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## The Great Betrayal: Potential Statelessness After Living Decades In Mother India

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### Abstract

An amendment in the Indian Citizenship Act (2005) may render millions of citizens stateless with the new clause of “illegal migrant” without any cut-off date, as most of the immigrants particularly from Eastern Bengal, came to India facing persecution and without any legal document of immigration.

Key Words : The Great Betrayal, Statelessness, Living Decades, Mother India

### I. Introduction

After the Partition, repeated waves of Bengali immigrants came to West Bengal till Bangladesh Liberation War in 1971 when Hindus in Bangladesh faced ethnic cleansing by the Pakistani Army. In the absence of any refugee law safeguarding the rights of the refugees, the immigrating population willing to stay in India are left with three options: a) to commingle with the local citizens and eventually manage the citizenship documents; b) to continue with the citizenship of their country of origin and regularly renew their visas; and c) to stay in India as illegal migrants. An amendment of the Citizenship Act—drafted by the “secular” Congress Government in 2003 and legalised in

2005 by the NDA Government led by the “Hindu Nationalist” BJP—inserted a new disqualifier in citizenship in the form of “illegal migrant” without any cut-off date. Thus at any point of time since the birth of India, if one of the parents of a citizen born and/or living in Independent India proves to be an “illegal migrant”—a foreigner who has entered into India without valid documents or stayed beyond the permissive period—he/she might lose the Indian citizenship. Despite being born and/or living in India for decades one can become stateless, if one of his/her parents is found to be an ‘illegal migrant’ at a later date. Nearly 20 million Indian citizens having a root in the other side of the border, like this author, have become

vulnerable with this amendment fearing to become stateless persons if the authorities turn hostile against them which often run along the religious/ethnic line in India.

## II. Result and Discussion

### 2.1 Citizenship And Nationality In India

The legal and constitutional provisions of citizenship and nationality in India are ridden with controversies which are often overlooked by the national and international human rights bodies and organisations. A closer look at the nature of Indian citizenship acts and the constitutional provisions associated with the citizenship in India will hopefully unravel this in detail. Since independence, the laws related Indian Citizenship and Nationality as well as the relevant articles of the Constitution of India provide single citizenship applicable to people of the entire country. According to this principle, a person living in any part of the country can become an Indian citizen provided he/she fulfils all the conditions laid down by the relevant laws and the Constitution of India. Moreover, an Indian ceases to become a citizen once he/she accepts the citizenship of another country.

The most important event guiding the basic principles of Indian citizenship is the Partition of the Subcontinent as the Independent India was created by partitioning the Indian Subcontinent. The birth of the two nations—India and Pakistan—has resulted influxes and outfluxes of millions of people in both the newly born countries who were uprooted from their own natural habitat. The citizenship at the commencement of the Constitution of India was framed accordingly. The persons domiciled in the territory of India as on 26 November 1949 automatically have become Indian citizens by virtue of operation of the relevant provisions of the Indian Constitution coming into force on 26 January 1950. Following this, the Constitution of India also made provisions regarding citizenship for the migrants from

territories of Pakistan, which were earlier parts of British India before the partition. The leaders in India also framed the first Indian Citizenship Act in 1955 keeping in view of the transient nature of the part of Indian population during the first decade of Independence particularly in the eastern and western part of the country. Later the Act was amended several times during the last seven decades e.g. 1986, 1992, 2003 and 2005. These amendments, particularly the last two incorporated in 2003 and 2005, have changed the concept of Indian citizenship and nationality substantially.

The nationality law of India mostly guided by the *jussanguinis* (citizenship by right of blood) as opposed to the *jus soli* (citizenship by right of birth within the territory). Both these provisions have its own features in the Indian nationality law. Under *jus sanguinis* in India -

- a) Persons born outside India on or after 26 January 1950 but before 10 December 1992 are citizens of India by descent if their father was a citizen of India at the time of their birth; or
- b) Person born outside India on or after 10 December 1992 are considered as citizens of India if either of their parents is a citizen of India at the time of their birth; or
- c) From 3 December 2004 onwards, persons born outside of India shall not be considered citizens of India unless their birth is registered at an Indian consulate within one year of the date of birth; or
- d) In certain circumstances it is possible to register after 1 year with the permission of the Central Government. The application for registration of the birth of a minor child must be made to an Indian consulate and must be accompanied by an undertaking in writing from the parents of such minor child that he or she does not hold the passport of another country.

On the other hand, under *jus soli* in India -

- a) Any person born in India, on or after 26 January 1950 but prior to the commencement of the 1986 Act on 1 July 1987 is a citizen of India by birth; or
- b) A person born in India on or after 1 July 1987 is a citizen of India if either parent was a citizen of India at the time of the birth; or
- c) Those born in India on or after 3 December 2004 are considered citizens of India only if both of their parents are citizens of India or if one parent is a citizen of India and the other is not an illegal migrant at the time of their birth the citizen can be an Indian or a foreigner.

One can also get Indian citizenship by registration as the Central (Federal) Government may, on an application, register any person (not being an illegal migrant) as a citizen of India under section 5 of the Citizenship Act 1955 if he/she fulfils any of the following criteria:

- a) a person of Indian origin who is ordinarily resident in India for seven years before making application under section 5(1)(a) (throughout the period of twelve months immediately before making application and for six years in the aggregate in the eight years preceding the twelve months); or
- b) a person of Indian origin who is ordinarily resident in any country or place outside undivided India; or
- c) a person who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration; or
- d) minor children of persons who are citizens of India; or
- e) a person of full age and capacity whose parents are registered as citizens of India; or
- f) a person of full age and capacity who, or either of his parents, was earlier citizen of independent India, and has been residing in India for one year immediately before

- g) making an application for registration; or
- a person of full age and capacity who has been registered as an overseas citizen of India for five years, and who has been residing in India for one year before making an application for registration. Indian citizenship can also be acquired by a foreigner by naturalisation who has resided in India for twelve years. The only condition attached to this criterion is that the applicant must have lived a total of 12 years in India in a period of 14 years, and must have lived in India for 12 months uninterrupted before applying for citizenship.

One can renounce his/her citizenship which is covered in Section 8 of the Citizenship Act 1955. Under this section, if an adult “of full age and capacity” makes a declaration of renunciation of Indian citizenship, he loses Indian citizenship. In addition, the minor child of that person (if any) also loses Indian citizenship from the date of renunciation. The child can apply for the resumption of his/her Indian citizenship, when he/she reaches the age of eighteen. Termination of Indian citizenship, which differs from the renunciation provision as it applies to “*any citizen of India*” and is not restricted to adults, is covered in Section 9 of the Citizenship Act, 1955. Under this section of the Act, any citizen of India who by naturalisation or registration acquires the citizenship of another country shall cease to be a citizen of India. This provision also extends if the citizenship is obtained for the child by his/her parents or by birth in a foreign soil.

## 2.2 Constitutional Provisions On Citizenship And Nationality In India

The Constitution of India has laid down the provisions of citizenship at the commencement of the Constitution which were incorporated in Articles 5 to 11 in Part II of the Constitution of India. Article 5 described the issues of citizenship at the commencement of this

Constitution. Under this section, every person who has his domicile in the territory of India and

- a) Who was born in the territory of India; or
- b) Either of whose parents was born in the territory of India; or
- c) Who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

Article 6 of Indian Constitution ensures the rights of citizenship of certain persons who have migrated to India from Pakistan as these people can be considered as a citizen of India at the commencement of Indian Constitution if -

- a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and
- b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or  
(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government - Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

Article 7 of the Indian Constitution, on the other hand, has permitted people who have, after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan to gaining citizenship of India and those who have migrated to the territory of India after 19<sup>th</sup> July, 1948 under

proper permit for resettlement or permanent return. Article 8 deals with the rights to acquire citizenship of certain persons of Indian origin residing outside India, Article 9 of the Constitution annuls citizenship of those persons who have acquired citizenship of a foreign State, Article 10 gives rights of a citizen to continue as a citizen and Article 11 gives power to the Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

### 2.3 The Controversy

The controversies associated with Indian citizenship and nationality are multilayered and multifaceted and often less emphasised by the national and international scholars on human rights and jurisprudence. The most important aspect of this debate is the absence of a refugee law in India which can safeguard the rights of the refugees within the territory of India. This is despite the fact that India now hosts nearly 207816 refugees and asylum seekers from various parts of the Subcontinent (UNHCR 2015). But the observers believe that the real number far exceeds the UNHCR estimation. Most of these people are from like Pakistan, Bangladesh, Sri Lanka, Tibet, Afghanistan, Kashmir and more recently Rohingya Muslims from Burma. The internally displaced persons (IDP) in India, who are sometimes in even worse situation than the refugees and asylum seekers, are not included in this figure. Since there is no official refugee in India, the people living within the territory of India are either the citizens or non-citizens who are either foreigners with valid visas and “illegal migrants”.

One can see the origin of this debated from the event of Partition of Indian Subcontinent though we must emphasise that the Partition of the Subcontinent and refugee problem are not synonymous for the obvious reason that people living in the different parts of Subcontinent and in their own natural habitat since centuries of coexistence until the Partition separated them

and the two new countries were born in the 15<sup>th</sup> of 1947. From the day of the Partition to the date of the commencement of the Constitution of India i.e. the 26<sup>th</sup> January of 1949, people were considered as internally displaced. Even after the commencement of the Indian Constitution, minorities from the other side of the border continued to come regularly to India and settled in the country. The waves of influxes were further caused by hasty and erratic borderline drawn by (Sir) Radcliffe driven across Bengal which created abrupt disruption of the live and livelihood of thousands scores of Bengalis living in the border areas who suddenly found themselves living in their own home in the enemy territory (Sengupta 2003; Bandopadhyay 2004; Chakrabarti 2004). The leaderships in both newly born countries also wanted create a distinction between partition and refugee problem in the Subcontinent due to an overwhelming fear of the influx of teeming millions of displaced persons into both India and Pakistan. Our leaders understood that the total 'population exchange' was never possible and neither was it intended during the Partition. Moreover, a total population exchange would have devastating effects for both the newly born countries with meagre resources. Leaders of both the countries had agreed in principle to protect the minorities and if needed, honour their will to shift. These leaders were committed during the independence of both the countries to take the responsibilities of the refugees created due to the Partition.

The situation in the undivided province of Bengal was somewhat different than the rest of the country during the time of Partition. When the minorities in the western part of the Subcontinent were aware of the Partition and many of them were taking preparing to shift, the many people of Bengal were not quite sure about the partition of Bengal. The reason of such an oblivious situation had arisen due to an ongoing effort from some political quarters for

a separate autonomous "Subba" (province) within India which gave a glimmer of hope to the people of Bengal that the province will be spared from partition. Eventually the effort was foiled mostly by the communal elements in the major political parties as well as by religious fundamentalists (Chatterji 1995). But unlike the rest of the country, people of Bengal were unsure about the Partition till the date of its actual enactment i.e. 14<sup>th</sup> and 15<sup>th</sup> August, 1947 (Masani 1954). As a result, while the western part of India witnessed most of refugee influxes during period of Partition, repeated waves of refugees struck eastern India till the Bangladesh War in 1971 rendering 1948 deadline meaningless. The volume of influxes from the East Pakistan differed at different points of India which were related with the internal situation in that part of the Subcontinent. While a huge chunk of Hindu minorities entered India during the few years following Partition, many preferred to stay back for the sake their livelihood. But with the commencement of the Bangladesh Liberation War an ethnic cleansing was initiated by the Pakistan Army when the Bengali Hindu population were targeted and killed or persecuted. During this phase of history another major influx of population happened in India as the minorities in East Pakistan came to India and never went back.

Most of these people, displaced from their own home until 1970s and came to India to avoid persecution, were almost pauperised as many of them had to leave empty handed. The resettlement programmes were also ridden with controversies as differential treatments were found on the refugee resettlement between the western part and the eastern part of India. While the most people coming Western Pakistan were settled with the help of the Central Government of India and huge funds were allocated for this programme, the refugees from Eastern Pakistan did not receive much support from the Central Government and the Provincial Government of West Bengal did not have much resources to

support nearly 40 million Bengali refugees coming from the Eastern Part of Pakistan. Part of this apathy may, however, be explained by the repeated waves of refugees from eastern Pakistan who settled in West Bengal at different points of time unlike the western part of India where almost all the refugees were settled within a few years of Partition which was easier for the administration to implement the resettlement policies. But the central question remained—how these people could be absorbed in the Indian population. After the commencement of the Constitution of India these people had three options a) to stay in India with valid visa; or b) to stay as “illegal migrants”; or c) to mingle with the local population and somehow manage the documents of citizenship which most of them have done.

#### **2.4 The Betrayal**

Since 1955, repeated amendments of the Nationality Law were made ostensibly because of the changing nature of challenges facing the country. These challenges were never really clearly spelt out by our lawmakers or the executive. But from the overall trend of these amendments after 1955 it seems that by and large there was consent among the leadership in India that keeping the doors ajar for the millions of Bangladeshi refugees may not be prudent as it will put serious constraints on the meagre resources of the newly born country. There was another apprehension among the leadership in India that continuous influx of refugees, particularly from the eastern side of Pakistan will change the demographic nature of the province of West Bengal as the authority in India will not be able to limit the influx for the Hindu minorities and many Muslim refugees may also sneak in India. While not denying the reality of the influx of large number of Muslim people from East Pakistan/Bangladesh in West Bengal and Assam, one must not forget the fact that the entire leadership of both the countries during the Partition understood that the

exchange of entire minority population in both countries will result massive exodus of refugees which cause havoc to both the newly born countries and both the countries were committed to safeguard the minorities in their countries. Indian Constitution incorporated special rights of the minorities in the articles 26, 29, and 30 while in Pakistani Constitution articles 205, 206, and 207 were specially drafted for the minorities and backward castes/classes. While Indian Government could not provide reservation on the basis of religion meaning minorities as per the decision of the apex court in India, in Pakistan 20 % jobs were reserved for the minorities— 10% for the scheduled castes, 9% for high caste Hindus and 1% for the Buddhists. In addition, Pakistan incorporated the rights of minorities in their national flag as a white strip. All these were meant to instill confidence among the minorities and prevent them from leaving their country.

As an additional measure to build confidence among the minorities in both countries, the prime ministers of both the countries were engaged in a landmark treaty which is known as the Nehru-Liyakat Treaty in 8<sup>th</sup> April, 1950. As a follow-up of this treaty, two ministers of the provincial government of West Bengal – Charuchandra Biswas and Anil Chanda – went to East Pakistan after the commencement of Indian Constitution to persuade the minorities not to leave the land and promised to stand by the minorities in Pakistan in case of difficulties. These persuasions along with various measures from the Pakistani Government many minorities preferred to stay in East Pakistan. Despite all the measures, the ambience of insecurity prevailed over various parts of East Pakistan and minorities began to leave the country. If one gauges the nature of influxes from East Pakistan one can find that initially the literate, rich, high caste Hindus started to leave as they could leave the land more easily than the illiterate, poor low caste/dalit Hindus. The

reason of such an attitude of this section of population was their cultural capital in terms of education and social capital in the form of various networks with the people of West Bengal. Many of them could exchange their properties in the East Pakistan with the properties of the Bengali Muslims in West Bengal who were ready to leave India for East Pakistan. This was possible because of the networks they had with the other side of the border due to the clout they enjoyed within the Bengali speaking Hindus in both the countries (Chakrabarti 2007).

The poor, uneducated, and dalit Hindus in East Pakistan, on the other hand, preferred to stay back during the first two decades of the Partition because they were not confident to survive with their limited means and skills in a new land. In addition, they were providing some basic services to the population in East Bengal which they continued to do so. For them, only the masters changed—from high caste Hindus to the newly formed Muslim ruling class (Bagchi 1998). It is mainly during the Bangladesh Liberation War, when the Pakistani Army started systematic ethnic cleansing targeting the Hindu minorities, the poor, uneducated, and dalit Hindus started to leave East Bengal.

Another important aspect that the leaders of India seem to have forgotten the fact that at the dawn of our Independence our iconic leaders like Gandhi, Nehru, Ballavbhai Patel were committed to safeguard the entire population of this Subcontinent. Pandit Nehru told in a statement that even if the Subcontinent was divided the population remained the same and the people on the other side of the border were also our brothers and sisters. Mahatma Gandhi told that those Sikhs and Hindus who were living in Pakistan could come to India at any point of time if they did not want to live there. Sardar Ballavbhai Patel told the Hindus and other minorities in the East Pakistan were the same people and could not be regarded as

aliens (Sengupta 2007). After all these commitments from these stalwarts, the minorities were left on their own in the East Pakistan who faced all sorts of religious hostilities particularly under Pakistani regime and by the Muslim fundamentalists in the recent past. In addition, the nationality law has been tightened from time to time to prevent the entry of these poor, uneducated, and dalit Hindus who have no other alternatives but to face persecution in their own country creating a sense of betrayal among these uprooted people.

The sense of betrayal gets strengthened when we have a closer look at the Citizenship (Amendment) Act 2003, and the Citizenship (Amendment) Act, 2005. These amendments have changed the provisions of “citizenship by birth” in India. As per the present provisions, “Citizenship by birth” - every person born in India-

- a) on or after the 26th day of January, 1950, but before the 1st day of July, 1987;
- b) on or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;
- c) 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.

These amendments also specify that a person shall not be a citizen of India by virtue of this section if at the time of his birth-

- a) either his father or mother possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India; or

- b) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.”.

The Citizenship (Amendment) Act 2003, and the Citizenship (Amendment) Act, 2005 further amended the section 2 of the Citizenship Act, 1955 as the following clause shall be substituted,

- (b) “illegal migrant” means a foreigner who has entered into India-
- (i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or
  - (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;’;

These amendments are dangerous from two aspects:

- a) It effectively ends the provision of getting citizenship by registration; and
- b) There is no cut-off date for identifying ‘illegal migrants’ – so a person living in India for 40-50 years can suddenly find him/herself as aliens.

These amendments made the lives of nearly 20 million people vulnerable, particularly those who have some roots in the erstwhile East Pakistan or the present day Bangladesh. The persons migrating from Bangladesh can very seldom have legal papers as they had to flee their houses to escape the persecution which many cases led to death and in most of the cases it happened within a very short period mostly after surviving a communal riot (Das 1993). Their offspring, who have born here and/or did not even see Bangladesh or Pakistan, can become stateless people without the right adult franchise, education, job, bank account etc. if they cannot prove their both of their parents were not illegal migrant. Such a person can

easily land in police custody as even personal animosity within a neighbourhood can result such a situation. Moreover, these amendments are not in accordance with international human rights standard as the international jurisprudence does not allow any retrospective implementation of a legal provision. International community have seen with dismay one such retrospective implementation of a legal/constitutional provision which annulled the citizenship of Rohingya Muslims in Burma who are facing one of the worst ethnic cleansing since World War II. In the debate during the tabling of these amendments in the Indian Parliament, the Foreign Minister of India argued that the amendments became imperative to facilitate Indians to gain citizenship in the advanced countries like US, UK, Canada etc though no such provisions in these amendments actually reflected it. Dr. Manmohan Singh, the leader of opposition during that period i.e. 2004-2005, argued on the floor of the parliament that this Act should incorporate some basic human rights standards which are in accordance with the international standard. However, the Citizenship (Amendment) Act, 2005 was passed without any amendment in the parliament during the NDA regime led by BJP. Ironically, the Congress Party led UPA ruled India for the next two five year terms under the leadership of Dr. Manmohan Singh which did not bother to have a relook at this Act. More curiously, Dr. Manmohan Singh was himself born in village which is now in Pakistan and had to leave his native land during the Partition. Belying the popular belief, both the Congress Party and its leader Dr. Singh failed to change the narrative of ignoring the apprehension of the human rights workers in this regard.

### III. Conclusion

This circle completes with the introduction of The Citizenship (Amendment) Bill 2016 in the lower house of Indian Parliament on July 19, 2016. This Bill seeks to amend the

Citizenship Act, 1955 to make illegal migrants who are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, eligible for citizenship if they have arrived on or before 31 December, 2014. The glaring omission from this list is the category of Muslim illegal migrants. Jews and Baha'i, which form a negligible proportion in the subcontinent, are also omitted from this list of permissible illegal migrants. This Bill also seeks to amend, one of the requirements for citizenship by naturalisation which required an applicant to reside in India during the last 12 months, and for 11 of the previous 14 years. The Bill proposes to lower the 11 year requirement to six years for persons belonging to the same six religions and three countries. For the first time in the history of independent India a Bill seeks some special provisions in citizenship on the basis of religion as the Bill, when passed by both the houses in India Parliament and becomes an Act, will make illegal migrants from the aforesaid six religions eligible for citizenship. This Bill may be violative of the principle enshrined in Article 14 of the Indian Constitution which guarantees right to equality. The Bill has been referred to a Joint Parliamentary Committee for observation and the Committee is yet to submit the report though it was due on the last of the first week of the Winter Session, 2016. This Bill marks the completion of the circle that was initiated in 2005 with the passage of The Citizenship (Amendment) Bill 2005.

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