious lines, but faced such strong opposition that East and West Bengal were reunited in 1912 (instead, Orissa and Bihar were partitioned from it). At the Partition of 1947, the population exchange was smaller in Bengal than in Punjab and Sindh (not more than four million refugees, or approximately 22% of the total figure).

(b) Chakmas

- 5.7 The Chittagong Hill Tracts feature prominently among the many errors of the 1947 Partition plan. Although the majority of the inhabitants of this area were Buddhist Chakmas or other non-Muslim tribals, it was included as part of East Pakistan, and since its inclusion the tribal inhabitants have faced consistent state oppression. The Kaptai hydroelectric project, completed in 1964, displaced 100,000 inhabitants, many of them across the border. Government efforts to settle the area with poor Bangladeshi Muslims were answered with demands for self-determination from organized tribal militants. Chakmas continued to cross into India seeking refuge from communal disturbances and state violence.

- 5.8 The refugees were provided migration certificates, of the same kind that had been tendered to refugees in 1947, and were settled primarily in border-adjointing areas of Arunachal Pradesh. The numbers have swelled from 30,000 after the influxes of the 1960s to approximately 65,000 today. The Chakmas and other tribal refugees have so far been denied citizenship, not on account of legal ineligibility, but out of political hostility and sheer bureaucratic intransigence. The Chakmas have been treated with blatant discrimination by the state government, which has refused them police protection, ration cards and standard public services. The All Arunachal Pradesh Students Union ["AAPSU"], with at least the compliance of the government, has been terrorizing Chakma camps. Moved by the National Human Rights Commission to intervene, the Supreme Court of India, in *National Human Rights Commission v. State of Arunachal Pradesh* (1996) 1 SCC 742, declared that, *inter alia*, Chakma refugees were entitled to apply for Indian citizenship and the protection of their right to life.
- 5.9 Many Chakmas have become Indian citizens. The Central Government has on several occasions expressed the intention of conferring citizenship on the remaining number, and it has stated that the children of the Chakmas who were born prior to the 1987 amendment of the Citizenship Act would have legitimate claims to citizenship. Applications for citizenship from the Chakmas have not been forwarded by the State Government to the Central Government, in contravention of the Citizenship Rules, 1955. The State Government has expressed its concern that "the settlement of Chakmas in large numbers in the State would disturb its ethnic balance and destroy its culture and identity". The Supreme Court directed the Government to "ensure that the life and liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out ... shall be repelled," and furthermore, that all applications for registration as a citizen shall be forwarded to the Central Government. However, no Chakmas have been granted citizenship in the decade after the judgement. The State Election Commission has consistently refused to enroll Chakmas on the voter lists, and when compelled to in 2003 by the Election Commission of India, it later on deleted the names arbitrarily.
- 5.10 What the predicament of the Chakmas goes to show is that the operation of state power on various levels can be effective at creating exclusions. The apparent national policy of the India is quite benevolent towards the Chakmas when viewed in terms of legal provisions for their citizenship, or the supervision of their rights by the NHRC, the Election Commission, the Supreme Court and the Home Ministry. On the other hand, the State Government of Arunachal Pradesh has shown a simple disregard for the law and the authority of national institutions, preferring instead a policy of exclusion that protects a particular ethnic claim and an electoral layout that is favourable to them. The problem, here, is not the law but the *rule of law*, and

the force that one part of the state can bring to bear on another in order that rule of law prevails.

(c) *Illegal Migrants in India*

- 5.11 The situation of the Chakmas is conspicuous because it raises questions of the potency of law itself. Numerically, however, the Chakmas fade in comparison to the 15 million illegal, and in many cases stateless, Bangladeshi migrants present on Indian territory, around whom the law is shifting. The political and religious violence that accompanied the formation of Bangladesh in 1971 caused the influx of 10 million Bengali refugees into India. They were received by the Indian Government in camps and settlements across the five States that bound Bangladesh. When hostilities ceased, the majority of these refugees voluntarily returned to Bangladesh, although about one million, mostly Hindu, remained in India.
- 5.12 That residual refugee population has been joined, in the last three decades of Bangladesh's independent existence, by millions of impoverished Bangladeshis escaping poverty, natural disasters and growing pressure on natural resources who have crossed the Indian border in search of land and economic opportunity. These migrant settlers have supplemented a floating population of seasonal and frontier migrants. Ethnic proximity and kinship ties, together with a porous border and an allegedly complicit Bangladeshi administration, contributed to the illegal presence in India of an estimated 15 million Bangladeshi migrants in 2002. Many have procured ration cards and even insinuated themselves onto electoral rolls. The overwhelming majority of these migrants live in West Bengal (approximately 8 million) and Assam (5 million).
- 5.13 Various commentators, including the Supreme Court, have noted with alarm the effect of this influx on the demography, security and politics of north eastern India in general and Assam in particular. Between the late 1970s and early 1980s, disaffected and unemployed Assamese youth led a campaign of protest and agitation against the migrant influx and urged the government to take decisive measures to protect the interests of indigenous Assamese. Indeed, the issue fuelled enough resentment to swell the ranks and profiles of several violent insurgent organisations operating on migrant-receiving states, including the United Liberation Front of Asom (ULFA). Indian commentators have alleged that Bangladesh's inability to cater to its mammoth and desperate population has fed its growing territorial ambitions upon India's north east, which ambitions will be realized by a progressive demographic engulfment of the region.
- 5.14 Faced with a rising tide of Assamese opposition, the Central Government entered into talks with the protestors and in 1985 the Assam Accord was finalized. Under the Accord, Bangladeshis who entered India prior to 1 January 1966 were to be regularised as Indian citizens; those who entered between that date and 24 March

1971 were treated in accordance with the Foreigners Act (i.e., they would be compelled to register as foreigners or be deported); those who entered after the 1971 date were to be treated in accordance with the Illegal Migrants (Determination by Tribunal) Act, 1983.

- 5.15 The Foreigners Act, 1946 provides the Government very wide powers to deal with foreigners, thus enabling the Government of West Bengal to deport a significant number of ostensibly illegal migrants. Unfortunately, as a result of administrative over-zealousness and the communalisation of border politics, an unknown number of these are likely to be genuine Indian citizens, passed off as migrants because they are Muslim and too poor to contest the process. On the other hand, the Illegal Migrants (Determination by Tribunal) Act, 1983 placed the burden of proof on the government and allows the suspect to appeal: thus it observes due process admirably but has only enabled the tribunals in Assam to expel 1481 illegal migrants (a meagre 0.03% of their estimated total number in the state). Indian nationalist parties favour the arrangements under the Foreigners Act, because it is a stronger tool for expelling migrants and because such parties have a manifest bigotry towards Muslims, genuine Indian citizens or otherwise. Left-liberal parties including the incumbent Congress Party favoured the arrangements under the IMDT, because the migrants are an important part of their vote bank in the region. The IMDT Act was struck down by the Supreme Court in 2005, and the Central Government is presently negotiating the appropriate powers to vest in itself to deal with illegal migrants.
- 5.16 In the meantime, an enormous population of illegal migrants resides in India. They cannot work legally in the organized sector. The 2004 amendment of the Citizenship Act, 1955 forbids them from applying for citizenship by registration or naturalization, and it forbids their children from becoming Indian citizens even if the other parent is an Indian citizen. Since under the Bangladesh Citizenship Order, 1972 citizenship by descent is patrilineal, the child of a Bangladeshi migrant woman does not qualify for Bangladeshi citizenship either. This is necessarily creating a swelling population of stateless persons on Indian territory.

VI. FINDING SOLUTIONS

- 6.1 There is a savagery to the system of nationality and exclusion in the face of a worsening humanitarian situation for the stateless. The examination of how statelessness has been induced in South Asia provides a few important lessons for international, regional and national policy.
- (a) *International community*
- 6.2 Recognising the latent and extant problems of statelessness, 59 member states of the United Nations have ratified the 1954 Convention relating to the Status of Stateless

Persons, which urged countries to improve the juridical and socioeconomic status of stateless persons residing in their territory. Thirty one states have ratified the 1961 Convention on the Reduction of Statelessness, which encourages countries to preclude many of the situations on account of which people are born into or driven into statelessness. These two international instruments constitute the legal basis for the rights and obligations of stateless persons and States alike – but no South Asian country has been signatory to either one.

- 6.3 Instead, the need of the hour may be to re-conceptualise and re-prioritise statelessness. As a serious challenge to the nation-state paradigm upon which international law relies, the issue deserves more attention than it can be given as a neglected sub-class of refugees. Statelessness needs to be placed prominently on the canvas of international obligations towards protecting human rights. There needs to be a clearer consensus on who needs protection, and on the distinctive causes and classes of statelessness. A correct understanding of the situation of stateless persons could create multilateral incentives for nationalizing the stateless and bring adverse pressure on the States that would denationalize their marginal groups.
- 6.4 Some of these South Asian problems need to be examined internationally; and some regionally and bilaterally. Many ‘northern’ countries use this approach strategically rather than responsibly. When they want to off-load a problem they will call it a matter of national or regional concern obviating a need for a shared international approach.

(b) *Regional and bilateral relations*

- 6.5 Extant and latent statelessness has been dealt with bilaterally with almost immediate success (Partition), eventual success (Tamils in Sri Lanka) and total lack of success (Biharis in Bangladesh). The reasons that Partition refugees were so successfully nationalized are not encouraging reasons: it was important that the States were a new reality, that British India was a more familiar construct and thus kinship with the arriving immigrants was implicit. It was even more important that the arriving immigrants were of the majority religion or, in any case, not of a particular religion that would come to be associated with threat or outsiders. Such bias is not necessarily religious or even rooted in identity: the bias against Biharis in Bangladesh is in part because of their linguistic difference, but in large part it is rooted in a resentment of their community’s role in the atrocities of 1971.
- 6.6 Ultimately it is incumbent on the negotiators and the domestic policy-makers to remove themselves from intimate squabbles and political biases. In this respect, the ability of the political Centre to function with relative independence of provincial politics is important. Pakistan’s ultimate failure to repatriate the Biharis, in spite of political promises to that effect, was the fallout of a provincial political contest between Sindhis and Mujahir that got out of hand. The eventual success of the

bilateral efforts between India and Sri Lanka to resolve the status of the Estate Tamils can be attributed to the fact that there was minimal animosity between the two Central Governments. This allowed them to negotiate a compromise under which India repatriated more than half a million Tamils in the first two rounds, allowing Sri Lanka to resign itself to renationalizing all who remained. The negotiations would not have been as successful if regional parties from Tamil Nadu had too much influence on New Delhi.

(c) National politics

- 6.7 The principle of upward delegation on questions of statelessness extends to intra-national solutions as well. The situation of the Chakmas is close to resolved in terms of law and of central political will. The plain intransigence and dishonesty of a state government should not be permitted to interfere with that, particularly with such flagrancy and disregard for orders from the judiciary and autonomous regulators. One of the merits of the unitary system of the Indian State, over a looser federation of states, is that the Centre has greater powers – as over citizenship - to prevent the abuse of minorities by powerful locals who have vested interests in their continued disenfranchisement.
- 6.8 This is an argument for Central powers to enforce rights, not Central powers at the expense of rights. South Asian citizenship law illuminates two parallel trends: the movement away from citizenship as a right, and the movement away from citizenship as an inclusive legal category that is indifferent to race, religion, language, ethnicity or social history. The first trend in South Asia is the consolidation of power with Central Governments, enabling them to compromise *rights* according to the contingencies of domestic politics, security concerns and nationalist anxieties. This is dangerously short-sighted: rights exist *a priori* of political exigencies because they deal with areas of human life of such paramount importance that we cannot risk their loss. By building strong centralized administrations and favouring discretionary modes of obtaining citizenship over rights to citizenship, the State arrogates to itself a power to exclude, and the exercise of this power will necessarily be majoritarian and oppressive.
- 6.9 Despite, or perhaps because of, globalization and the erosion of the concept of sovereignty, South Asia and the world are witnessing the building up of a hard-line nationalism. It is above all necessary that the vigilance of citizens and of parliamentarians be directed against the influence of such nationalism on citizenship law. At present, the laws of most countries in South Asia indicate that the movement is still progressively towards exclusion, either as subtly as this movement is occurring in India or as explosively as in Bhutan. The singular exception to this movement is Sri Lanka, which made the bold move to offer citizenship to a group that had been hanging in limbo for over half a century. Sri Lanka's exceptional move highlights a fact at the bedrock of the nation-state system:

the stateless will not go away. The excluded are not a stain that will fade from being ignored, but rather they will, in all likelihood, grow. At the very least, they form a sustained site of suffering and exploitation, a stain on the nation at large not because of their identity but because of their desperation.

- 6.10 At present, South Asia is a victim of politics driven policies on statelessness which confront the problem when politically driven to do so and ignore it when it subsides. This results in solutions being temporary. The problems live on – growing by the day.

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