

An Assessment of the Factors and Contestations Behind Partition and the Changing Rules of Citizenship

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ABSTRACT

The partition of the Indian subcontinent on the eve of independence played a huge role in determining the rules of becoming citizens. There were multiple ranges of claimants from both the sides of partition lines which made the process complicated. There was a huge chunk of Hindu population migrating from the places which became part of Pakistan, particularly Punjab and Bengal. And similarly Muslim population were fleeing to newly created Pakistan and later on lot of them came back to reclaim their earlier homes. There were other conditions that were involved in laying down the rules of citizenship. All these conditions took a backseat and the partition created the importance of territorial citizenship.

This paper attempts to analyse the character of Indian citizenship after Partition and the immediate implications that followed.

Key words: Independence, Partition, Citizenship, territory

INTRODUCTION

After independence, the Princely states, the Portuguese and French colonies were integrated and gradually assimilated to the independent Indian Union. There were also issues regarding substantive area of citizenship. The question of the Indians who were settled in different countries was thrown into confusion. Indian leaders were in favour of citizenship to the overseas Indians. Gandhi had struggled for the rights of Indians in South Africa. However, Opposite to this position, Nehru encouraged the Indians overseas that they should identify with the country they reside. He took a position that Indians should be loyal to the country of residence instead of humming divided loyalties for both the nations. However, contrary to what he encouraged, he addressed to the Indians in Singapore that India would be capable of taking care of its overseas citizens but only if they wanted to.

Since the partition created the importance of territorial criterion, the Constituent Assembly viewed the claims of the overseas Indians as inadmissible. But overseas Indian residents pleaded that they faced difficulties in the other countries in the matter of employment and enjoying certain rights and privileges. However Indian government viewed that since those people choose to have foreign nationalities it equals to giving up Indian citizenship. The delinking of citizenship from nationality was evident. This created a huge disappointment among the overseas Indians. After a series of debates and discussions, the Indian government enacted the Article 8, whereby overseas Indians, with no domicile in India, could become Indian citizens, provided that they did not acquire any foreign citizenship. The notion of dual citizenship was ruled out and the Article 19 (I) provided the freedom to movement and reside in any part of the country.

Even though the Constituent Assembly was prepared six months before they announced partition, the actual happening was way beyond imagination. Around 14 million people crossed the borders, with half the migration happening on the two sides of Punjab and the other half between newly created East Pakistan and West Bengal. There was large scale violence on both sides and the people were amassed with fear about an uncertain future which created various types of identity claimants. There was no disagreement on the principle of 'jus soli'. From the Motilal Nehru report of 1928 to the Committee on Fundamental rights of the Constituent Assembly, they all agreed on the basic principle that any person domiciled in India, born or naturalized in the country, would be a citizen. Many other issues that complicated the process of entitlement are foreigners giving birth on Indian soil, children born out of Indian women who are married to foreign persons etc. This principle of 'jus soli' stands opposite to 'jus sanguinis' which is racial in character. Gandhi had always fought for the rights of Indians in South Africa. So, there was no way of supporting the concept of sanguinis here in India. But this sanguinis principle was recalled regarding the migrants from Pakistan. However, it just remains in statutory law.

Aftermath of Partition

The Constitution by Article 6 provides that those who came from Pakistan before July 1948 can become citizens. Those who entered after 19 July 1948 would need to register themselves. Article 7 states that those who fled to the other side due to communal violence can later return to their homes under a permit of resettlement or permanent return. This return from the western border was to be done under the Influx from Pakistan (Control) Ordinance. The Indian High Commission in Pakistan stated that it received thousands of applications every day from Muslim refugees. The evacuated properties on both sides of the border were taken over by the government. Some people were in favour of more inclusive provisions and they argued that those who fled communal violence and later returned should be given back their properties and restoration. Those who were more exclusive argued that Indian citizenship became too cheap. Some others claimed that all Hindus and Sikhs (not citizen of another state) should be entitled to get citizenship in India. The supporters of this claim were automatically suspicious about the Muslim population who fled to Pakistan and later returned. They said that this Muslim population fled to Pakistan because of religious sentiment and at the first place and hence their return to India is definitely not without suspect. Property restoration to those who returned back created a huge issue. The property of those who evacuated was used to rehabilitate the Hindu refugees and restoring back those properties would mean burden of the already rehabilitated refugees. Problem would arise then if someone who received a valid permit to return back but without getting their property back. Thus, the question of citizenship got linked to the issue of property.

The Partition didn't just happen in the western border. There was another side going through similar experiences but in a milder rate compared to the western border- the eastern border where partition created East Pakistan and later on Bangladesh in 1971. The influx of refugees from the eastern border was estimated to be two and a half million. The central government was in a way

ignorant towards the refugee problem from the east side. The situation on the eastern border was slightly different because the evacuated property was not given for rehabilitation of the Hindu refugees and the government decided to hold on to them until the original owners had come and reclaimed them. However, contrary to the expectations, the influx continued even after 1971. The migrated people were not solely Hindus and the continued migration began to upset the demographic and religious balance, especially in Assam. The problem persists till date.

Now that the Constitution laid down the provision for citizenship, the next issue was regarding legal citizenship. After 5 years of adoption of a republic, the Act of 1955 was enacted stating the framework for claiming citizenship via various sources- birth, descent, registration, naturalization and territorial identity. The act empowered the executive to have the sole decision in determining the rules of citizenship.

The Amendment of 1985 holds significance because it was enacted to cope up with the continued immigration from Bangladesh. The issue became politically contested in Assam and was a major area of interest and political play during elections. It was then the powerful student organisation in Assam (AASU) began its huge protests against the influx of foreigners and the incapability of the centre in solving the issue. This led to the "Assam Accord" signed between the AASU, the state government and the Centre. This accord recognized those people as citizens who migrated before 1966-1971. Those who came after that were to be treated as foreigners. The Assamese people had lost their temper by then because these people via some networks got recognition through ration cards or election cards making them legitimate to vote in the elections. Congress being the secular party was an easier choice for these migrants to gain voting access. The Congress party passed the IMDT Act in 1983 whereby the Tribunal was provided to detect and expel the foreigners. However, the Act proved to bring only further dissatisfaction among the people, the Students' organisation and the political parties in Assam. They held that the Act was indeed designed to protect the immigrants. However, the Congress party deemed it successful even though the deported number of immigrants was 1,481 out of 10,015 detected immigrants. The court scrapped the Act in 2005 stating that the Act was inconsistent to the Constitutional rules and that the act was not successful in deporting even half of one per cent of the cases initiated for detecting foreigners. The issue of immigrants from Bangladesh created Xenophobia among the people of Assam. The governor of the state in a report asserted that the immigrants were exclusively Muslims and that it is creating a religious imbalance in the region. Immigration in the western borders continued in waves to Rajasthan and Gujarat during India's two wars with Pakistan and later during the demolition of the Babri Masjid. Most of the immigrants at that time came on valid Indian Visas but overstayed. Those who got citizenship were legalized in citizenship camps. Two points that needs attention here is that Hindu migrants did not require any permit for resettling but the returning Muslims were a subject of debate in the Assembly and judicial decisions. Thus, the element of jus soli got infected with jus sanguinis.

It has been found that more than half of the citizen related cases were a result of the partition. The cases were generally about those people who found themselves at the wrong side of the border at the wrong time. By the time they managed to return to their desired side, the laws on

either side changed and they were forced to settle in an uncertain way. Even though some of them managed to get to the other side of the border, they were suspected and prawned with multiple questions. The questions and suspect was more on religious basis of the migrant. Ultimately, the migrants who genuinely found themselves on the wrong side started getting tossed here and there with despair and an uncertain future. In many cases, some individuals had Pakistani passports and tried to return to India on the basis that they were displaced by mistake or fled to the other side unintentionally. But the Court decided to disregard this as the only criteria to gain Indian citizenship. In the case of *Izhar Ahmad Khan v. union of India*, the court decided that Izhar Ahmad having the passport of Pakistan is the proof that he decided to be on the other side voluntarily. In another case in state of AndhraPradesh v. Abdul Khader, the Court decided that even though he held a Pakistani Passport and returned to India, he cannot be declared a foreigner because he did not renounce his Indian nationality. Thus, the Court got entangled in a lot of complicated cases regarding whom to give validation as an Indian citizen or who were entitled to become one. Thus, the question of their citizenship was subjected to judicial determination. However, the Supreme Court commented sympathetically on the case of *Shabbir Hussain v. State of Uttar Pradesh*, where Shabbir Hussain was on a two months visit to Lahore on business purpose and by that time the Influx from Pakistan (Control) Ordinance was promulgated. He was forced to return only with a temporary permit and when he overstayed he was arrested. The Supreme Court held that ordinary people are unaware of such legislations and constitutional proceedings sometimes change their lives in a snap.

There was a complex relationship between documents and citizenship claims in India after Partition. Normally, people would acquire documents when they are citizens of a country. Here, the case was different. People were claiming to be entitled as citizen by pre producing certain documents. The most commonly used document at that time was acquisition of passports (Pakistani passports), without realizing the consequences of holding a passport which might mean taking up of a nationality and thus citizenship of that country. The Court interpreted that such passports might be taken under pressure or voluntarily or through fraudulent means. Therefore, the Court has to find out the actual means or reasons for acquisition before passing any judgement.

It was in the case of continued influx of migrants from Pakistan, the Court took a more cynical position regarding the passports and other documents such as ration cards and election identity cards. These documents were easier to gain through various devious ways. The Court held the position that having name on the voters list does not provide a proof for citizenship. The elections were postponed in Assam twice and the political parties and the Student's organisation boycotted the electoral process because of the highly suspected voter's list. It was only after the electoral list was revised, elections were conducted.

The issue of property-

Property was another area of contested in post-partitioned India. As mentioned earlier, there is a link between property and citizenship. The documents which the people possess where used to acquire property as well. But this way of acquisition is not possible when the individual changes

his citizenship. The evacuated properties were taken custody by the state when the owners left for Pakistan. The evacuated property was later termed as enemy property. In the Tashkent Declaration, both the governments decided to discuss the return of those evacuated properties from both the sides. But Pakistan had sold off the enemy properties left by Indians on their side when the diplomatic relations between both the countries was broken. But India has been holding a worth of 1300 crore of enemy property under the Enemy Property Act of 1968. This act empowered the government to check the frivolous transfer and sale of enemy properties. There were cases where, the father or the grandfather migrated to Pakistan but the other members of the family stayed in India as Indian Citizens. The Court decided that property holdings of such persons can be given to the claimants who remained here as Indian citizens. In 2010, the government amended the Enemy Act, enabling the rightful heirs to claim the property.

Females- citizens or commodities ?

The partition also brought in the separate issue of the female citizens. Thousands of women were abducted and raped and married forcefully on both the sides. These women got separated from their own families. To challenge these patriarchal attitudes of the abducting persons, the Constituent Assembly passed the Abducted Persons Recovery Act. The government on both sides agreed to return Hindu women found in the Pakistan side and Muslim women from the Hindu side. This Act ignored the choices of the women whether wanted to return to stay with the abductees because by the time this act had come up, they had children with the abductees. Hindu families on the other hand were not ready to accept these women back who had sex with man from a different religion and considered them unacceptable on the basis of purity. Older women who had property were going through another wave of suffering. Young man would often force them to adopt them and transfer the property in their name. Women who voluntarily married to persons of another religion were also subjected to the law that women living with person of another religion were declared abducted. Thus, the citizenship of the women was getting determined by the patriarchal nationalism.

Aspirations of the Migrants and the immigrants to become Citizens

Migration has always been a phenomenon across the world. However, the recent waves of economic migration in the world, both skilled and unskilled, and refugees fleeing religious and political persecution, have somehow threatened the demography and economic conditions of the nation where these people migrate. These outsiders with time assimilate with that particular society and become aspirants of legal citizenship of that nation. This brings the challenge of deciding whether these people should be conferred with legal status or not. If allowed, then what should be the criterion for considering them as citizens? How long they should be there to be claimants of citizenship?

There is a certain group of people who can neither be determined as refugees nor migrants if they are defined according to law. They represent a peculiar characteristic of half migrant and half refugee and also partly indigene. India being a multi-ethnic and a diverse society, it attracts different kinds of immigrants to different places from the neighbours. There are these groups of

people who came from Pakistan and are now rendered stateless. These people cannot be kept outside the political contest of the domain of citizenship. They are known as denizens. Two types of claimants can be distinguished from these denizens. One, those who are waiting to get the legal status of citizenship and the others who got the legal status but still not satisfied with the limited access they have in substantive citizenship rights. Hence, these people can be categorized as the aspirants of citizenship in India.

It is important to explore the understandings of these people of the value of citizenship. Why are they so eager to be legally recognized? What kind of rights do they think will come along if at all they are given the legal status? How do they imagine their life would change if they are entitled to these legal rights? Overall what importance does it hold for them to become citizens? On the other side, what has been the response of the state to such claims? The principle of *jus soli* or *jus sanguinis* will be applied to them? We have to explore the ways in which Indian state has been responding to such claims and the consequences of such responses.

There is a distinction between refugees and migrants. According to the International Refugee Law, migrants are those who voluntarily move across borders for economic reasons and refugees are those who forced to flee mainly because of political and religious persecution. Therefore, if certain rights are granted by the state to these stateless people, they are more on humanitarian basis rather than legal. That does not necessarily qualify them as citizens. In the case of India, those who migrated from Pakistan to live in Rajasthan borders, are hard to be labelled with certain nomenclature and they are now in the peripheries of citizenship. There are two categories here. Those who migrated more voluntarily but not necessarily for economic reasons are now refugees and applicants of citizenship. India does not exclusively have any law to define or discuss the status of refugees. India did not ratify the 1951 Convention on the Status of Refugees and simply defined Refugee as someone who under the fear of being persecuted on religious, race and political grounds flees their country of nationality.

Since, our law does not provide any way through which citizenship claims of these people can be considered, therefore, the only way left is to provide them certain rights on moral grounds. If provided, what should be the basis of providing such rights? Their length of stay or the place they have chosen to stay. The economic migrants can very well demand certain political rights and membership on the argument that they are already participants of the economic regulations which are governed by law of that country. Thus, a nation-state reproduces tensions and confusions while trying to balance the universal humanitarian values and maintaining the sovereignty of the national boundaries. It is indeed moral to address the claims of the refugees, but in the absence of an international legal regime to address the new challenges, the states cannot cope up with this issue alone. Nation-states in real are far from the ideal of being cosmopolitan.

There are a variety of refugees in India, residing in various parts of the country. Apart from refugees coming from Bangladesh, there are refugees from Sri Lanka and Tibet. The Sri Lankan refugees are those who are residing in Tamil Nadu and a majority of them have been stateless living in camps. A lot of them were born on Indian soil but failed to gain citizenship due to the

amendment act of 2003. Refugees from Tibet account a huge number who came to India following Dalai Lama. Considering the situation of political asylum of Dalai Lama, these people were allowed to have identity certificates and registration from the Government.

Rajasthan shares border with Pakistan on the western side. Rajasthan has witnessed a large scale migration from the western borders, particularly to three districts of Jaisalmer, Jodhpur and Barmer. These migrated people are basically from Sindh and Southern Punjab in Pakistan. Those who migrated during the partition were settled comfortably. But seasonal migration continued to these areas due to droughts which occur both ways. Migration occurred due to social reasons like marriage and family occasions. The largest wave of migration came from Sindh during the 1965 war with Pakistan. Migration rate began to lower down until the demolition of the Babri Masjid. This event created an atmosphere of insecurity among the Hindu population on the other side and Muslim population in India. This was followed by religious fundamentalism, crime against women and forced conversion. Sindh, which was the home of 95 % of Pakistan's Hindu population, has declined after that. Large number of migrants from these groups came to India as visitors as valid passports or on Indian Visas. The refugees who came in 1965 and then in 1971 from the Parkar district have been eventually granted citizenship. These people were mobilized under the leadership of Pak Visthapit Sangh and eventually around 13,000 people were granted citizenship in the year 2005.

The two major political parties in India, both BJP and Congress, showed little or no interest in the refugees. But both the government have initiated policies for granting them citizenship. But irrespective of who was in power at the centre, the Rajasthan state administration has been largely active in the matter of these refugees.

This was the case of the refugees which stands strikingly different to the claims of the immigrants who are already citizens of other states but still wish to enjoy the privileges of Indian citizenship. These people include those who migrated to Fiji, Trinidad, Guyana, Malaysia and South Africa, both for educational and professional purposes and eventually settled there. The more recent emigrants are those who migrated to the United States for better opportunities and prosperity. Till the time of Vajpayee government, the response to the emigrants was, in Nehru's injunction, that they should maintain loyalty and allegiance to the nation of residence. It was only in 1998, during Vajpayee's tenure, at a global conference of Indian entrepreneurs, he announced the interest of the Indian government to discuss the issue of dual citizenship for the Non-Resident Indians. The government gave justification that this would strengthen investment in India to secure the diasporic investments. India was inspired by China's success in seeking diasporic investments. However, the initiative was termed racist or the dollar pound apartheid because it was exclusive in nature. It excluded the diaspora in neighbouring Pakistan and Bangladesh and also the poorer diaspora of the first wave of migration to Mauritius, Fiji etc.

In 2001, the committee on the Indian diaspora recommended dual citizenship through an amendment of the Citizenship Act. The Amendment of 2003, however, allowed the persons of Indian origins to be registered only as OCI's. But this provision was limited to 16 countries only

under the justification that these countries too have provisions for dual citizenship. This seems prejudicial because ironically all these 16 countries are located in the West.

The recent experience shows that the West has been experiencing economic recession and the Indian entrepreneurs are spreading their roots abroad. Therefore, diasporic investment is no longer an impetus to work towards granting of dual citizenship to the emigrants. Guess the emigrants have to show new forms of assets or the government has to explore newer impetus that would contribute to the “National Reserve” as described by the Singhvi Committee. In matters of dual citizenship, to check on the divided loyalties, the committee suggested that the emigrants would not be allowed to join defence or police forces or join civil services. The right to vote or contest elections are also ruled out. This was done to block the possibility of divided loyalties, in case the respective countries went to war.

CONCLUSION

Thus, the debates and arguments on citizenship in India show how the leaders of then India were engaged in the issues of territory and identity in determining the rules of citizenship. Later on overseas citizenship was initiated justified on the basis of economic boost by diasporic investments. Partition was a major factor in determining and laying down the constitutional principles of citizenship but other events such as creation of Bangladesh and the continued influx from the eastern borders, economic strategies are crucial in determining the discourse of citizenship in India.

REFERENCES

1. Zamser Ali, ‘In-depth analysis of NRC co-ordinator, Prateek Hajela’s affidavit reveals stand based on hypothesis’, Sabrang: Hate Hurts, Harmony works, 31 October 2018, <https://sabrangindia.in>, (accessed 19 April 2019).
2. CJP Team, ‘UN again raises concerns about ‘Statelessness’ and ‘Exclusion’ of minorities in Assam’, Sabrang: Hate Hurts, Harmony works, 22 September 2018, <https://sabrangindia.in>, (accessed 19 April 2019).
3. Sabrangindia, ‘Supreme Court says it will not extend final NRC deadline’, Sabrang: Hate Hurts, Harmony works, 18 March 2019, <https://sabrangindia.in>, (accessed 19 April 2019).
4. Sabrangindia, ‘SC denies permission to suspend NRC work for Elections in Assam’, Sabrang: Hate Hurts, Harmony works, 5 February 2019, <https://sabrangindia.in>, (accessed 19 April 2019).
5. Sabrangindia, ‘SC allows all 15 documents for NRC claims process, extends deadline’, Sabrang: Hate Hurts, Harmony works, 1 November 2018, <https://sabrangindia.in>, (accessed 19 April 2019).

6. Talukdar Suprakash, 'how the BJP's Citizenship Amendment Bill, 2016 is drawing protests in Assam', Sabrang: Hate Hurts, Harmony works, 1 June 2018, <https://sabrangindia.in>, (accessed 19 April 2019).
7. Dutta Akhil Ranjan, 'Political Destiny of Immigrants in Assam: National Register of Citizens', Economic and Political Weekly, vol. LIII, no. 8, 2018, pp. 18-21.
8. Faulks K., Citizenship, London, Routledge, 2000.
9. Garg Sanjeeb, 'Revisiting the Nationality Question in Assam, the EPW 1980-81 Debate', Economic and Political Weekly, vol. LIII, no. 22, 2018, pp. 13-15.
10. Hazarika Sanjoy, 'Defining Citizenship: Assam on the edge again', Economic and Political Weekly, vol. LIII, no. 30, 2018, pp. 12-13.
11. Jayal Gopal Niraja, Citizenship and its Discontents: an Indian History, Ranikhet, Permanent Black, 2013.
12. Kumar Alok Prasanna, 'National Register of Citizens and the Supreme Court', Economic and Political Weekly, vol. LIII, no. 29, 2018, pp. 10-11.
13. Roy Anupama, 'Ambivalence of Citizenship in Assam', Economic and Political Weekly, vol. L1, no. 26 & 27, 2016, pp. 45-51.
14. Roy Anupama, Citizenship in India, Oxford, Oxford University Press, 2000.
15. Yasin A. and A Upadhyaya, Human Rights, New Delhi, Akansha Publishing House, 2006.