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STATELESSNESS AND THE CITIZENSHIP AMENDMENT ACT, 2019: THE CASE OF SRI LANKAN TAMIL REFUGEES

—Urvi Pathak*

For decades since the Sri Lankan civil war, Sri Lankan Tamil refugees have lived as stateless persons in India. However, India does not recognise “refugees” and “stateless persons” as legally separate categories, and treats them in a common immigration system with “foreigners”. This conflation of citizenship law with the immigration regime is a result of the introduction of the category of “illegal migrant” as a determinative tool of Indian citizenship.

This paper explores recent shifts in Indian citizenship laws, which have been embroiled in the tension between jus soli and jus sanguinis bases of citizenship, particularly with the category of “illegal migrant” and the Citizenship (Amendment) Act, 2019, and their impact on Sri Lankan Tamil refugees’ citizenship. This paper finds that despite the influence of international human rights, formal citizenship continues to be the clinching factor in Sri Lankan Tamil refugees’ quality and security of life in India today – an echo of Hannah Arendt’s conception of the “right to have rights”, by which she meant that the right to citizenship is a gateway for an individual to access all other rights.

Against this backdrop, this paper suggests interim solutions for Sri Lankan Tamil refugees to secure formal citizenship in India, and in particular, the role of courts in crafting

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jurisprudence that would support the alleviation of their statelessness. In the same breath, this paper strongly argues in favour of, first, the need for a forward-looking reconceptualization of Indian citizenship laws based on the jus soli principle; and second, a recognition of India's burden under the UN Conventions on statelessness to reduce and prevent statelessness, particularly through eliminating documentation-heavy citizenship determinations.

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I. INTRODUCTION

The enactment of the Citizenship (Amendment) Act, 2019 ("2019 Act"), and the proposed National Register of Citizens ("NRC") exercise have made citizenship the most contested topic in India, given that these two changes seek to radically alter the foundations of Indian citizenship law and potentially render millions of people stateless.¹ Under the Convention Relating to the Status of

¹ Gautam Bhatia et al., *On citizenship* (Aleph Book Company 2021); Human Rights Watch, "Shoot the traitors": Discrimination against Muslims under India's new citizenship policy (2020); Christophe Jaffrelot, 'Citizenship Law in India, a Populist Polarization?' (6 February 2020) <<https://carnegieendowment.org/2020/02/06/citizenship-law-in-india-populist-polarization-pub-81023>> accessed 28 July 2021; Centre for Policy Research, 'Unpacking the Citizenship Amendment Act' (18 December 2019) <<https://www.cprindia.org/news/unpacking-citizenship-amendment-act>> accessed 28 July 2021; Jhuma Sen, 'Afterlives of Partition: citizenship and legal belongings' (*JGU Publications*, 8 May 2020) <<http://dspace.jgu.edu.in:8080/jspui/bitstream/10739/3600/1/Afterlives%20of%20Partition.pdf>> accessed 28 July 2021; Niraja Gopal Jayal, 'View: India on a slippery slope towards an ethno-national state' (Economic Times, 14 December 2019) <<https://economictimes.india-times.com/news/politics-and-nation/view-india-on-a-slippery-slope-towards-an-ethno-national-state/articleshow/72624503.cms?from=mdr>> accessed 28 July 2021; Peter McCullin Centre on Statelessness, 'Citizenship, constitutionalism and civil liberties: A briefing note on recent developments in India' (17 July 2020) <https://law.unimelb.edu.au/__data/assets/

Stateless Persons, 1954 (“1954 Convention”), a stateless person is one “who is not considered as a national by any state under operation of its law.”²

The 2019 Act relaxes the requirements for obtaining Indian citizenship for refugees fleeing religious persecution.³ However, the scope of the 2019 Act is narrow and specific, leaving out several notable groups of South Asian refugees. As a result, these excluded groups will be forced to live as stateless individuals in India.⁴

One category of refugees that the 2019 Act fails to provide for are the Sri Lankan Tamils, who had fled to India in the wake of the Sri Lankan civil war and have lived in Indian refugee camps ever since.⁵ Presently, they cannot gain citizenship in either Indian or Sri Lanka.⁶ Although the Tamil Nadu and Central governments have devised numerous welfare measures for these refugees⁷, there has been little constructive action towards granting them Indian

pdf_file/0003/3441054/Statelessness-in-India-Briefing-Note.pdf> accessed 28 July 2021; Anupama Roy, ‘In the name of a majority’ (The Hindu, 13 December 2019) <<https://www.thehindu.com/opinion/lead/in-the-name-of-a-majority/article30289562.ece>> accessed 28 July 2021; Anas Tanwir and Sanobar Fatma, ‘New Citizenship Act is illogical and poorly drafted’ (*National Herald*, 14 December 2019) <<https://www.nationalheraldindia.com/opinion/new-act-is-illogical-and-poorly-drafted>> accessed 28 July 2021.

² Convention Relating to the Status of Stateless Persons 1954 (adopted 28 September 1954, entered into force 6 June 1960), art 1 (“1954 Convention”); Convention on the Reduction of Statelessness 1961 (adopted 30 August 1961, entered into force 13 December 1975) (“1961 Convention”); in popular culture, the film ‘The Terminal’ depicts statelessness based on a real-life story of an Iranian-born refugee rendered stateless forced to live in the Charles de Gaulle International Airport in Paris for sixteen years as in Paul Berczeller ‘The man who lost his past’ (*The Guardian*, 6 September 2004) <<https://www.theguardian.com/film/2004/sep/06/features.features11>> accessed 28 July 2021.

³ 2019 Act, s 2, s 6.

⁴ “Refugee” and “stateless person” are conceptually and legally different categories; however, under Indian law, these two groups experience no differentiation. Further, most Sri Lankan Tamil refugees in India are also stateless.

⁵ BS Chimni, ‘The Legal Condition of Refugees in India’ (1994) 7 *Journal of Refugee Studies* 378; Nasreen Chowdhory, ‘The Idea of “Belonging” and Citizenship Among Refugees: Some Theoretical Considerations’ in Nasreen Chowdhory (ed), *Refugees, Citizenship and Belonging in South Asia: Contested Terrains* (Springer 2018); Rina Chandran, ‘Missing from India’s Citizenship Law: 100,000 Sri Lankan Refugees’ (*Reuters*, 3 December 2019) <<https://www.reuters.com/article/us-india-refugees-protests-trfn-idUSKBN1YS0VA>> accessed 28 July 2021.

⁶ Sen (n 1); Rebecca Wolozin, ‘Citizenship Issues and Issuing Citizenship: A Case Study of Sri Lanka’s Citizenship Laws in a Global Context’ (2009) 16 *Asian-Pacific Law and Policy Journal* 1; Rajesh Venugopal, *Nationalism, Development and Ethnic Conflict in Sri Lanka* (Cambridge University Press 2018); Nithyani Anandakugan, ‘The Sri Lankan Civil War and its History, Revisited in 2020’ (*Harvard International Review*, 31 August 2020) <<https://hir.harvard.edu/sri-lankan-civil-war/#:~:text=The%20war%20was%20mainly%20a,state%20for%20the%20Tamil%20minority>> accessed 28 July 2021.

⁷ Manohar Velamati, ‘Sri Lankan Tamil Migration and Settlement: Time for Reconsideration’ (2009) 65 *India Quarterly* 271; BS Chimni, ‘Meaning of Words and the Role of UNHCR in Voluntary Repatriation’ [1993] 5 *International Journal of Refugee Law* 442.

citizenship.⁸ The Tamil Nadu government have been trying to find a middle ground in terms of citizenship for these refugees,⁹ including the potential introduction of dual citizenship proposals.¹⁰ Sri Lankan Tamil refugees' unsuccessful attempts at acquiring Indian citizenship have made them fearful of the repercussions of the 2019 Act, especially the possibility of deportation.¹¹

The adverse impact of the 2019 Act proves to be even more lethal if one considers that Indian law does not take cognisance of its responsibilities towards stateless persons in its territory, and there seems to be no political will to alter this predicament.¹² Statelessness is an extremely vulnerable experience that robs such individuals of the right to a social or political community, or to access rights under domestic law as compared to citizens.¹³ The most recent example of this vulnerability has been in the wake of the Covid-19 pandemic, where the government has made vaccines available free of cost only to Indian citizens.¹⁴

⁸ Sitharamam Kakarala and others, *India and the Challenge of Statelessness: A Review of the Legal Framework Relating to Nationality* (NLUD Press 2012); Gireesh Babu, 'There will be Process to Give Citizenship to Sri Lankan Tamil Refugees: FM' (*Business Standard*, 19 January 2020) <https://www.business-standard.com/article/current-affairs/there-will-be-process-to-give-citizenship-to-sri-lankan-tamil-refugees-fm-120011900335_1.html> accessed 28 July 2021.

⁹ PTI, 'DMK will Continue to Resist CAA, Support Citizenship for Sri Lankan Tamils: MK Stalin' (*The Indian Express*, 14 March 2021) <<https://www.newindianexpress.com/states/tamil-nadu/2021/mar/14/dmk-will-continue-to-resistcaa-support-citizenship-for-sri-lankan-tamils-mk-stalin-2276499.html>> accessed 28 July 2021.

¹⁰ B Sivakumar, 'Possible for Lankan Tamils to get Dual Citizenship' (*The Times of India*, 19 February 2020) <<https://timesofindia.indiatimes.com/city/chennai/possible-for-lankan-tamils-to-get-dual-citizenship-aiadmk/articleshow/74207177.cms>> accessed 28 July 2021; Web Desk, 'CAA: AIADMK Reiterates Request for Dual Citizenship for Lankan Tamil Refugees' (*The Week*, 6 January 2020) <<https://www.theweek.in/news/india/2020/01/06/caa-aiadmk-reiterates-request-for-dual-citizenship-to-lankan-tamil-refugees.html>> accessed 28 July 2021; however, some commentators are sceptical of this suggestion as in V Suryanarayan, 'Dual Citizenship for Refugees is Impractical' (*The Indian Express*, 12 March 2021) <<https://www.newindianexpress.com/opinions/2021/mar/12/dual-citizenship-for-refugeesis-impractical-2275468.html>> accessed 28 July 2021.

¹¹ KA Shaji, 'CAA: Sri Lankan Tamil Refugees Say the New Law has Killed their Hopes of Citizenship' (*Huffpost*, 22 December 2019) <https://www.huffpost.com/archive/in/entry/citizenship-amendment-act-sri-lankan-tamil-refugees_in_5dff246ce4b05b08bab6aff2> accessed 28 July 2021.

¹² Shuvro Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* (Palgrave Macmillan 2017); Angshuman Choudhury, 'Why is the Indian State Shockingly Blind to the Problem of Statelessness?' (*Scroll.in*, 30 October 2019) <<https://scroll.in/article/940712/why-is-the-indian-state-shockingly-blind-to-the-problem-of-statelessness>> accessed 28 July 2021.

¹³ Charlotte-Anne Malischewski, 'Legal Brief on Statelessness: Law in the Indian Context' in Calcutta Research Group, *Statelessness in Law: Two Assessments, Policies and Practices*, No. 60 [2014].

¹⁴ UNHCR, *The Impact of COVID-19 on Stateless Populations: Policy Recommendations and Good Practices on Vaccine Access and Civil Registration* (2021).

The 2019 Act has been met with monumental backlash in the form of nationwide protests countered by police crackdowns,¹⁵ and 130 petitions challenging its constitutionality before the Indian Supreme Court (“SC”).¹⁶ The 2019 Act also earned India global condemnation¹⁷ ranging from the United Nations (“UN”),¹⁸ United States (“US”),¹⁹ European Union (“EU”),²⁰ Pakistan,²¹ and the Organisation for Islamic Cooperation.²²

Critics of the 2019 Act widely view it as an effort to radically redefine India as a nation – from a pluralist and secular democracy to an ethnonationalist state.²³ They highlight that India has been forced to re-examine crucial ques-

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- ¹⁵ Anjali Mody, ‘India Awakens to Fight for its Soul’ (*The New York Times*, 20 December 2019) <<https://www.nytimes.com/2019/12/20/opinion/india-citizenship-law-protests.html>> accessed 28 July 2021; Sanya Mansoor and Billy Perrigo, “‘This is not just a Muslim Fight.’ Inside the Anti-Citizenship Act Protests Rocking India’ (*Time*, 19 December 2019) <<https://time.com/5752186/india-protests-citizenship-act/>>; accessed 28 July 2021.
- ¹⁶ Supreme Court Observer, ‘Citizenship Amendment Act, Indian Union Muslim League v Union of India – Day 2 Arguments 22 January’ (22 January 2020) <<https://www.scoobserver.in/court-case/caa/caa-day-2-arguments>> accessed 28 July 2021.
- ¹⁷ Rajeswari Pillai Rajagopalan, ‘The Rising Domestic Danger to India’s Foreign Policy Under Modi’ (*The Diplomat*, 6 March 2020) <<https://thediplomat.com/2020/03/the-rising-domestic-danger-to-indias-foreign-policy-under-modi/>> accessed 28 July 2021; Citizen Bureau, ‘Protests Across the World Against CAA’ (*The Citizen*, 27 January 2020) <<https://www.the-citizen.in/index.php/en/NewsDetail/index/6/18226/Protests-Across-the-World-Against-CAA>> accessed 28 July 2021.
- ¹⁸ Draft amicus curiae application by Michelle Bachelet Jeria, the United Nations High Commissioner for Human Rights, before the Supreme Court in *Deb Mukharji v Union of India*, W.P. (C) No. 1474 of 2019. However, it is unclear if this petition was indeed put before the SC; Arvind Narrain, ‘UN Human Rights Chief’s CAA Plea Puts the Spotlight on India’s International Law Obligations’ (*Scroll.in*, 5 March 2020) <<https://scroll.in/article/955177/un-human-rights-chiefs-caa-plea-puts-the-spotlight-on-indias-international-law-obligations>> accessed 28 July 2021.
- ¹⁹ United States Commission on International Religious Freedom, Annual Report 2020 p. 20; Mohammad Ali, ‘Another US City Passes Resolution Against India’s Citizenship Law’ (*Al Jazeera*, 12 February 2020) <<https://www.aljazeera.com/news/2020/2/12/another-us-city-passes-resolution-against-indias-citizenship-law>> accessed 28 July 2021.
- ²⁰ European Parliament, ‘European Parliament Resolution on India’s Citizenship (Amendment) Act, 2019’ (22 January 2020) <https://www.europarl.europa.eu/doceo/document/B-9-2020-0082_EN.html> accessed 28 July 2021.
- ²¹ Naveed Siddiqui, ‘Pakistan Condemns “Regressive, Discriminatory” Nationality Bill Passed by India’s Lower House’ (*Dawn*, 10 December 2019) <<https://www.dawn.com/news/1521480>> accessed 28 July 2021.
- ²² PTI, ‘OIC Expresses Concern Over CAA, Minorities in India; Says “Closely” Following Developments’ (*The Indian Express*, 23 December 2019) <<https://www.newindianexpress.com/nation/2019/dec/23/oic-expresses-concern-over-caa-minorities-in-india-says-closely-following-developments-2079712.html>> accessed 28 July 2021.
- ²³ Niraja Gopal Jayal, ‘Reconfiguring Citizenship in Contemporary India’ [2019] 42 *Journal of South Asian Studies* 33; Prabhaskar Ranjan, ‘A fight for Old India’ (*Telegraph*, 13 January 2020) <<https://www.telegraphindia.com/opinion/how-the-anti-caa-protests-mark-a-pushback-from-civic-nationalists-against-the-rising-tide-of-ethno-cultural-nationalism/cid/1735546>> accessed 28 July 2021; Nazir Ahmad and Muneeb Yousuf, ‘The Idea of India—And a Transition Toward Violent, Exclusionary Nationalism’ (*The Diplomat*, 2 April 2020) <<https://thediplomat.com>>

tions which run contrary to the “conventional wisdom”²⁴ that plurality in India has flourished – what does it mean to be Indian? What binds India together as a nation?²⁵

This paper explores the conceptual framework of Indian citizenship law and its conflation with the immigration regime in recent years. In particular, it finds that the category of “illegal migrant” in citizenship and immigration law has been the most contentious development, since it infuses a *jus sanguinis* character in Indian citizenship, and either exacerbates statelessness or prevents stateless persons like Sri Lankan Tamils from accessing Indian citizenship. In this backdrop, this paper finds that formal citizenship continues to remain the determinative tool in accessing rights for Sri Lankan Tamils in Indian refugee camps, echoing Hannah Arendt’s prophecy of citizenship being the “right to have rights”. With the significance of formal citizenship in mind, this paper explores pathways to Indian citizenship for Sri Lankan Tamils, and also provides a forward-looking conception of Indian citizenship.

The first section has a twofold intent: it provides a conceptual backdrop to statelessness and links it with Hannah Arendt’s ‘right to rights’; and studies the history behind Sri Lankan Tamils’ exodus from Sri Lanka and into India to seek refuge.

The second section provides a framework of Indian citizenship laws, and investigates the tension between the *jus soli* and *jus sanguinis* bases of Indian citizenship. In particular, this tension is explored through amendments that make Indian citizenship contingent on the fact that the applicant is not an “illegal migrant”. Next, this section tries to scrutinise if the influence of *jus sanguinis* in Indian citizenship law has caused the right to have rights to become true for Sri Lankan Tamil refugees.

com/2020/04/the-idea-of-india-and-a-transition-toward-violent-exclusionary-nationalism/> accessed 28 July 2021.

²⁴ Gurharpal Singh, ‘Reassessing “Conventional Wisdom”: Ethnicity, Ethnic Conflict, and India as an Ethnic Democracy’ in Sanjib Baruah (ed), *Ethnic Conflict in India* (OUP 2012).

²⁵ Bhatia and others (n 1); Jayal (n 23); Sunil Khilnani, *The Idea of India* (Penguin India 1997); Pratap Bhanu Mehta, *The Burden of Democracy* (Penguin Random House 2017); Pranab Bardhan, ‘Attempts are Being made to Dismantle the Pluralistic Ideas of India that are a Legacy of Gandhi and Tagore’ (*The Indian Express*, 12 October 2019) <<https://indian-express.com/article/opinion/columns/un-civic-nationalism-identity-politics-society-development-hindu-rashtra-ambekar-6064961/>> accessed 28 July 2021; Swati Chawla and others, ‘Who is a Citizen in Contemporary India?’ (EpiCenter, 11 February 2020) <<https://epicenter.wcfia.harvard.edu/blog/who-citizen-contemporary-india>> accessed 28 July 2021; Manash Firaq Bhattacharjee, ‘India is Losing the Promise of Inclusivity’ (*The Indian Express*, 13 December 2019) <<https://indianexpress.com/article/opinion/columns/indian-citizenship-amendment-bill-nrc-6164215/>> accessed 28 July 2021; Niraja Gopal Jayal, ‘The 2016 Citizenship Amendment Bill Consolidates a Trend Towards a Majoritarian and Exclusionary Concept of Indian Citizenship’ (*The Caravan*, 20 February 2017) <<https://caravanmagazine.in/vantage/2016-citizenship-amendment-bill-majoritarian-exclusionary>> accessed 28 July 2021.

The third section provides potential pathways for Sri Lankan Tamil refugees to obtain Indian citizenship as an interim measure, and examines the potential for the role of courts in reducing statelessness among these refugees. This part of the paper also attempts to highlight long-term and holistic solutions for statelessness in India through the example of Sri Lankan Tamil refugees. Finally, this paper provides concluding remarks.

However, this paper does not intend to trace the jurisprudence of secularism in India,²⁶ make a finding as to the constitutionality of the 2019 Act,²⁷ or provide an in-depth study of refugee law in India.²⁸ Rather, it problematises recon-

²⁶ See generally Abhinav Chandrachud, *Republic of Religion: The Rise and Fall of Colonial Secularism in India* (Penguin Viking 2020); Jhalak Kakkar, 'India's New Citizenship Law and its Anti-Secular Implications' (Lawfare Blog, 16 January 2020) <<https://www.lawfareblog.com/indias-new-citizenship-law-and-its-anti-secular-implications>> accessed 28 July 2021.

²⁷ Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' [2020] 4 *Indian Law Review* 138; Mohsin Alam Bhat, 'The Constitutional Case Against the Citizenship Amendment Bill' [2019] 7 *Economic and Political Weekly* 11; Mihir Desai, 'CAA-NRC-NPR and its Discontents' [2020] 55 *Economic and Political Weekly* 25; Mihika Poddar, 'The Citizenship (Amendment) Bill, 2016: International Law on Religion-based Discrimination and Naturalisation Law' [2018] 2 *Indian Law Review* 108; Leah Varghese and Harish Narasappa, 'Contestations Over Indian Citizenship: An Analysis of the Citizenship (Amendment) Bill, 2016' [2019] 31 *National Law School of India Review* 157; Niraja Gopal Jayal, 'Faith-based Citizenship The Dangerous Path India is Choosing' (*India Forum*, 13 November 2019) <<https://www.theindiaforum.in/article/faith-criterion-citizenship>> accessed 28 July 2021; Madhav Khosla, 'Religion, not Religious Persecution: Why Amended Citizenship Act is Clearly Unconstitutional' (*The Print*, 16 December 2019) <<https://theprint.in/opinion/religion-not-persecution-why-amended-citizenship-act-is-unconstitutional/335867/>> accessed 28 July 2021; Pritam Baruah, 'Not Just Equality, the CAA Betrays Constitutional Values of Dignity, Integrity' (*The Wire*, 27 December 2019) <<https://thewire.in/rights/caa-constitution-equality>> accessed 28 July 2021; Alok Prasanna Kumar, 'Citizenship (Amendment) Act: An unconstitutional Act' (*Deccan Herald*, 15 December 2019) <<https://www.deccanherald.com/specials/sunday-spotlight/citizenship-amendment-act-an-unconstitutional-act-785638.html>> accessed 28 July 2021; Gautam Bhatia, 'The Citizenship (Amendment) Act Challenge: Three Ideas' (*Indian Constitutional Law and Philosophy*, 21 January 2020) <<https://indconlawphil.wordpress.com/2020/01/21/the-citizenship-amendment-act-challenge-three-ideas/>> accessed 28 July 2021; Varun Kannan 'The Constitutionality of the Citizenship (Amendment) Act – A rejoinder' (*Indian Constitutional Law and Philosophy*, 3 January 2020) <<https://indconlawphil.wordpress.com/2020/01/03/guest-post-the-constitutionality-of-the-citizenship-amendment-act-a-rejoinder/>> accessed 28 July 2021; Nivedhitha K, 'The Citizenship (Amendment) Bill is Unconstitutional' (*Indian Constitutional Law and Philosophy*, 5 December 2019) <<https://indconlawphil.wordpress.com/2019/12/05/guest-post-the-citizenship-amendment-bill-is-unconstitutional/>> accessed 28 July 2021; PTI, 'CAA Violates Constitutional Provisions: Amartya Sen' (*The Economic Times*, 8 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/caa-violates-constitutional-provisions-amartya-sen/articleshow/73151348.cms?from=mdr>> accessed 28 July 2021.

²⁸ Chimni (n 5); Sarker (n 12); Patricia Hyndman, 'The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants' [1987] 9 *Human Rights Quarterly* 49; Ishita Chakrabarty 'Show Your Religion, Claim Your Citizenship: The Citizenship Amendment Act, 2019' [2021] 35 *Emory International Law Review Recent Developments* 17; Arjun Nair, 'National Refugee Law for India: Benefits and Roadblocks' (2007) *Indian Institute of Peace and Conflict Studies Research Papers* <http://www.ipcs.org/issue_briefs/issue_brief_pdf/51462796IPCS-ResearchPaper11-ArjunNair.pdf>

structive ideas of Indian citizenship that seek to justify the shift of citizenship towards *jus sanguinis* based in descent and religious identity by drawing on Constituent Assembly debates on Partition and citizenship.²⁹ It argues for an updated re-look at the pluralist and secular foundations of Indian citizenship to be the guiding force for moulding Indian citizenship.³⁰

II. STATELESSNESS, THE RIGHT TO HAVE RIGHTS, AND SRI LANKAN TAMIL REFUGEES IN INDIA

A. Conceptual framework to statelessness and Hannah Arendt's 'right to have rights'

A stateless person is one without citizenship from any country in the world.³¹ Hannah Arendt famously drew the link between statelessness and the inability to realise rights in the aftermath of the First World War when Europe was teeming with millions of stateless persons.³² The First World War saw Europe crushed under a massive wave of ethnonationalist sentiment, with demands for independent states by various ethnic groups.³³ As a result, erst-while multinational states like Austro-Hungarian Empire dissolved to give way to separate states for, *inter alia*, ethnic Slovenians, Austrians, Hungarians.³⁴

accessed 28 July 2021; Jessica Field and Srinibas Burra, 'The Global Compact on Refugees: Indian Perspectives and Experiences' (2020) Academicians Working Group and UNHCR <<http://hdl.handle.net/10739/3407>> accessed 28 July 2021.

²⁹ As discussed by Chandrachud (n 27); Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (OUP 2013).

³⁰ Bhatia (n 51); N. Ram, 'The Evolving Politics of Citizenship in Republican India' in Bhatia and others (n 1).

³¹ 1954 Convention, art 1.

³² Hannah Arendt, 'The Decline of the Nation-state and the End of the Rights of Man' in Hannah Arendt (ed), *The Origins of Totalitarianism* (Harcourt, Brace & World Inc. 1966) p. 296; David Fitzgerald, 'The History of Racialized Citizenship' in Ayelet Shachar and others (ed), *The Oxford Handbook of Citizenship* (OUP 2017); Ute Daniel and others, 'International Encyclopedia of the First World War. Introduction' (1914-1918 online, 8 October 2014) <https://encyclopedia.1914-1918-online.net/article/1914-1918-online_international_encyclopedia_of_the_first_world_war_introduction> accessed 28 July 2021.

³³ Arendt (n 32); Fitzgerald (n 32); Jennifer Llewellyn and Steve Thompson, 'Nationalism as a Cause of World War I' (*Alpha History*, 7 September 2020) <<https://alphahistory.com/worldwar1/nationalism/>> accessed 28 July 2021; Editors of Britannica Encyclopedia, 'Paris Peace Conference 1919-1920' (*Encyclopædia Britannica*, 11 January 2021) <<https://www.britannica.com/event/Paris-Peace-Conference>> accessed 28 July 2021 ("Britannica"); Office of the Historian, 'The Paris Peace Conference and the Treaty of Versailles' (*United States Department of State*) <<https://history.state.gov/milestones/1914-1920/paris-peace>> accessed 28 July 2021.

³⁴ Arendt (n 32); Jane Mader, 'Hannah Arendt and World War I: On Statelessness and the Rise of Totalitarian Regimes' (Hannah Arendt Center for Politics and Humanities 1 March 2020) <<https://hac.bard.edu/amor-mundi/hannah-arendt-and-world-war-i-on-statelessness-and-the-rise-of-totalitarian-regimes-2020-01-03>> accessed 10 February 2021

Since there was not enough territory in Europe to accommodate all ethnicities' demands, some groups, like Jews, were reduced to minority status.³⁵ However, the states that housed these minorities were ethnonationalist states, meaning that they existed by and for specific ethnic identities; as a result, the states resented the presence of minorities in their territory.³⁶

Although the definition of "ethnicity" is contested, it commonly refers to a shared group identity based on characteristics like religion, race, language.³⁷ These characteristics have also been called descriptive characteristics.³⁸ When states determine citizenship based on descriptive characteristics, they are following the citizenship model of *jus sanguinis*.³⁹ In using *jus sanguinis*, the state intends to retain its ethnonationalist character for future generations by reproducing its existing population's demographic.⁴⁰ Thus, *jus sanguinis* also derives citizenship based on descent. On the other hand, states may confer

³⁵ Arendt (n 32); Fitzgerald (n 32); the new states signed treaties in recognition of their obligation to safeguard minority rights. However, the obligation to preserve minority rights came in sharp conflict with the nationalistic fervour which had birthed the ethnonationalist states, creating immense resentment of minorities as in Arendt (n 32); Kheinkor Lamarr, 'Jurisprudence of Minority Rights: The Changing Contours of Minority Rights' (2018) Research Association for Interdisciplinary Studies Working Paper 15 <<http://rais.education/wp-content/uploads/2017/10/015March.pdf>>; Krisztina Than and Krisztina Fenyo, 'One Century on, Hungarians Still Feel World War One 'Injustice'' (*Reuters*, 4 June 2020) <<https://www.reuters.com/article/us-ww1-century-hungary-trianon-idUSKBN23B1SD>> accessed 28 July 2021; Elizabete Aunina, 'Perpetual Conflict of 'Turkishness': The Turkish State and its Minority Groups' (E-international Relations 11 April 2018) <<https://www.e-ir.info/2018/11/04/perpetual-conflict-of-turkishness-the-turkish-state-and-its-minority-groups/>> accessed 28 July 2021; see generally, Yakub Halabi, 'Tiny Religious Minorities and Minority Group Rights: The case of the Druze Community' [2020] 26 *Journal for the Study of Race, Nation and Culture* 739.

³⁶ Arendt (n 32); Lamarr (n 35); Edwin Wilmsen and Patrick McAllister (ed), *The Politics of Difference: Ethnic Premises in a World of Power* (University of Chicago Press 1996).

³⁷ Fitzgerald (n 32); although "ethnicity" is a contested term, the term "ethnic" can be understood as "those who identify themselves or are identified by others in cultural terms, such as language, religion, tribe, nationality, and possibly race" as in Joseph Rudolph, *Encyclopedia of Modern Ethnic Conflicts* (ABC-CLIO 2015); see generally, James Manor, "'Ethnicity' and Politics in India" [1996] 72 *Royal Institute of International Affairs* 459

³⁸ Carolina Nuñez, 'Mapping Citizenship: Status, Membership, and the Path in Between' [2016] 3 *Utah Law Review* 477.

³⁹ Fitzgerald (n 32); *jus sanguinis* is primarily followed in continental European countries as in Laura van Waas, 'Nationality Matters: Statelessness Under International Law' Human Rights Research Series (2008) <https://files.institutesi.org/Nationality_Matters.pdf> accessed 28 July 2021; Peter Schuck and Rogers Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (Yale University Press 1985); Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020); Patrick Weil, 'The Lessons of the French Experience for Germany and Europe' in David Cesarani and Mary Fulbrook (ed), *Citizenship, Nationality and Migration in Europe* (Routledge 1996); Ayelet Shachar, 'Children of a lesser state: Sustaining Global Inequality Through Citizenship Laws' Jean Monnet Working Paper 2/03 (2003) <<https://jeanmonnetprogram.org/archive/papers/03/030201.html>> accessed 28 July 2021; Alladi Krishnaswami Ayyar and KM Munshi, *Constituent Assembly Debates* pp. 3.18.149-3.18.181 (29 April 1947) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-29> accessed 28 July 2021.

⁴⁰ Schuck and Smith (n 39).

birth-based citizenship, termed *jus soli*.⁴¹ Under *jus soli*, citizenship is ascribed to an individual based on an objective criterion, usually, birth in the territory of a state.⁴²

Rogers Brubaker has discussed the mismatch of constructing “insiders” and “outsiders” based on ethnicity.⁴³ On the one hand, states use formal citizenship as a bright-line rule to segregate citizens or ‘insiders’ from non-citizens or ‘outsiders’, following *jus soli*.⁴⁴ On the other hand, states that follow *jus sanguinis* base citizenship on ethnicity, and not on formal citizenship, as the bright-line rule between ‘insiders’ and ‘outsiders’.⁴⁵ In this latter scenario, ‘insiders’ are members of one specific ethnicity, whereas ‘outsiders’ are persons of other ethnicities.⁴⁶

In this backdrop, Arendt argued that the post-war creation of ethnonationalist states posed an imminent threat to the rights of minorities in Europe.⁴⁷ For Arendt, the absence of a political community for individuals meant that they cannot realise their rights.⁴⁸ Thus, the nation-state, specifically an ethnic nation-state, was the only platform for individuals to realise their rights – an idea Arendt called the ‘right to have rights’.⁴⁹ For her, the right to citizenship was the ‘right to have rights’, since it provided a gateway for individuals to access other rights.⁵⁰

⁴¹ The foremost examples of countries that follow *jus soli* are the United Kingdom and the US as in Waas (n 39); Erin Blakemore, ‘Why the United States Has Birthright Citizenship’ (*History Stories*, May 12, 2020) <<https://www.history.com/news/birthright-citizenship-history-united-states>> accessed 28 July 2021; Christopher Lee, ‘*Jus soli* and *jus sanguinis* in the colonies: The Interwar Politics of Race, Culture and Multiracial Legal Status in British Africa’ [2011] 29 *Law and History Review* 497.

⁴² Nuñez (n 38); Schuck and Smith (n 39).

⁴³ Rogers Brubaker, ‘Citizenship as social closure’ in Rogers Brubaker (ed), *Citizenship and Nationhood in France and Germany* (Harvard University Press 1998).

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*; Fitzgerald (n 32).

⁴⁷ Arendt (n 32).

⁴⁸ Arendt (n 32); for Arendt, the absence of the ethnonationalist state meant that individuals do not have a “place in the world” to express opinions, participate in public life and exercise rights. A “place in the world”, then, means both the territory of the political community and a place of lawful residence as in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP 2012); Brubaker and Laitin, and Bosniak make similar arguments as in Rogers Brubaker and David Laitin, ‘Ethnic and Nationalist Violence’ [1998] 24 *Annual Review of Sociology* 423; Linda Bosniak, ‘Citizenship Denationalized (the State of Citizenship Symposium)’ [2000] 7 *Journal of Global Legal Studies* 447.

⁴⁹ Arendt (n 32); Leila Azar, ‘Hannah Arendt: The Right to Have Rights’ (*Critical Legal Thinking*, 12 July 2019) <<https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights/>> accessed 28 July 2021.

⁵⁰ Arendt (n 32); for Arendt, individuals are not born equal with inherent human rights; rather, they realised rights through their political communities. She was not convinced in the idea of ‘universal’ human rights as in Arendt (n 32); see generally Jeffrey Isaac, ‘A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights’ [1996] 90

India's Constituent Assembly saw a similar sentiment being voiced by Ajit Prasad Jain, who said that "citizenship is the bedrock of our constitution".⁵¹ In his view, citizenship was crucial for Indians because accessing rights, specifically constitutional rights, was contingent on citizenship.⁵² Thus, India has seen its own discussions of citizenship as the right to have rights.⁵³

Arendt prophesied that the right to have rights would come true for minorities in Europe. Although minorities were grudgingly given citizenship, the host countries' resentment of such minorities eventually won over. As a result, these countries stripped minorities of citizenship and exterminated them.⁵⁴ For Arendt, the resentment, and violent extermination of minorities in Europe was merely a logical extension of creating states based on ethnonationalism.⁵⁵

Most infamously, Arendt's nightmare played out in Nazi Germany, which defined who a "true German" was based on ethnicity.⁵⁶ Jews and other ethnicities who failed the test of being "true Germans" were denationalised, sent to concentration camps and massacred. Thus, the construction of ethnic "outsiders" aided Nazi Germany's Final Solution⁵⁷ to exterminate ethnic outsiders.⁵⁸

Race sciences, especially racial citizenships, fell into disuse in the aftermath of the Second World War, which had witnessed the horrors Nazi Germany had inflicted upon its perceived racial inferiors.⁵⁹ To safeguard against such

American Political Science Review 61; Morton Winston, 'Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights' [2009] 31 Human Rights Quarterly 278.

⁵¹ Ajit Prasad Jain, Constituent Assembly Debates Volume XI p. 11.162.164 (22 November 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-22> accessed 28 July 2021; Gautam Bhatia, 'Citizenship and the Constitution' in Bhatia and others (n 1).

⁵² Jain (n 51).

⁵³ Bhatia (n 51).

⁵⁴ Arendt (n 32); Kesby (n 48).

⁵⁵ Arendt (n 32).

⁵⁶ To identify 'true Germans', the Nazis employed race sciences, codifying them in the Nuremberg Laws. The Nuremberg Laws dictated that persons of Jewish descent were not 'true Germans' and ineligible for German citizenship as in Michael Berenbaum, 'Nürnberg Laws' (*Britannica*, 13 May 2020) <<https://www.britannica.com/topic/Nurnberg-Laws>> accessed 28 July 2021;

⁵⁷ "The term "Final Solution of the Jewish Question" was a euphemism used by Nazi Germany's leaders. It referred to the mass murder of Europe's Jews. It brought an end to policies aimed at encouraging or forcing Jews to leave the German Reich and other parts of Europe" as in US Holocaust Memorial Museum, 'Final solution: overview' <<https://encyclopedia.ushmm.org/content/en/article/final-solution-overview>> accessed 28 July 2021.

⁵⁸ Dan Stone, *Histories of the Holocaust* (OUP 2010); Peter Hayes and John Roth, *The Oxford Handbook of Holocaust Studies* (OUP 2011); a United Nations study recognised the connection between statelessness and genocide, persecution and racism as in UN Ad Hoc Committee on Refugees and Stateless Persons 'A Study of Statelessness' (1 August 1949) E/1112; E/1112/Add.1; US Holocaust Memorial Museum, Nazi racial science <<https://www.ushmm.org/collections/bibliography/nazi-racial-science>> accessed 28 July 2021.

⁵⁹ Romila Thapar, 'Citizenship: The Right to be a Citizen' in Bhatia and others (n 1).

discriminatory denationalising acts by States in the future, the UN drafted two conventions on statelessness – the 1954 Convention and the Convention on the Reduction of Statelessness, 1961 (“1961 Convention”).⁶⁰ However, as many unfortunate instances have illustrated since,⁶¹ states continue to denationalise groups based on race or religion till date.⁶² Today, the 1954 Convention and the 1961 Convention provide a guide for countries to mould their policies in favour of the stateless populations they house.⁶³

B. Historical background to Sri Lankan Tamil refugees in India

Sri Lankan Tamil refugees fled religious persecution at the hands of the Sinhalese before and during the Sri Lankan civil war, and live as stateless individuals in Indian refugee camps. However, since they are a heterogeneous community, they have a variety of claims to Indian citizenship.

Sri Lanka’s population has historically consisted of the Sinhalese community as the majority, and the Tamils as a minority.⁶⁴ The Sinhalese community is primarily Buddhist and speak Sinhalese, whereas the Tamils are mostly Hindu and speak Tamil.⁶⁵ Within the Tamils, most are the indigenous “Jaffna Tamils”.⁶⁶ On the other hand, the smaller subset is the “Estate Tamils”, whose forefathers were brought to Ceylon from India to work in the British

⁶⁰ 1954 Convention; 1961 Convention; see generally Alice Edwards and Laura van Waas (ed) *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

⁶¹ James Minahan, *Encyclopedia of Stateless Nations: Ethnic and National Groups Around the World* (Greenwood Press 2016).

⁶² The Statelessness Convention recognises that states have the right to denationalise those who have obtained nationality through fraud or misrepresentation as in 1954 Convention, art 8.

⁶³ Amrita Ghosh, ‘Evaluating the State of Statelessness – The Curious Case of no Nationality’ [2018] 2 *Indian Journal of Law and International Affairs* 104; Tendayi Bloom, ‘Problematizing the Convention on Statelessness’ United Nations University Institute on Globalization, Culture and Mobility (2013) <<https://gcm.unu.edu/publications/policy-reports/problematizing-the-conventions-on-statelessness.html>> accessed 28 July 2021.

⁶⁴ Nasreen Chowdhory, ‘State Formation, Marginality and Belonging: Contextualizing Rights of Refugees in India, Bangladesh and Sri Lanka’ in Nasreen Chowdhory (ed), *Refugees, Citizenship and Belonging in South Asia: Contested Terrains* (Springer 2018); Nasreen Chowdhory, ‘The Politics of Accommodation and the Rights of Tamils in Sri Lanka’ in Nasreen Chowdhory (ed), *Refugees, Citizenship and Belonging in South Asia: Contested Terrains* (Springer 2018); Partha Ghosh, *Migrants, Refugees, and the Stateless in South Asia* (Sage Publications 2016); Robert Rotberg, *Creating Peace in Sri Lanka: Civil War and Reconciliation* (Brookings Institution 1999); Christine Fair, *Urban Battle fields of South Asia: Lessons Learned from Sri Lanka, India and Pakistan* (Rand Corporation 2005); Nasreen Chowdhory, ‘Citizenship and Membership: Placing Refugees in India’ in Nasir Uddin and Nasreen Chowdhory (ed) *Deterritorialised Identity and Transborder Movement in South Asia* (2019).

⁶⁵ Wolozin (n 6).

⁶⁶ *ibid.*

plantations.⁶⁷ While the two groups of Tamils share a common language and are predominantly Hindus, they have separate identities.⁶⁸

Since there is no single cause that led to the Sri Lankan civil war, it is helpful to view the situation holistically, as an occurrence caused due to a multitude of reasons.⁶⁹ First, Sinhalese political parties dominated electoral politics.⁷⁰ Even the most prominent Tamil party, the Tamil United Liberation Front, failed to muster votes in the 1977 and 1989 general elections.⁷¹ As a result, Tamils could not find a voice in law-making or key governmental positions in Sri Lanka. Second, armed with dominance in the state executive and the legislature, the Sinhalese government enacted a new constitution which declared Sinhalese as the official language,⁷² and Buddhism as the state religion.⁷³ This constitution created a furore among Tamils, who viewed it as a direct attack on their language and religion.⁷⁴ Third, the Sinhalese government enacted a citizenship law to strip Estate Tamils of citizenship.⁷⁵

⁶⁷ Rotberg (n 64).

⁶⁸ Wolozin (n 6).

⁶⁹ Wolozin (n 6); Rotberg (n 64); Fair (n 64); Ahilan Kadirgamar, 'Polarization, Civil War and Persistent Majoritarianism in Sri Lanka' in Thomas Carothers and Andrew O'Donohue (ed), *Political Polarization in South and Southeast Asia: Old Divisions, New Dangers* (Carnegie Endowment for International Peace 2020); Amita Shastri, 'Estate Tamils, The Ceylon Citizenship Act of 1948 and Sri Lankan Politics' [1999] 8 *Contemporary South Asia* 65.

⁷⁰ Rotberg (n 64); Fair (n 64).

⁷¹ Fair (n 64); K Mohanasundram, 'Tamil Nadu and LTTE: Changing trends in ethnic Relationships' [1985] 69 *Proceedings of the Indian History Congress* 1161; Sonia Bouffard and David Carment, 'The Sri Lanka Peace Process: A Critical Review' [2006] 1 *Journal of South Asian Development* 151; Nuwan Senaratna, 'A Brief History of Sri Lankan Parliamentary Elections' (*Medium*, 17 December 2019) <<https://medium.com/on-politics/a-brief-history-of-sri-lankan-parliamentary-elections-ea14a98afcca>> accessed 28 July 2021.

⁷² Constitution of Sri Lanka (Ceylon) 1972, art 7; the language policy had far-reaching consequences; for instance, it significantly reduced Tamils' strength in civil services and allowed the Sinhalese to 'take-over' the schooling system as in Wolozin (n 6); Grace Pieris 'The Contribution of Education to Tamil Separatism and to the Ethnic Conflict in Sri Lanka' [2019] 16 *Aleph*, *UCLA Undergraduate Research Journal for the Humanities and Social Sciences* 145.

⁷³ Constitution of Sri Lanka (Ceylon) 1972, art 6.

⁷⁴ Wolozin (n 6); Rotberg (n 64); Fair (n 64); Shastri (n 69).

⁷⁵ Rotberg (n 64); Chowdhury (n 64); Rashmi Dias and others, *Hill Country Tamils of Sri Lanka: Towards Meaningful Citizenship* (2019); Ceylon Citizenship Act, 1948; Gerrard Khan, 'Citizenship and Statelessness in South Asia', Working Paper No. 47 Tufts University (2001) <<https://www.unhcr.org/research/working/3bf0ff124/citizenship-statelessness-south-asia-gerrard-khan.html>> accessed 28 July 2021; citizenship was available only by establishing descendants who were Sri Lankans, which was impossible for Estate Tamils whose forefathers were Indian citizens as in Shastri (n 69); the Supreme Court of Ceylon found that government officials were trying to intentionally reject Estate Tamils' applications while implementing the Ceylon Citizenship Act, 1948 as in Wolozin (n 6); Shastri (n 69); *Soosey Fernand v Commissioner for Registration of Indian and Pakistani Residents* (1955) NLR 57 and *Duraisamy v Commissioner for Registration of Indian and Pakistani Residents* (1955) NLR 56 as in Luwie Ganesathasan and Asanga Welikala, *Report on Citizenship Law: Sri Lanka* (2017) <https://cadmus.eui.eu/bitstream/handle/1814/46448/RSCAS_GLOBALCIT_CR_2017_10.pdf> accessed 28 July 2021.

Tamil militancy grew in Sri Lanka to counter Sinhalese dominance in State and polity, with the Liberation Tigers of Tamil Eelam (“LTTE”) establishing themselves as the most critical group of the prevailing government. The LTTE primarily demanded for the creation of a separate Tamil nation, Eelam.⁷⁶ The militancy groups embattled the Sinhala-dominated government for over three decades, punctuated by multiple failed peace talks.⁷⁷

Amidst the ethnic violence which cost civilians their lives and property, thousands of Tamils fled the civil war and crossed the ocean into India seeking refuge.⁷⁸ The fleeing groups primarily came into Tamil Nadu because they felt a deep bond of shared culture and language. In the aftermath of the Sri Lankan civil war, there are two main Sri Lankan Tamil clusters in India.

The first group comprises the Estate Tamils, who were repatriated to India through pacts between India and Sri Lanka.⁷⁹ The second group comprised of refugees fleeing the civil war, who were resettled in numerous camps by the Indian government (“Camp-Refugees”). They entered India in three waves starting in 1984, up to 2006, based on the ebb and flow of the Sri Lankan civil war.⁸⁰

Over time, the Indian and Sri Lankan governments made several bilateral attempts to repatriate willing Sri Lankan Tamils from Indian refugee camps to Sri Lanka.⁸¹ However, political fallouts and the violence of the war marred

⁷⁶ Rotberg (n 64); Fair (n 64); Shastri (n 69); Robert Kearney, ‘Ethnic Conflict and the Tamil Separatist Movement in Sri Lanka’ [1985] 25 *Asian Survey* 898; the LTTE demanded for a separate Tamil state in the Jaffna peninsula, the traditional homeland for Tamils, called “Eelam” as in Chowdhory (n 64).

⁷⁷ Chowdhory (n 64); Rotberg (n 64); Fair (n 64).

⁷⁸ Rotberg (n 64).

⁷⁹ Abhijit Dasgupta, ‘Repatriation of Sri Lankan Refugees: Unfinished Tasks’ [2003] 38 *Economic and Political Weekly* 2365; however, the term “repatriates” is somewhat misleading because neither Indian nor Sri Lankan governments considered their choices in the repatriation process. Interestingly enough, repatriates also distance themselves from Camp-Refugees. Ostensibly, they wish to dissociate from the poverty and the ad-hoc way of life in the camps. Instead, repatriates’ narratives in studies focus on resettlement into “respectable” neighbourhoods in Chennai and normalcy in everyday life, for instance, visiting Sri Lanka using their Indian passports like regular citizens as in Anne-Sophie Bentz and Anthony Goreau-Ponceaud, ‘To be or not to be a Refugee? Reflections on Refugeehood and Citizenship among Sri Lankan Tamils in India’ [2020] 24 *Citizenship Studies* 176.

⁸⁰ Chowdhory (n 64); Bentz and Goreau-Ponceaud (n 79); Pavithra Jayawardena ‘Sri Lankan Out-Migration: Five Key Waves Since Independence’ [2020] 1 *University of Colombo Review* 101; Himanshi Raizada, ‘Sri Lankan refugees in India: The Problem and the Uncertainty’ [2013] 1 *International Journal of Peace and Development* 1.

⁸¹ Urmila Phadnis, ‘The Indo-Ceylon Pact and the “Stateless” Indians in Ceylon’ [1967] 7 *Far Eastern Survey* 226; Urmila Phadnis and Lalit Kumar, ‘The Sirimavo-Shastri Pact of 1964: Problems and Prospects of Implementation’ [1975] 31 *India Quarterly: A Journal of International Affairs* 249.

these efforts.⁸² Further, Sri Lanka has tried to domestically alleviate Estate Tamils' statelessness through various laws passed in 1986, 1988, 2003 ("2003 Grant of Citizenship Act") and 2009.⁸³ Some of these laws witnessed limited success due to onerous procedural requirements,⁸⁴ loss of documentation by civilians in the wake of the war,⁸⁵ and the prevailing socio-political climate.⁸⁶

However, the 2003 Grant of Citizenship Act was a notable exception since it successfully resolved statelessness for 190,000 Estate Tamils in Sri Lanka.⁸⁷ The success of the 2003 Grant of Citizenship Act lies in its simplified procedure of granting citizenship and collaboration with the UNHCR along with local stakeholders.⁸⁸ Sri Lanka earned immense praise for alleviating its statelessness problem from the UNHCR, which called the 2003 Grant of Citizenship Act a "turning point" in Sri Lanka's history.⁸⁹ Unfortunately, India has not yet followed suit in demonstrating political willingness to reduce statelessness for Sri Lankan Tamil refugees.

III. INDIAN CITIZENSHIP LAW AND THE "ILLEGAL MIGRANT" QUESTION

A. Framework of Indian citizenship laws

Understanding citizenship law in India requires an understanding of both citizenship laws and the immigration regime.⁹⁰ Collectively, this set of laws distinguishes between insiders or citizens, and outsiders or non-citizens.⁹¹

⁸² Phadnis and Kumar (n 81); Richa Bajaj, 'Indo-Sri Lankan Relations: Nehru to Indira Gandhi' (DPhil thesis, Aligarh Muslim University 2004); Akshaya Mishra, 'Indira Gandhi Helped Train Tamil Rebels, and Reaped Whirlwind' (Firstpost, 23 May 2011) <<https://www.firstpost.com/world/indira-gandhi-helped-train-tamil-rebels-and-reaped-whirlwind-13913.html>> accessed 28 July 2021.

⁸³ Grant of Citizenship to Stateless Persons Act 1986; Grant of Citizenship to Stateless Persons (Special Provisions) Act 1988; Grant of Citizenship to Persons of Indian Origin Act, 2003; Citizenship to Persons of Indian Origin (Amendment) Act 2009.

⁸⁴ Grant of Citizenship to Stateless Persons Act 1986, s 3; Indo-Ceylon Agreement (Implementation) Act 1967.

⁸⁵ Wolozin (n 6).

⁸⁶ To illustrate some socio-political events, India intervened in the civil war with the Indian Peacekeeping Force, Rajiv Gandhi was assassinated by an LTTE member, Sri Lankan leadership changed with a fresh general election as in Chimni (n 7); Chowdhory (n 64); Dasgupta (n 79).

⁸⁷ Chetani Wijetuna, 'Feature: Sri Lanka makes citizens out of stateless tea pickers' (*UNHCR India*, 7 October 2004) <<https://www.unhcr.org/news/latest/2004/10/416564cd4/feature-sri-lanka-makes-citizens-stateless-tea-pickers.html>> accessed 28 July 2021.

⁸⁸ UNHCR, *Resolving existing major situations of statelessness, Good Practices Paper Action I* (2015).

⁸⁹ Chimni (n 5).

⁹⁰ This point is explained further infra in Part III (b).

⁹¹ Brubaker (n 43).

The first source for consideration is the Indian Constitution.⁹² The Constituent Assembly drafted constitutional provisions of citizenship, keeping in mind the most pressing issue of the time – the Partition of India at independence.⁹³ To illustrate, Article 5 confers birth based citizenship only to those who were alive at the time of the commencement of the Constitution.⁹⁴ Similarly, Articles 6 and 7 deal only with migrants moving to or from India on account of Partition.⁹⁵ The Constituent Assembly also inserted Article 11 to empower the Parliament to make citizenship laws based on India's needs beyond independence.⁹⁶

The second source is the primary law on citizenship in India, the Citizenship Act, 1955 ("1955 Act"), enacted by the Parliament in pursuance of Article 11.⁹⁷ Under the 1955 Act, there are five modes prescribed for acquiring Indian citizenship, namely, by birth,⁹⁸ by descent,⁹⁹ through registration,¹⁰⁰ by naturalisation,¹⁰¹ and through India incorporating new territory.¹⁰²

The third and equally crucial source is India's immigration regime that governs non-citizens. The Foreigners Act, 1946 ("1946 Act")¹⁰³ is a colonial era legislation that focuses on the entry and exit of foreigners from India based on the possession of legal documents like passports, visas, entry or exit permits. These documents are obtained under the Passports Act, 1967,¹⁰⁴ and the Passports Rules, 1980.¹⁰⁵

Alternatively, foreigners can seek temporary or permanent visas from the Indian government under the Long-Term Visa Guidelines ("LTV Guidelines").¹⁰⁶ A long-term visa ("LTV") is particularly attractive because it opens up avenues to other rights, like obtaining education, identity cards and

⁹² Constitution of India 1950, ch II, arts 5, 6, 7, 8, 9, 10, and 11.

⁹³ Jayal (n 23); Jayal (n 27); BR Ambedkar, Constituent Assembly Debates vol IX p 9.115.178 (10 August 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-10> accessed 28 July 2021; in this vein, Bhatia claims that in effect, the Constitution tells us "nothing" about citizenship as in Bhatia (n 51).

⁹⁴ Constitution of India 1950, art 5.

⁹⁵ Constitution of India 1950, arts 6 and 7.

⁹⁶ Constitution of India 1950, art 11.

⁹⁷ Citizenship Act 1955 along with Citizenship Rules 2009.

⁹⁸ 1955 Act, s 3.

⁹⁹ 1955 Act, s 4.

¹⁰⁰ 1955 Act, s 5.

¹⁰¹ 1955 Act, s 6.

¹⁰² 1955 Act, s 7.

¹⁰³ Foreigners Act 1946.

¹⁰⁴ Passports Act 1967.

¹⁰⁵ Passports Rules 1980.

¹⁰⁶ Ministry of Home Affairs, Guidelines for Long Term Visa <https://www.mha.gov.in/PDF_Other/AnnexVI_01022018.pdf> accessed 28 July 2021 ("Long-Term Visa Guidelines").

housing on an interim basis.¹⁰⁷ The LTV Guidelines also allow applications from applicants fearing persecution in a manner that mirrors the language of the Convention and Protocol Relating to the Status of Refugees 1951 (“1951 Convention”).¹⁰⁸ LTVs can also be used to apply for Indian citizenship through registration or naturalisation.¹⁰⁹

Since India is not a party to the 1951 Convention, the 1954 Convention or the 1961 Convention, and also does not have a domestic law on refugees or stateless persons, the government governs the presence of these groups through the LTV Guidelines.¹¹⁰ The absence of this recognition under an official legislation is significant, considering that in 2021, India housed as many as 208,065 refugees, many of whom are also stateless like the Sri Lankan Tamils.¹¹¹ Data from the Ministry of Home Affairs indicates that out of the total refugee population, over 94,000 are Sri Lankan Tamil refugees alone, with 59,506 of them living in camps, and 35,000 living outside of camps.¹¹²

In the absence of a specific targeted law, refugees and stateless persons are sent into a common immigration system with foreigners, and governed through the state’s political and administrative set-ups under the 1946 Act.¹¹³ The 1946 Act comes into play here since it does not differentiate the intent of different groups of foreigners entering India. As Bhairav Acharya highlights, tourists, refugees and migrants have varied reasons for entering India.¹¹⁴ However, since the 1946 Act is agnostic to these differences, it makes refugees and stateless persons vulnerable to detention, trial or deportation.¹¹⁵

¹⁰⁷ Long-Term Visa Guidelines, s 5 (iii).

¹⁰⁸ Long-Term Visa Guidelines, s 5 (‘well-founded fear of persecution based on race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion’); 1951 Convention, s 1.

¹⁰⁹ Form IC-5(1)(A), Form IC-5(1)(B), Form IC-5(1)(C), Form IC-5(1)(D), Form IC-5(1)(E), Form IC-5(1)(E), Form IC-5(1)(F), Form IC-5(1)(G); Citizenship Rules 2009, s 4, s 5, s 6, s 7, s 8, s 9, s 10.

¹¹⁰ Lok Sabha Unstarred Question No. 2623 (2 August 2016) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2016-pdfs/ls-020816/2623%20E.pdf>>; Lok Sabha Unstarred Question No. 6307 (5 May 2015) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2015-pdfs/ls-050515/6307.pdf>>; Press Information Bureau PIB ‘Law for Refugees in India’ (6 August 2014) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=108152>> accessed 28 July 2021.

¹¹¹ Chinni (n 5); Bhairav Acharya, ‘The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals’ [2016] 9 NUJS Law Review 173; United Nations High Commissioner for Refugees, India (31 March 2021) <<https://reporting.unhcr.org/sites/default/files/India%20fact%20sheet%20March%202021.pdf>> accessed 28 July 2021.

¹¹² Ministry of Home Affairs, *Annual Report 2019-20*, para 13.

¹¹³ Chinni (n 5); Saurabh Bhattacharjee, ‘India Needs a Refugee Law’ [2008] 43 Economic and Political Weekly 71.

¹¹⁴ Acharya (n 111).

¹¹⁵ Chakrabarty (n 28); Nair (n 28); Bhattacharjee (n 113); Nasreen Chowdhory, ‘Understanding refugee rights in India’ in Nasreen Chowdhory (ed), *Refugees, Citizenship and Belonging in South Asia: Contested Terrains* (Springer 2018); the Madras HC made this explicit finding in *K Arulinbathevar v State of TN*, (2017) 4 MLJ (CrI) 121.

Therefore, the state's approach to refugees and stateless persons is subject to a reorientation of political will, the identity of the individual in question, and the prevailing socio-political climate.¹¹⁶ To illustrate, the Indian State metes differential treatment over time depending on the incumbent government – although it welcomed Sri Lankan Tamil refugees in the 1980s, the current government has not accorded similar treatment for the Rohingyas.¹¹⁷ Various reports by human rights organisations and media forums have also documented that the Indian State has consistently pressured foreigners to prove their identity, confined suspected foreigners in camps, and ordered deportations under the 1946 Act.¹¹⁸

To compound the problems under the 1946 Act, courts have been overly deferential in creating safeguards against the 1946 Act. For instance, in the cases of *Hans Muller*,¹¹⁹ and *Louis de Raedt*,¹²⁰ the SC declared that the 1946 Act confers unfettered discretion to the government to expel foreigners. The positions taken in *Hans Muller* and *Louis de Raedt* have consistently been

¹¹⁶ 1946 Act, s 2, s 7A, s 8, s 11, s 14; Chakrabarty (n 28); Nair (n 28).

¹¹⁷ Chowdhury (n 5) ; Bhattacharjee (n 113); Anasuya Syam, 'Patchwork of Archaic Regulations and Policies in India: A Breeding Ground for Discriminatory Practice Against Refugees' [2019] 51 New York University Journal of International Law and Politics 14; to illustrate, India recently deported seven Rohingya persons from Manipur to Myanmar as in Ishita Kumar and Nayantara Rajan, 'By Deporting 7 Rohingya Men, Supreme Court and Government of India failed to uphold International Humanitarian Obligations' (*The Leaflet*, 6 October 2018) <<https://www.theleaflet.in/deporting-rohingya-supreme-court-government-india-failed-international-humanitarian-obligations/#>> accessed 28 July 2021.

¹¹⁸ Passport (Entry into India) Act 1920, s 5; Chimni (n 5); Bhattacharjee (n 113); Amnesty International India, *Between Fear and Hatred: Surviving Migration Detention in Assam* (2018); Sabyasachi Chaudhary, 'Dispossession, Un-freedom, Precarity: Negotiating Citizenship Laws in Postcolonial South Asia' [2021] 120 South Atlantic Quarterly 209; Talha Abdul Rahman, 'Identifying the 'Outsider' An Assessment of Foreigner Tribunals in the Indian State of Assam' [2020] 2 Statelessness and Citizenship Review 112; Ahmed Shaheed, *Institutional Discrimination and Statelessness in India* (2020) <<https://www.ohchr.org/Documents/Issues/Religion/Submissions/CSOs/11.barak-huma-rights-protection-committee.pdf>> accessed 28 July 2021; Mohsin Alam Bhat, 'Citizenship's Rule of exception' (*The Leaflet*, 26 January 2021) <<https://www.theleaflet.in/citizenships-rule-of-exception/#>> accessed 28 July 2021; Kai Schultz, 'As India Clamps Down on Migration, Millions May Lose Citizenship' (*The New York Times*, 30 July 2018) <<https://www.nytimes.com/2018/07/30/world/asia/india-citizenship-assam-muslim.html>> accessed 28 July 2021; Tawqeer Hussain, 'How is it Human?': India's Largest Detention Centre Almost Ready' (*Al Jazeera*, 2 January 2020) <<https://www.aljazeera.com/news/2020/1/2/how-is-it-human-indias-largest-detention-centre-almost-ready>> accessed 28 July 2021; Faizan Mustafa, 'Kangaroo Tribunals: Foreigners' Tribunals Almost Another Arm of BJP Government in Assam' *The Indian Express* (8 October 2019) <<https://indianexpress.com/article/opinion/columns/supreme-court-foreigners-tribunals-assam-nrc-6058158/>> accessed 28 July 2021; Darshana Mitra, 'From Citizen to Criminal: Citizenship Determination in India and the Limits of Due Process' (*The Leaflet*, 27 January 2021) <<https://www.theleaflet.in/from-citizen-to-criminal-citizenship-determination-in-india-and-the-limits-of-due-process/#>> accessed 28 July 2021.

¹¹⁹ *Hans Muller of Nurenburg v Supt.*, Presidency Jail AIR 1955 SC 367.

¹²⁰ *Louis De Raedt v Union of India* (1991) 3 SCC 554 : AIR 1991 SC 1886.

reiterated by courts, firmly entrenching the unfettered discretion of the state in dealing with foreigners as the law of the land.¹²¹

Sri Lankan Tamil refugees, too, have fallen prey to the draconian provisions of the 1946 Act. The Tamil Nadu government has passed notifications under the 1946 Act directing that Sri Lankan Tamil refugees cannot move outside refugee camps, and must obtain permission from the Collector to do so.¹²² In persistent attempts to break free from this restriction, Sri Lankan Tamil refugees have filed numerous petitions challenging such notifications.¹²³ However, courts have reiterated *Hans Muller* and *Louis de Raedt* in saying that the 1946 Act confers unfettered discretion on the government for dealing with foreigners.¹²⁴

Unfortunately, international law can provide little respite to refugees and stateless persons in India.¹²⁵ Although India is a party to the covenants on civil and political rights¹²⁶ and economic, social and cultural rights,¹²⁷ they are enforceable in India to a limited extent.¹²⁸ India has not made a meaningful

¹²¹ *Reza Abdullatif Saboonchi v State of Maharashtra*, 2012 SCC OnLine Bom 1363 : 2013 (4) Bom CR (Cri) 427; *Republic of Italy v Union of India*, (2013) 4 SCC 721; *Johnny Paul Pierce v Union of India* 2020 SCC OnLine Ker 2958; *Rehman Shagoo v State of J&K*, 1958 SCC OnLine J&K 1 : AIR 1958 J&K 29; *Giani Bakshish Singh v Govt of India*, (1973) 2 SCC 688 : AIR 1973 SC 2667; *G Moorthy v State of Karnataka* 1992 SCC OnLine Kar 362 : (1993) 1 Kant LJ 376; *Fred Howard Haering v State of HP* 1994 SCC OnLine HP 26 : AIR 1996 HP 27; *Gilles Pfeiffer v Union of India*, 1996 SCC OnLine Mad 190 : AIR 1996 Mad 322; *Tasleem Murad v Govt of AP* 2002 SCC OnLine AP 738 : (2002) 5 ALD 307; *Cherchi Domenico Ferdinando v Union of India* 2004 SCC OnLine Del 93 : AIR 2004 Del 147; *Kalavathy v Government of Tamil Nadu*, 1995-2-LW(CrI) 690; *Kanu Sanyal v Distt Magistrate, Darjeeling* (1974) 4 SCC 141 : AIR 1974 SC 510; *P. Loganathan v Inspector of Police*, Writ Petition No. 14962 of 1991 (9 December 1991); *Maheswaran v State of Tamil Nadu*, H.C.P. 1208 of 2005 (21 March 2006); *Premavathy v State of TN* 2003 SCC OnLine Mad 764 : 2004 CriLJ 1475; *Rasenthiram v State of Tamil Nadu*, H.C.P. No. 278 of 2007 (18 August 2007); *Sasikala v State of TN* 2006 SCC OnLine Mad 642; *Selvakulendran v State of TN* HCP No. 1249 of 2005 decided on 15 March 2006.

¹²² 1946 Act, s 3(g); Chimni (n 5); Anupama Roy, *Mapping citizenship in India* (OUP 2010).

¹²³ *Kalavathy* (n 121); *Kanu Sanyal* (n 121); *P. Loganathan* (n 121); *Maheswaran* (n 121); *Premavathy* (n 121); *Rasenthiram* (n 121); *Sasikala* (n 121); *Selvakulendran* (n 121).

¹²⁴ *ibid.*

¹²⁵ VG Hegde, 'Indian Courts and International Law' [2010] 23 *Leiden Journal of International Law* 53; Bimal Patel, *India and International Law* (Brill 2005); Shuvro Sarker, 'Reducing Statelessness: A New Call for India' (2014) *Policies and Practices* Calcutta Research Group 60 <<https://ssrn.com/abstract=2961121>> accessed 28 July 2021; Unnati Ghia, 'Suddenly Stateless: International Law Implications of India's New Citizenship Law' (*Opinio Juris*, 5 February 2020) <<http://opiniojuris.org/2020/02/05/suddenly-stateless-international-law-implications-of-indias-new-citizenship-law/>> accessed 28 July 2021.

¹²⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) ("ICCPR").

¹²⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976).

¹²⁸ Constitution of India 1950, art 51; India has also tried to cite reservations to certain provisions of these covenants, for instance, for ICCPR, art 13, India reserves the right to apply

attempt towards formulating adequate policy level responses for the issues faced by refugees or stateless persons resident in its territory.¹²⁹

B. Foundational shifts in Indian citizenship: The illegal migrant issue

Traditionally, there have been two categories in citizenship law – citizens and non-citizens. While the 1955 Act deals with the former category for granting, revoking and renouncing citizenship, the 1946 Act focuses on the entry and exit of the latter by inquiring if such foreigners possess the requisite legal documents.¹³⁰ However, the creation of a third category of the ‘illegal migrant’ has thrown a spanner in the works, by blurring the distinction between citizenship law and immigration law.¹³¹ Under Indian law, an illegal migrant is a foreigner who has entered India without valid documents, or one who stays in India beyond the time permitted by travel documents.¹³²

The category of the illegal migrant was initially created to address the specificities of the Assam Accord.¹³³ However, incremental amendments to citizenship law have introduced the category of the illegal migrant for general determinations of citizenship outside of Assam as well.¹³⁴

domestic law relating to foreigners as in Chimni (n 5); Chakrabarty (n 28); Hegde (n 125); Patel (n 125).

¹²⁹ Bhattacharjee (n 113).

¹³⁰ Anubhav Dutt Tiwari and Prashant Singh, ‘Experiencing the Violence of Law: Contextualising the NRC Process in Assam’ 12 [2021] *Jindal Global Law Review* 29.

¹³¹ *ibid.*

¹³² 1955 Act, s 2 (1) (b).

¹³³ The creation of ‘illegal migrant’ in citizenship law was a response to the Assam Accord, however, a detailed study of citizenship issues in Assam and the Assamese NRC exercise is beyond the scope of this paper, see Ram (n 30); Rahman (n 118); *Sarbananda Sonowal v Union of India* (2005) 5 SCC 665 : AIR 2005 SC 2920; *Assam Public Works v Union of India*, (2019) 9 SCC 70; *Assam Sanmilita Mahasangha v Union of India* (2015) 3 SCC 1; Chetna Sharma, ‘Citizenship Amendment Bill 2016: continuities and contestations with special reference to politics in Assam, India’ [2019] 4 *Asian Ethnicity* 522; Alok Kumar, ‘National Register of Citizens and the Supreme Court’ [2018] 53 *Economic and Political Weekly* 10; Shahnawaz Malik ‘Future of Citizenship Laws in India With Special Reference to Implementation of NRC in Assam’ [2020] 6/4 *Journal of Legal Studies and Research* <<https://ssrn.com/abstract=3665733>>; Gautam Bhatia, ‘Privacy, Data Protection, and the National Population Register’ (*Indian Constitutional Law and Philosophy*, 28 February 2020) <<https://indconlawphil.wordpress.com/2020/02/28/privacy-data-protection-and-the-national-population-register/>> accessed 28 July 2021; Mohammad Hassan, ‘The Origin, History and Legality of the Citizenship (Amendment) Act 2019’ [2020] <<https://dx.doi.org/10.2139/ssrn.3571012>>; Explained Desk, ‘Explained: Who are the 19 Lakh Excluded from Assam NRC, and What Next for them?’ (*The Indian Express*, 14 September 2019) <<https://indianexpress.com/article/explained/explained-assam-nrc-final-list-published-19-lakh-excluded-5953556/>> accessed 28 July 2021.

¹³⁴ Niraja Gopal Jayal, ‘Indian Citizenship’ in Engin Isin and Peter Nyers (ed), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014).

The second impact of this new category has been through the effect of the Foreigners Tribunals (“FT”)¹³⁵, which deals with suspected foreigners.¹³⁶ As Anubhav Tiwari and Prashant Singh highlight, the FT embarked on a mission that was markedly different from the original intent of the 1946 Act. Instead of simply regulating the entry and exit of identified foreigners, the FTs now make determinations about the legality of suspected foreigners’ presence in India. Such a determination by the FT is based either by the suspected foreigners demonstrating the possession of valid legal documents to justify their presence in India, or by proving that they are Indian citizens.¹³⁷ Since foreigners are defined as “persons who are not citizens of India”, and illegal migrants are foreigners who have entered India without valid legal documents, the determination of one’s status as a foreigner or an illegal migrant inherently also carries a determination of whether or not they are a citizen.¹³⁸

However, the consequence of being declared one of these two categories is strikingly different – while being declared a foreigner makes one eligible for deportation, being declared an illegal migrant disqualifies one or their children from acquiring Indian citizenship. Although the FTs have not affected Sri Lankan Tamil refugees directly yet,¹³⁹ they have created a jurisprudential shift by legitimising the inquiry into the citizenship status of anyone the State chooses, and blurring the demarcation between citizenship law and immigration law.¹⁴⁰

The category of ‘illegal migrant’ was first introduced in the 1955 Act through an amendment in 2004 (“2004 Amendment”).¹⁴¹ The 2004 Amendment marked a sea change in citizenship law since it introduced a third, in-between

¹³⁵ Interestingly, the 1946 Act does not provide for a mandate to make determinations of the citizenship status of persons, or for setting up FTs. Thus, the FTs are presently functioning without any statutory mandate, and are arguably constitutionally impermissible as in Talha; this question is to be answered by a larger bench of the SC as in *Assam Public Works v Union of India* (2019) 9 SCC 70.

¹³⁶ Foreigners (Tribunals) Order 1964.

¹³⁷ Tiwari and Singh (n 130); previously, illegal migrants were regulated under the Illegal Migrants (Determination by Tribunal) Act 1983 which had stronger due process requirements compared to the 1946 Act. However, the SC declared the law to be unconstitutional, all cases regarding illegal migrants came under the 1946 Act as in *Malischewski* (n 13).

¹³⁸ S 2 (a), s 2 (b), 1946 Act

¹³⁹ The 1964 Order which had previously been confined to Assam in its application has been extended to the entire country as in Vijaita Singh, ‘All States can now Constitute Foreigners Tribunals’ (*The Hindu*, 10 June 2019) <<https://www.thehindu.com/news/national/all-states-can-now-constitute-foreigners-tribunals/article27706366.ece>> accessed 28 July 2021.

¹⁴⁰ Harsh Mander and others, ‘Citizenship and the Mass Production of Statelessness in Assam’ in Three Essays Collective and Centre for Equity Studies, *India Exclusion Report 2019-2020* (2020).

¹⁴¹ Citizenship (Amendment) Act 2004, s 2 (i) (‘2004 Amendment’); Ram discusses that the explicit enumeration of religion in citizenship law was encoded in ethnonationalism, wherein ‘infiltrator’ was an ‘illegal migrant’ and ‘refugee’ was code for non-Muslim ‘illegal migrant’ as in Ram (n 30).

category of illegal migrants.¹⁴² Post the 2004 Amendment, persons born on or after January 26, 1950 but before July 1, 1987 are citizens by the simple fact of birth in India.¹⁴³ Next, persons born in India on or after July 1, 1987 but before January 1, 2004 are citizens if either of their parents was an Indian citizen at the time of their birth.¹⁴⁴ Finally, persons born on or after January 1, 2004 are citizens only if neither of their parents is an illegal migrant at the time of their birth.¹⁴⁵ Furthermore, the 1955 Act now also disqualifies persons who fall under the category of illegal migrant from obtaining citizenship by naturalisation or registration.¹⁴⁶

To identify and deport such illegal migrants, the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 (“2003 Rules”) were amended to initiate the preparation of an NRC.¹⁴⁷ The bleak future that may lie ahead with the country-wide implementation of the 2003 Rules appears to be foreshadowed by the Assam NRC exercise. Since the publication of the Assam NRC’s final list, the first formal exercise of this nature,¹⁴⁸ it has been heavily criticised by domestic and international commentators for rendering 19 million persons stateless.¹⁴⁹ Further, the numerous egregious errors resulting in

¹⁴² 2004 Amendment, s 2.

¹⁴³ 1955 Act, s 3 (1)(a).

¹⁴⁴ 1955 Act, s 3 (1)(b).

¹⁴⁵ 1955 Act, s 3 (1)(c).

¹⁴⁶ 1955 Act, s 3, s 5, s 6.

¹⁴⁷ Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003; Ministry of Home Affairs, Notification S.O. 2753(E) 31 July 2019; 1955 Act, s 3, s 14A; Nizamuddin Siddiqui, ‘Why Citizenship Matters? Some Relevant Observations on the Citizenship (Amendment) Act 2019 and the proposed National Register for Citizens in India’ [2019] SSRN <<https://dx.doi.org/10.2139/ssrn.3702897>> accessed 28 July 2021.

¹⁴⁸ The Assam NRC found 3,11,21,004 persons eligible for inclusion in the final list, whereas 19,06,657 were excluded as in BBC, ‘Assam NRC: What next for 1.9 Million “Stateless” Indians?’ (BBC, 31 August 2019) <<https://www.bbc.com/news/world-asia-india-49520593>> accessed 28 July 2021.

¹⁴⁹ Amnesty International India (n 118); NALSAR University of Law and others, *The Courts and the Constitution, 2020: Past, Present and Future Directions* (2020) <<https://lawandotherthings.com/wp-content/uploads/2020/12/Citizenship-Final.pdf>> accessed 28 July 2021; Raunak Sood, ‘An Analysis of the NRC Controversy in Assam: Migration and Citizenship in India’ (*Oxford Human Rights Hub*, 14 December 2018) <https://ohrh.law.ox.ac.uk/an-analysis-of-the-nrc-controversy-in-assam-migration-and-citizenship-in-india/> accessed 28 July 2021; CJP Team, ‘Why the CAA+NPR+NRC is a Toxic Cocktail for Everyone’ (*Citizens for Peace and Justice*, 27 January 2020) <<https://cjp.org.in/why-the-caanprnc-is-a-toxic-cocktail-for-everyone/>> accessed 28 July 2021; Harsh Mander and Mohsin Alam Bhat, ‘This Land is Mine’ (*Heinrich Böll India*, 31 January 2020) <<https://in.boell.org/en/2020/01/31/land-mine>> accessed 28 July 2021; Sangeeta Barooah, ‘Women Without Parents: An NRC Ground Report’ (*The Wire*, 13 September 2019) <<https://thewire.in/rights/women-without-parents-an-nrc-ground-report>> accessed 28 July 2021; *Parichay* Blog, ‘Interview with Swati Bidhan Baruah’ (*Parichay*, 5 October 2020) <<https://parichayblog.org/2020/10/05/interview-with-swati-bidhan-baruah/>> accessed 28 July 2021; Renuka Viswanathan, ‘Why Women are at Greater Risk with NPR/NRC’ (*The Citizen*, 23 February 2020) <<https://www.thecitizen.in/index.php/en/NewsDetail/index/7/18360/Why-Women-Are-At-Greater-Risk-With-NPRNRC>> accessed 28 July 2021.

exclusions from the NRC¹⁵⁰ have forced the government to re-think a pan-India NRC.¹⁵¹

Following the 2004 Amendment, the next major step was a notification brought by the Central Government (“2015 Amendment”) to exempt certain classes of foreigners from deportation.¹⁵² The most striking aspect of the eligibility requirements under the 2015 Amendment is its specific reference to religious identity.¹⁵³ Before the 2015 Amendment, religion-based bias was evident in Articles 6 and 7 of the Indian Constitution, and in the examination of one’s parents’ citizenship status for birth-based citizenship,¹⁵⁴ a thinly veiled inquiry into the religion of the applicant under the Citizenship Act.¹⁵⁵ With the 2015 Amendment, Indian citizenship laws were slowly shedding religion-neutrality in favour of actively protecting specific communities.

More recently, the 2019 Act was passed to exempt specific categories of individuals from being categorised as illegal migrants.¹⁵⁶ To qualify under the

¹⁵⁰ PTI, ‘Sitting MLA, Former Legislator, Kargil Veteran Excluded from NRC’ (*Business Standard*, 31 August 2019) <https://www.business-standard.com/article/pti-stories/sitting-mla-former-legislator-kargil-veteran-excluded-from-119083100949_1.html> accessed 28 July 2021.

¹⁵¹ PTI, ‘No Decision yet on Pan-India Rollout of National Register of Citizens, Centre tells Rajya Sabha’ (*The Financial Express*, 17 March 2021) <<https://www.financialexpress.com/india-news/no-decision-yet-on-pan-india-rollout-of-national-register-of-citizens-centre-tells-rajya-sabha/2214649/>> accessed 28 July 2021; Business Today, ‘“PM Modi is Right, no Talks on Nationwide NRC Yet,” Says Amit Shah’ (*Business Today*, 25 December 2019) <<https://www.businesstoday.in/current/economy-politics/pm-modi-was-right-no-talks-on-nationwide-nrc-yet-amit-shah/story/392598.html>> accessed 28 July 2021; Chetan Chauhan, ‘Amit Shah Reiterates Call for Pan-India National Register of Citizens: All you Need to Know’ (*Hindustan Times*, 11 December 2019) <<https://www.hindustantimes.com/india-news/amit-shah-reiterates-call-for-pan-india-national-register-of-citizens-all-you-need-to-know/story-XxQ9SqXwb1gi-PIA6zuiDRP.html>> accessed 28 July 2021; Soumya Das, ‘Centre has Pan-India NRC Plan, Claims WB BJP Booklet’ (*Deccan Herald*, 7 January 2020) <<https://www.deccanherald.com/national/east-and-northeast/centre-has-pan-india-nrc-plan-claims-wb-bjp-booklet-792005.html>> accessed 28 July 2021.

¹⁵² Citizenship (Amendment) Act 2015; Ministry of Home Affairs, Notification GSR 686 (E) 7 September 2015 <[https://upload.indiacode.nic.in/showfile?actid=AC_CEN_5_23_00048_194631_1523947455673&type=order&filename=Foreigners%20\(Amendment\)%20Order,%202015.pdf](https://upload.indiacode.nic.in/showfile?actid=AC_CEN_5_23_00048_194631_1523947455673&type=order&filename=Foreigners%20(Amendment)%20Order,%202015.pdf)> accessed 28 July 2021 (“Notification dated 7 September 2015”).

¹⁵³ Notification dated 7 September 2015, s 2; Ministry of Home Affairs, Notification G.W.R. 702 (E) 18 July 2016 <<http://egazette.nic.in/WriteReadData/2016/170822.pdf>> accessed 28 July 2021.

¹⁵⁴ 1955 Act, s 3 (1) (b), s 3 (1) (c).

¹⁵⁵ Discussed further infra Part III (c)(i); Constitution of India 1950, art 6, art 7; Jayal (n 23); Jayal (n 27); Niraja Gopal Jayal, ‘The 2016 Citizenship Amendment Bill Consolidates a Trend Towards a Majoritarian and Exclusionary Concept of Indian Citizenship’ (*The Caravan*, 20 February 2017) <<https://caravanmagazine.in/vantage/2016-citizenship-amendment-bill-majoritarian-exclusionary>> accessed 28 July 2021.

¹⁵⁶ 2019 Act, s 2; interestingly, lawyer Nizam Pasha highlights an inherent contradiction in the 2019 Act – if a person does not have documents to prove their citizenship or acquire the

2019 Act, individuals must be Hindu, Sikh, Buddhist, Jain, Parsi, or Christian who entered India on or before December 31, 2014, and from Afghanistan, Bangladesh or Pakistan.¹⁵⁷

The 2019 Act adds a third layer to the complexities of Indian citizenship law. This is because first, one must look at the entire set of laws governing Indian citizenship law; second, identify if they can be categorised as illegal migrants; and third, identify if they can be exempt from such classification as an illegal migrant under the 2019 Act based on, *inter alia*, religious identity. If one falls within the ambit of the 2019 Act, they will not be an illegal migrant and hence not be disqualified from Indian citizenship.¹⁵⁸ However, persons ineligible under the 2019 Act, as the Sri Lankan Tamils, are disqualified from acquiring Indian citizenship.¹⁵⁹

Numerous scholars have levelled severe criticism against the validity of the 2019 Act.¹⁶⁰ Further, several petitions have been lodged before Indian courts, raising crucial questions like the constitutionality of the 2019 Act,¹⁶¹ federalism,¹⁶² and police brutality at “anti-CAA” protests¹⁶³ emanating from

requisite visas or LTVs, how can they prove their nationalities or religion? as in Nizam Pasha, ‘OPINION | Six Claims Around CAA-NRC Pushed By the Ruling Party Which are Far From the Truth’ (*News18*, 31 December 2019) <<https://www.news18.com/news/opinion/opinion-six-claims-around-cao-nrc-pushed-by-the-ruling-party-which-are-far-from-the-truth-2438377.html>> accessed 28 July 2021.

¹⁵⁷ 2019 Act, s 2; similarly, individuals who meet the criteria need to fulfil only 5 years of residence to naturalise as Indian citizens instead of 11 years in the ordinary course in the path to Indian citizenship as in 2019 Act, s 6.

¹⁵⁸ Shaul Gabbay, ‘India’s Muslims and Hindu Nationalism’ [2020] 8 *International Journal of Social Science Studies* 51.

¹⁵⁹ 1955 Act, s 3, s 5, s 6.

¹⁶⁰ A detailed discussion is beyond the scope of this paper; to name a few, Jayal (n 23); Jayal (n 27); Jayal (n 27); Bhatia (n 51); Irfan Habib, ‘CAA-NRC and its Misleading Historical Context’ *The Indian Express*, 2 January 2020 <<https://indianexpress.com/article/opinion/columns/cao-nrc-and-its-misleading-historical-context-6196201/>> accessed 28 July 2021; Ramachandra Guha, ‘Why the CAA is Illogical, Immoral and Ill-timed, Writes Ramachandra Guha’ (*Hindustan Times*, 12 January 2020) <<https://www.hindustantimes.com/columns/why-the-cao-is-illogical-immoral-and-ill-timed-opinion/story-AwBFkNxmDQ4vPVIar6iJJ.html>> accessed 28 July 2021.

¹⁶¹ Bhatia (n 25); Chandrachud (n 27); Bhat (n 27); Desai (n 25); Poddar (n 27); Varghese and Narasappa (n 27).

¹⁶² SCC Observer, ‘The State of Kerala v Union of India’ (2020) <<https://www.scobserver.in/court-case/kerala-cao-suit>> and <https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/1216/Kerala_CAA_OS.pdf> accessed 28 July 2021.

¹⁶³ Bharat Bhushan, ‘Citizens, Infiltrators, and Others: The Nature of Protests Against the Citizenship Amendment Act’ [2021] 120 *South Atlantic Quarterly* 201; *Firstpost*, ‘Full Text: 10,000 Academics, Members of Civil Society Sign Petition to Protest Police Action at Jamia Millia, Curfew at AMU’ (Firstpost, 18 December 2019) <<https://www.firstpost.com/india/full-text-10000-academics-members-of-civil-society-sign-petition-to-protest-police-action-at-jamia-millia-curfew-at-amu-7796171.html>> accessed 28 July 2021; Betwa Sharma, ‘Two Months On, CAA Protesters Fight Public Apathy as Police Brutality Continues’ (*Huffpost*, 13 February 2020) <<https://www.huffpost.com/archive/in/entry/>>

the implementation of the 2019 Act.¹⁶⁴ Despite the propensity of backlash, curiously enough, the SC has been dragging its feet in hearing the petitions regarding the 2019 Act.¹⁶⁵ Most significantly, the SC has refused to place a stay on the 2019 Act before allowing the Central Government to provide a response.¹⁶⁶

One of the key questions critics level against the 2019 Act is its selective protection to specific groups.¹⁶⁷ Although the ostensible intent of the 2019 Act is to protect refugees fleeing persecution,¹⁶⁸ it does so through several ill-founded assumptions.¹⁶⁹

First, it assumes that religious persecution is confined to countries whose state religion is Islam.¹⁷⁰ In contrast, Sri Lankan Tamils faced religious persecution in a non-Islamic state.¹⁷¹ It also seems to believe that only Islamic countries engage in persecution, especially religious persecution. This belief follows the savage-victim-saviour narrative, which portrays India as the saviour for non-Muslims from savage Muslim ‘foreigners’.¹⁷²

caa-protests-jamia-delhi-police_in_5e43b2e5c5b6d0ea38108660> accessed 28 July 2021; Sruthisagar Yamunan, ‘Supreme Court to Tiz Hazari: How the Judiciary Responded to CAA Protests and Police Action’ (Scroll.in, 24 December 2019) <<https://scroll.in/article/947770/supreme-court-to-tiz-hazari-how-the-judiciary-responded-to-caa-protests-and-police-action>> accessed 28 July 2021; Soibam Singh, ‘Independent Inquiry Sought into Police Brutality on Jamia Students’ (*The Hindu*, 4 August 2020) <<https://www.thehindu.com/news/cities/Delhi/independent-inquiry-sought-into-police-brutality-on-jamia-students/article32271993.ece>> accessed 28 July 2021.

¹⁶⁴ *Mohd. Aman Khan v Union of India*, 2020 SCC OnLine All 1; *Rajat Gangwar v State of UP* 2019 SCC OnLine All 5792; *Kathija Bi v State*, CrI. O.P. No. 5219 of 2019 (18 March 2021); *Akhil Gogoi v National Investigation Agency*, 2021 SCC OnLine Gau 290; *Amit Sahni v Commissioner of Police*, 2021 (217) AIC 154; *Devangana Kalita v Delhi Police* 2020 SCC OnLine Del 867; *Firoz Khan v State (NCT of Delhi)*, 2020 SCC OnLine Del 1694; *Indian Union of Muslim League v Union of India*, Writ Petition C1470/2019 (22 January 2020).

¹⁶⁵ Apoorva Mandhani, ‘CAA Case Comes up Just Thrice in 1 Year in SC Despite 140 Pleas, Including from UN Body’ (*The Print*, 6 January 2021) <<https://theprint.in/judiciary/caa-case-comes-up-just-thrice-in-1-year-in-sc-despite-140-pleas-including-from-un-body/579837/>> accessed 28 July 2021.

¹⁶⁶ *Indian Union of Muslim League* (n 164).

¹⁶⁷ Chakrabarty (n 28); Ahmed argues that the 2019 Act fails the doctrine of manifest arbitrariness under Article 14 as in Farrah Ahmed, ‘Arbitrariness, Subordination and Unequal Citizenship’ [2020] 4 *Indian Law Review* 121.

¹⁶⁸ Report of the Joint Committee on the Citizenship (Amendment) Bill 2016 (2019) (‘Joint Committee Report’); 2019 Act, Statement of Objects and Reasons.

¹⁶⁹ Jayal (n 23); Poddar (n 27); Jayal (n 27); Bhatia (n 25); Badri Raina, ‘Citizenship Amendment Bill: A Warning Bell for the Republic’ (*The Wire*, 9 December 2019) <<https://thewire.in/reigion/citizenship-amendment-bill-hindu-rashtra>> accessed 28 July 2021.

¹⁷⁰ Namely, Afghanistan, Pakistan and Bangladesh; Kannan (n 25); Raina (n 169).

¹⁷¹ Deirdre McConnell, ‘A Long History of Tamil Persecution’ (*Colombo Telegraph*, 29 December 2016) <<https://www.colombotelegraph.com/index.php/a-long-history-of-tamil-persecution/>> accessed 28 July 2021.

¹⁷² Makau Mutua, ‘Savages, Victims and Saviours: The Metaphor of Human Rights’ [2001] 42 *Harvard International Law Journal* 201.

Second, the 2019 Act assumes the absence of intra-religious persecution. For instance, Ahmediyyas and Balochis are Muslims but face religious persecution in Pakistan.¹⁷³ Third, unlike the 1951 Convention,¹⁷⁴ the 2019 Act identifies persecution solely on religion.¹⁷⁵ However, South Asia is rife with other forms of persecution as well; for instance, Tibetans in China faced political persecution.¹⁷⁶ Unsurprisingly, the Indian state has hitherto failed to convince the entire populace regarding the utility of the 2019 Act, given its inability to address the needs of refugee groups who are excluded from its ambit.¹⁷⁷

Finally, the LTV Guidelines were amended to mirror the 2019 Act, defining eligible applicants along religious lines.¹⁷⁸ Interestingly, the LTV Guidelines also create additional benefits to eligible applicants like allowances to move freely in most parts of the country,¹⁷⁹ get Permanent Account Number cards (required for Indian income tax purposes) and Aadhar numbers (necessary for identification purposes and availing government as well as certain private services).¹⁸⁰ Most crucially, possession of LTV allows the holder to apply for Indian citizenship under the 1955 Act.¹⁸¹

The Ministry of Home Affairs claims that under its policy, groups like Sri Lankan Tamils who have been left out of the LTV Guidelines can claim

¹⁷³ Iftikhar Malik, 'Religious Minorities in Pakistan' (Minority Rights Group International 2002) <<https://www.refworld.org/pdfid/469cbfc30.pdf>> accessed 28 July 2021.

¹⁷⁴ Chandrachud highlights that best international practices for recognising refugees follow the 1951 Convention, which asks states to recognise refugees irrespective of 'race, religion, nationality or membership of a particular social group or political opinion'. Assuming India had been a signatory to the 1951 Convention, it would have fallen foul of the requirement to not make a religion-based classification for refugees as in Chandrachud (n 27).

¹⁷⁵ In this vein, Chandrachud compellingly argues that the 2019 Act also contravenes Article 14 due to its religion-based classification as in Chandrachud (n 27).

¹⁷⁶ Ramachandra ha, 'Home and the World' in Ramachandra Guha, *India After Gandhi* (Picador 2008); Free Tibet, 'Tibet's history' <<https://freetibet.org/about/history>> accessed 28 July 2021.

¹⁷⁷ Suparna Chaudhry, 'India's New Law may Leave Millions of Muslims without Citizenship' (The Washington Post, 13 December 2019) <<https://www.washingtonpost.com/politics/2019/12/13/indias-new-law-may-leave-millions-muslims-without-citizenship/>> accessed 28 July 2021.

¹⁷⁸ Long-Term Visa Guidelines, s 1(A) (The new requirements make the following categories eligible for LTV: first, Hindu, Sikh, Buddhist, Jain, Parsi, or Christian individuals from Afghanistan, Bangladesh or Pakistan. Second, Pakistani or Bangladeshi women and Afghanistan nationals married to Indian nationals and staying in India. Third, Indian origin women with Pakistani, Bangladeshi or Afghanistan nationality and without supporting male members wishing to return due to widowhood or divorce. Fourth, cases of extreme compassion.)

¹⁷⁹ Free movement does not include movement in protected, restricted and cantonment areas as in Long-Term Visa Guidelines, s 1 (H)(b).

¹⁸⁰ Long-Term Visa Guidelines, s 1 (H)(a), s 1 (H)(b)

¹⁸¹ Form IC-5(1)(A), Form IC-5(1)(B), Form IC-5(1)(C), Form IC-5(1)(D), Form IC-5(1)(E), Form IC-5(1)(F), Form IC-5(1)(G); Citizenship Rules 2009, s 4, s 5, s 6, s 7, s 8, s 9, s 10.

refugee status and apply separately for an LTV.¹⁸² However, granting of LTVs is wholly subject to government discretion, which means the absence of certainty of procedure or a guaranteed right for applicants. Further, the number of LTVs granted per year remains unclear, since different ministries have released inconsistent figures over time.¹⁸³ Consequently, we do not have much information on the policy and practice of the government's considerations while granting LTVs. Thus, the LTV Guidelines provide little relief to refugees who are not categorically included within their scope, including Sri Lankan Tamils.

C. The question of *jus sanguinis* citizenship

1. *Jus sanguinis* as an alternate basis for Indian citizenship

The trajectory of amendments discussed above shows the growing importance of one's status as an illegal migrant in acquiring Indian citizenship. There are two noteworthy facts about this transition: first, a move towards examining the citizenship of a person's ascendants; and second, a departure from religious-neutrality to actively using religion for citizenship determination.¹⁸⁴ Both these prongs indicate a shift in Indian citizenship law towards a *jus sanguinis* model.¹⁸⁵ To contextualise the repercussions of a potential *jus sanguinis* citizenship in India, it is imperative to understand the pitfalls of *jus sanguinis* along with the character of Indian citizenship law – is it *jus soli* or *jus sanguinis* in nature?

At the outset, it is useful to understand the differences between the two models. Numerous scholars argue that *jus sanguinis* is an exclusionary form of citizenship, whereas *jus soli* is an inclusive model.¹⁸⁶ This is because *jus soli*

¹⁸² Joint Committee Report (n 168); Lok Sabha Unstarred Question No. 2623 (2 August 2016) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2016-pdfs/ls-020816/2623%20E.pdf>>; Lok Sabha Unstarred Question No. 6307 (5 May 2015) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2015-pdfs/ls-050515/6307.pdf>>; Press Information Bureau *PIB* 'Law for Refugees in India' (6 August 2014) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=108152>> accessed 28 July 2021.

¹⁸³ Vijaita Singh, 'Figures for Long-term Visas to Minorities don't Add Up' (*The Hindu*, 20 January 2019) <<https://www.thehindu.com/news/national/figures-for-long-term-visas-to-minorities-dont-add-up/article26043881.ece>> accessed 28 July 2021.

¹⁸⁴ Jayal (n 23); Jayal (n 27); Anupama Roy, 'CAA 2019 and the Spectre of National Citizenship' (*The Leaflet*, 25 January 2021) <<https://www.theleaflet.in/caa-2019-and-the-spectre-of-national-citizenship/#>> accessed 28 July 2021.

¹⁸⁵ Waas (n 39).

¹⁸⁶ David Weissbrodt, 'The human rights of stateless persons' [2006] 28 *Human Rights Quarterly* 245; other scholars highlight that there is no necessary connection between *jus sanguinis* citizenship and statelessness as in Kristin Collins, 'Abolishing Ius Sanguinis Citizenship: A Proposal too Restrained and too Radical' in Rainer Bauböck (ed) *Debating Transformations of National Citizenship*, IMISCOE Research Series (2018); Rainer Bauböck, 'Ius Filiationis: A defence of Citizenship by Descent' in Rainer Bauböck (ed) *Debating Transformations of National Citizenship*, IMISCOE Research Series (2018).

confers citizenship on the simple fact of birth on a territory.¹⁸⁷ In contrast, *jus sanguinis* may exclude persons born in or residing in the territory of a state who lack shared ethnic characteristics or fail to draw their lineage from that state.¹⁸⁸ In this way, persons ineligible for want of ethnic features or lineage in States following *jus sanguinis* are unable to claim citizenship in such States.¹⁸⁹ Alternatively, if States transition from *jus soli* to *jus sanguinis*, persons initially eligible for citizenship under *jus soli* may lose their citizenship under *jus sanguinis*.¹⁹⁰ Further, persons rendered stateless under such *jus sanguinis* law will reproduce statelessness for their descendants, creating ‘multigenerational statelessness’.¹⁹¹ Thus, *jus sanguinis* citizenship has a powerful potential to exacerbate statelessness.

Indian citizenship is experiencing all of these phenomena – the law is shedding *jus soli* character in favour of *jus sanguinis* as evinced by the amendments of 2004, 2015 and 2019.¹⁹² As a result, children of parents who are stateless or doubtful citizens have been rendered stateless will probably pass on their lack of citizenship to the next generation, creating multigenerational statelessness. Further, refugees and stateless persons who are not exempt from being categorised as illegal migrants under the 2019 Act will continue to live without citizenship.¹⁹³

India’s Constituent Assembly was cognisant of the pitfalls of *jus sanguinis* as well, and intentionally eschewed *jus sanguinis* in favour of *jus soli*,¹⁹⁴ hop-

¹⁸⁷ Fitzgerald (n 32); Waas (n 39).

¹⁸⁸ Weissbrodt (n 186).

¹⁸⁹ Weissbrodt (n 186); Carol Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ [1998] 10 International Journal of Refugee Law 156.

¹⁹⁰ Jayal (n 34); Shachar (n 35); Lee (n 37); Batchelor (n 189).

¹⁹¹ Kakarala and others (n 8).

¹⁹² Jayal (n 34); as in Part III (a).

¹⁹³ Kakarala and others (n 8); Jayal (n 22); Jayal (n 34), Rahman (n 118); Soumya Shankar, ‘India’s citizenship law, in tandem with national registry, could make BJP’s discriminatory targeting of Muslims easier’ (*The Intercept*, 30 January 2020) <<https://theintercept.com/2020/01/30/india-citizenship-act-caa-nrc-assam/>> accessed 28 July 2021.

¹⁹⁴ Jayal (n 23); Jayal (n 27); Bhatia (n 51); Roy (n 122); Alladi Krishnaswami Ayyar and Sardar Vallabhbhai Patel, Constituent Assembly Debates Volume III p 3.18.158, p 3.18.183 (29 April 1947) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-29> accessed 28 July 2021; K. Santhanam, Constituent Assembly Debates Volume VII p 7.50.30 (6 November 1948) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-06> Jawaharlal Nehru and Alladi Krishnaswami Ayyar, Constituent Assembly Debates Volume IX p 9.117.34, p 9.117.47 (12 August 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-12> accessed 28 July 2021; Ajit Prasad Jain, Constituent Assembly Debates Volume XI p 11.162.164 (22 November 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-22> accessed 28 July 2021; Kamaleshwari Prasad Yadav, Constituent Assembly Debates Volume XI p 11.165.295 (25 November 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25> accessed 28 July 2021; Joya Chatterjee, ‘South Asian Histories of Citizenship, 1946-1970’ [2012] 4 The Historical Journal 55.

ing to lay the foundation of a pluralist, secular democracy.¹⁹⁵ This decision is interesting when juxtaposed with colonial imaginations that pitted Hindus against Muslims as separate nations; an idea that crystallised in the ‘two-nation’ theory¹⁹⁶ most famously propagated by M.A. Jinnah.¹⁹⁷

Building on the two-nation theory that India was a ‘homeland for Hindus’,¹⁹⁸ some Constituent Assembly members argued for Indian citizenship to favour Hindus and Sikhs.¹⁹⁹ The ‘homeland for Hindus’ notion has seen a modern resurgence in independent India, most strikingly with the rise to power of the Bharatiya Janata Party.²⁰⁰ As a result, recent governmental policies, including the reconceptualisation of citizenship law, have sought to address otherwise “neglected” Hindu interests.²⁰¹

¹⁹⁵ Ahmad and Yousuf (n 23); however, several challenges have seriously questioned the ability of Indian democracy to accommodate plurality, like movements for self-determination in, *inter alia*, Nagaland, Jammu and Kashmir, Punjab etc. as in Guha (n 176); Sanjib Baruah, *Ethnonationalism in India: A Reader* (OUP 2012).

¹⁹⁶ “‘Two-Nation Theory’” refers to the thesis that Hindus and Muslims in India were two distinct communities that could not coexist within a single state without dominating and discriminating against the other or without constant conflict; it resulted in the 1947 Partition of India and Pakistan’ as in Clinton Bennett, ‘Two-nation Theory’ in Zayn Kassam and others (ed), *Islam, Judaism, and Zoroastrianism: Encyclopedia of Indian Religions* (Springer 2018).

¹⁹⁷ Thapar (n 59).

¹⁹⁸ Thapar argues that determining indigenous populations is a tricky process since the growth of nation-states bounded in territory is a relatively recent phenomenon, including in India as in Thapar (n 59); Elizabeth Seshadri, ‘CAA and the Devaluation of Secular India’ (*The Hindu Centre* 12 February 2020) <<https://www.thehinducentre.com/the-arena/current-issues/article30789891.ecesee>> last accessed 28 July 2021; see generally, Andreas Wimmer and Yuval Feinstein, ‘The Rise of the Nation-state Across the World, 1816-2001’ [2010] 75 *American Sociological Review* 764.

¹⁹⁹ Gurmukh Singh Musafir, Constituent Assembly Debates Vol VII p 7.51.117 (8 November 1948) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-08> accessed 28 July 2021; P.S. Deshmukh, Constituent Assembly Debates Vol IX p 9.116.34 (11 August 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-11> accessed 28 July 2021.

²⁰⁰ Jaffrelot (n 1); Jayal (n 23); Jayal (n 27); M. Reza Pirbhai, ‘Hindutva and the Meaning of Modernity’ (*Berkley Forum*, 9 March 2020) <<https://berkeleycenter.georgetown.edu/responses/hindutva-and-the-meaning-of-modernity>>; Angana Chatterji, ‘Citizenship Laws and the Nazification of India’ (*Berkley Forum*, 9 March 2020) <<https://berkeleycenter.georgetown.edu/responses/citizenship-laws-and-the-nazification-of-india>> accessed 28 July 2021; Satish Misra, ‘Understanding the rise of the Bharatiya Janata Party’ ORF Online (2018) <https://www.orfonline.org/wp-content/uploads/2018/09/ORF_Issue_Brief_258_BJP_N.pdf> accessed 28 July 2021; Ashutosh Varshney, India’s Watershed Vote: Hindu Nationalism in Power?, *Journal of Democracy*, Vol 25, No 4 (2014) accessed 28 July 2021.

²⁰¹ Jayal (n 23); Jayal (n 27); Milan Vaishnav, ‘Religious Nationalism and India’s Future’ Carnegie Endowment for International Peace (2019); Usama Hameed, ‘Footprints of Fascism in India: Implications for Local Muslims’ [2020] 17 *Policy Perspectives* 27; Kalim Siddiqui, ‘Hindutva, Neoliberalism and the Reinventing of India’ [2017] 4 *Journal of Economic and Social Thought* 142; Irfan Ahmad, ‘Citizen Amendment Act is Confirmation of India as a Hindu Nation-State’ (*Berkley Forum*, 9 March 2020) <<https://berkeleycenter.georgetown.edu/responses/citizen-amendment-act-is-confirmation-of-india-as-a-hindu-nation-state>> accessed 28 July 2021; Rajshree Chandra, ‘Has India Descended Into a Constitutional Theocracy?’ (*The Wire*, 17 December 2020) <<https://thewire.in/government/>

Some revisionist arguments to Indian citizenship, most prominently by Abhinav Chandrachud,²⁰² have attempted to provide an explanation to the modern resurgence of the ‘homeland for Hindus’ idea. Chandrachud submits that the 2019 Act is merely an extension of the Constituent Assembly’s debates at the time of and following Partition.²⁰³ In a nutshell, Chandrachud argues that the permit system²⁰⁴ enshrined in Articles 6 and 7 of the Indian Constitution created differential pathways to Indian citizenship for Hindu and Muslim

india-hindutva-constitutional-theocracy-cao> accessed 28 July 2021; Adnan Qaiser, ‘The Hindutva Itch: India’s Perverse Strategic Thought’ (South Asia Journal, 1 September 2018) <<http://southasiajournal.net/the-hindutva-itch-indias-perverse-strategic-thought/>> accessed 28 July 2021; Angana Chatterji and others, *Majoritarian State: How Hindu Nationalism is Changing India* (Harper Collins 2019); Martha Nussbaum, *The Clash Within: Democracy, Religious Violence, and India’s Future* (Harvard University Press 2009); Irfan Habib, ‘The Envisioning of a Nation: A Defence of the Idea of India’ [1999] 27 *Social Scientist* 18; Partha Mukherji, ‘The Indian State in Crisis? Nationalism and Nation-Building’ [1994] 43 *Sociological Bulletin* 21; Human Rights Watch, *Violent Cow Protection in India: Vigilante Groups Attack Minorities* (2019); Dilip Mandal, ‘Whose Ram Raja does Ayodhya temple bring — Gandhi’s or Modi’s? Ambedkar Can Answer’ (The Print, 5 August 2020) <https://theprint.in/opinion/ram-rajya-ayodhya-bhoomi-pujan-temple-gandhi-modi-ambedkar/475024/> accessed 28 July 2021; Jeffrey Gettleman and Maria Abi-Habib, ‘As Protests Rage on Citizenship Bill, is India Becoming a Hindu Nation?’ (*The New York Times*, 16 December 2019) <<https://www.nytimes.com/2019/12/16/world/asia/india-citizenship-protests.html>> accessed 28 July 2021; Flavia Agnes, ‘The Abuse of India’s Triple Talaq Verdict’ (*Al Jazeera*, 4 September 2017) <<https://www.aljazeera.com/opinions/2017/9/4/the-abuse-of-indias-triple-talaq-verdict>> accessed 28 July 2021; Andrew Whitehead, ‘Article 370: India’s Move on Kashmir will Fuel Resentment’ (*BBC*, 5 August 2019) <<https://www.bbc.com/news/world-asia-india-49233608>> accessed 28 July 2021.

²⁰² Chandrachud (n 27); Abhinav Chandrachud, ‘The Origins of Indian Citizenship’ (*Bloomberg Quint*, 26 December 2019) <<https://www.bloombergquint.com/opinion/citizenship-amendment-act-the-unsecular-origins-of-indian-citizenship-by-abhinav-chandrachud>> accessed 28 July 2021.

²⁰³ Chandrachud (n 27); Bhatia (n 51); Ram (n 30); Hassan (n 133); Samrat Choudhary, ‘North East: NRC, CAA Open Healing Wounds’ (*National Herald*, 13 December 2019) <<https://www.nationalheraldindia.com/india/north-east-nrc-cao-open-healing-wounds>> accessed 28 July 2021; Mohamed Zeeshan ‘The Completion of Partition’ (*Deccan Herald*, 28 December 2019) <<https://www.deccanherald.com/opinion/main-article/the-completion-of-partition-789345.html>> accessed 28 July 2021; Kamran Siddiqui, ‘Indian Muslims are Partially Responsible for their Own Deprivation’ (*The Quint*, 21 February 2020) <<https://www.thequint.com/voices/opinion/indian-muslims-partition-secular-cao-nrc-protests>> accessed 28 July 2021.

²⁰⁴ The permit system was created at the western border for migrants coming to India from Pakistan. The intent behind the system were concerns over the property left behind by Muslim migrants because in their initial move to Pakistan, the Indian government had re-allocated the property to new refugee settlers. The Indian government worried that if the original Muslim inhabitants were allowed to return and reclaim their property, conflict would ensue between them and the new occupants. To specifically discourage these Muslim migrants from returning from Pakistan, a “permanent resettlement permit” was introduced, which was one of the five kinds of permits as in Chandrachud (n 27); Joya Chatterjee, ‘Partition Studies: Prospects and Pitfalls’ [2014] 73 *Journal of Asian Studies* 309; Manav Kapur, ‘Evacuee or Citizen? Minority Citizenship and Property Rights in 1950s India’ (*The Leaflet*, 28 January 2021) <<https://www.theleaflet.in/evacuee-or-citizen-minority-citizenship-and-property-rights-in-1950s-india/#>> accessed 28 July 2021; Jawaharlal Nehru, Constituent Assembly Debates Vol IX p 9.117.31 (12 August 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-12> accessed 28 July 2021.

migrants; specifically, the permit system allowed easier access to Hindus but created a disadvantage for Muslim migrants seeking Indian citizenship.²⁰⁵ He highlights that the differential requirements for citizenship was not an accident but an intentional design – the Constituent Assembly was aware of, and actively used, the difference in faith among migrants to encourage citizenship for Hindus and discourage it for Muslims.²⁰⁶

Thus, although the text of the Indian Constitution does not mention religion in terms of citizenship requirements, its consequence was to develop a divergent approach for Hindu and Muslim migrants. There was no formal discrimination based on religion, but the result of the law was the creation of a major disadvantage for Muslim refugees.²⁰⁷

In this backdrop, as Niraja Gopal Jayal argues, Indian citizenship law has experienced a tension in conceiving itself as *jus soli* or *jus sanguinis* beginning from Constituent Assembly debates around and arising out of Partition.²⁰⁸ This tension has reproduced itself in independent India through the slew of amendments that seek to topple *jus soli* and replace it with *jus sanguinis* citizenship – primarily by making Indian citizenship increasingly contingent on the applicant not being an illegal migrant.²⁰⁹

N. Ram and Gautam Bhatia caution against overemphasising revisionist arguments that try to characterise Indian citizenship as inherently non-secular

²⁰⁵ Muslim migrants were required to obtain a permanent resettlement permit whereas Hindu migrants were not. Acquiring a permanent resettlement permit was extremely arduous because it involved several steps of state scrutiny including disclosure of faith, details of property in India, and subject to veto by the Indian state where the Muslim migrant wished to resettle as in Chandrachud (n 27); Chatterjee (n 194); Chatterjee (n 204); Influx from West Pakistan (Control) Ordinance 1948; Influx from West Pakistan (Control) Act 1949; Permit System Rules 1948, r 3, r 10, r 16, Appendix II (C).

²⁰⁶ Chandrachud (n 27); the reason behind this intentional design was the issue of ‘evacuee’ property as in Chatterjee (n 204); Vazira Zamindar, *The Long Partition and the Making of Modern South Asia* (Columbia University Press 2007); Sarah Ansari, *Life After Partition: Migration, Community and Strife in Sindh 1947 – 1962* (OUP Pakistan 2005).

²⁰⁷ Chandrachud (n 27); in contemporary times, this consequence-based test has been recognised in the context of Article 15 in *Navtej Singh Johar v Union of India* (2018) 10 SCC 1. The SC held that it is not only whether a law bases its discrimination on one of the grounds mentioned in Article 15, for instance, sex. Instead, the real test is whether the effect of such classification results in discrimination. Using this idea, we can examine Articles 6 and 7 through their effects – creating differential pathways to citizenship based on religion and creating a disadvantage for Muslim migrants. This consequence-based test has also been discussed in *Rani Raj Rajeshwari Devi v State of UP* 1954 SCC OnLine All 90 : AIR 1954 All 608; Gautam Bhatia, ‘Sex discrimination: Anuj Garg and the anti-stereotyping principle’ in Gautam Bhatia *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India 2019).

²⁰⁸ Jayal (n 23); Jayal (n 27).

²⁰⁹ Jayal (n 23).

and non-discriminatory.²¹⁰ They concede that the ‘homeland for Hindus’ arguments were voiced in the Constituent Assembly and that the permit system has unsecular foundations,²¹¹ but remind us that the ultimate form of Indian citizenship which the Constituent Assembly ultimately adopted was birth-based and non-discriminatory.²¹² Further, they highlight that the Partition was an exceptional moment of determining citizenship, which should not be used as a bright-line test for determining contemporary Indian citizenship.²¹³

In particular, Bhatia argues that Chapter II should be read in conjunction with constitutional provisions like equality, non-discrimination, safeguarding of minority rights, and secularism.²¹⁴ For Ram and Bhatia, then, Indian citizenship does, has and will continue to signify a pluralist and secular form of citizenship.²¹⁵

The inquiry into religious identity and descent as spearheaded by the ‘illegal migrant’ question in citizenship law promises to create, or deepen, rifts in India. It creates a precarious situation for persons belonging to religious minorities, revives a ‘homeland for Hindus’ notion of India and places the rights of its resident refugees and stateless persons at risk. Thus, it is imperative for India to remind itself of the pluralist and secular ideals it was born with, particularly for determining Indian citizenship. Although there have been disagreements over whether *jus soli* or *jus sanguinis* form the rightful foundations of Indian citizenship, it is imperative for us to advocate and practice for a *jus soli*-based Indian citizenship; this is because *jus soli* complements the plurality of India as a nation, and protects persons born in its soil irrespective of their parents’ citizenship status. Thus, stateless persons like Sri Lankan Tamil refugees can acquire citizenship through a model based on *jus soli* citizenship.²¹⁶

²¹⁰ Bhatia (n 51); Ram (n 30); similarly, Shadan Farasat, ‘Framers Put Forth a Plural, Secular Basis for Citizenship’ (*Hindustan Times*, 23 January 2020) <<https://www.hindustantimes.com/india-news/framers-put-forth-a-plural-secular-basis-for-citizenship/story-d2jdwOt9IE4IxKey-5lZC3J.html>> accessed 28 July 2021.

²¹¹ Dr Ambedkar noted that the citizenship provisions had been subject to prolonged debate, ‘I do not think that any other article has. given the Drafting Committee such a headache as this particular article’ in Constituent Assembly Debates Vol IX (10 August 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-08-10> accessed 28 July 2021.

²¹² .Ram (n 30); Bhatia (n 51); Rochana Bajpai, *Why Did India Choose Pluralism? Lessons from a Postcolonial State*, Accounting for Change in Diverse Societies (2017).

²¹³ Ram (n 30); Bhatia (n 51).

²¹⁴ Bhatia (n 153); Constitution of India 1950, Preamble, Part III.

²¹⁵ Ram (n 30); Bhatia (n 51).

²¹⁶ Discussed *infra* in Part IV.

2. *Right to have rights and jus sanguinis citizenship for Sri Lankan Tamils*

The question that remains unanswered now is: has the shift towards *jus sanguinis* citizenship in India caused Sri Lankan Tamil refugees to realise Arendt's conception of the right to have rights? This section attempts to answer this question in the context of Camp-Refugees.²¹⁷

At first glance, it seems that the right to have rights does not apply to the citizenship status of Camp-Refugees. First and most significantly, Camp-Refugees hold a profound cultural and linguistic affinity with the Indian population of Tamil Nadu. Nasreen Chowdhory argues that through this sense of "belonging"²¹⁸ with the host population, Camp-Refugees can claim India's rightful membership.²¹⁹ In other words, Camp-Refugees need not confine themselves to seeking rights based on nationality.

Second, there are growing instances of decoupling rights and citizenship.²²⁰ In today's world, merely belonging to a community may not mean being a politico-legal member and vice versa.²²¹ Anne-Sophie Bentz and Anthony Goreau-Ponceaud specifically illustrate this disaggregation of rights from citizenship by contrasting Camp-Refugees with the urban poor who are formally Indian citizens.²²² Bentz and Goreau-Ponceaud argue that despite formal citizenship, the urban poor receive scant State assistance.²²³ Similarly, D Parthasarathy argues that formal citizenship has not guaranteed substantive rights for marginalised groups like Adivasis and Dalits.²²⁴

²¹⁷ Estate Tamils in India already hold Indian citizenship.

²¹⁸ '...nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual ... is in fact more closely connected with the population of the State conferring nationality than with that of any other State.' as proclaimed in *Liechtenstein v Guatemala* [1955] ICJ Rep 4. This test is also known as the 'genuine link' test or the 'social fact of attachment' to a country as put by the International Court of Justice, see generally Audrey Macklin 'Is it Time to Retire *Nottebohm*?' [2017] 111 *American Journal of International Law Unbound* 492.

²¹⁹ Chowdhory (n 5) ; Chowdhory (n 64).

²²⁰ Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994); Nira Yuval-Davis, *The Politics of Belonging: Intersectional Contestations* (Sage Publications 2011); Seyla Benhabib, "'The right to have rights": Hannah Arendt on the Contradictions of the Nation-state' in Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004).

²²¹ Lamarr (n 35); Brubaker (n 43); Chowdhory (n 64); Soysal (n 220); Yuval-Davis (n 220); Benhabib (n 220); Patrick Balazo, 'Better Must Come: Citizenship and Belonging after Statelessness' [2019] 1 *Statelessness and Citizenship Review* 5

²²² Bentz and Goreau-Ponceaud (n 79).

²²³ *ibid.*

²²⁴ D. Parthasarathy, 'Citizenship (Amendment) Act: The Pitfalls of Homogenising Identities in Resistance Narratives' [2020] 55 *EPW Engage*; this argument has been made specifically in relation to the 2019 Act as well as in Suraj Yengde, 'The Anti-Dalit, Anti-Adivasi Features

In contrast, Camp-Refugees are given considerable benefits by the Central and Tamil Nadu governments. Camp-Refugees receive free medical services, food, water supply, utensils, clothing, electricity and monthly doles.²²⁵ There has been an incremental expansion in benefits over the years such as free colour TVs schemes, allowance for funeral expenses and sports equipment, issuance of driving licence among others.²²⁶ These measures indicate that Camp-Refugees enjoy a relatively decent condition of life in India despite lacking formal citizenship.²²⁷ In this way, Bentz and Goreau-Ponceaud contend that refugee status can be more beneficial than formal citizenship.²²⁸

However, taking a holistic picture of Camp-Refugees' reveals that their lives are much more complicated. First, although government measures seem generous on paper, there are significant gaps in their implementation on the ground.²²⁹ For instance, refugee children were for long confined to camp schools because they did not have certificates to be admitted into regular ones.²³⁰ Although this situation has improved slightly for primary education, seeking higher education continues to be an arduous process for Camp-Refugees.²³¹ In several cases, Camp-Refugees' educational qualifications are not recognised in India.²³² As a result, their employment opportunities are severely restricted, and they must resort to menial jobs or self-employment like shops selling vegetables and everyday items.²³³

There are also numerous instances of corruption in camps, for example, in accessing the rations.²³⁴ It is difficult for poor Camp-Refugees to meet these demands for bribes. Further, living conditions in camps are grim. Poor

of the 2020 Indian Citizenship Amendment Act' (Political and Legal Anthropology Review, 7 September 2020) <<https://polarjournal.org/2020/09/07/the-anti-dalit-anti-adviasi-features-of-the-2020-indian-citizenship-amendment-act/>> accessed 28 July 2021.

²²⁵ Chimni (n 5).

²²⁶ Department of Rehabilitation Tamil Nadu Government, 'Information Handbook under the Right to Information Act 2005' <https://www.tn.gov.in/rti/proactive/public/handbook_rehabilitation.pdf> accessed 28 July 2021.

²²⁷ Chimni notes that factions of the local population resent the Camp-Refugees for this 'preferential' treatment as in Chimni (n 5).

²²⁸ Bentz and Goreau-Ponceaud (n 79).

²²⁹ Irudaya Rajan and C Valatheeswaran, 'Sri Lankan Tamil Refugees in India: Rehabilitation Mechanisms, Livelihood Strategies and Lasting Solutions' [2011] 30 Refugee Survey Quarterly 24.

²³⁰ Chimni (n 7).

²³¹ Vinodh Arulappan, 'With Poor Conditions in Camps, Sri Lankan Tamils Remain Citizens of No-man's Land' (*The Indian Express*, 22 December 2019) <<https://www.newindianexpress.com/states/tamil-nadu/2019/dec/22/with-poor-conditions-in-camps-sri-lankan-tamils-remain-citizens-of-no-mans-land-2079412.html>> accessed 28 July 2021.

²³² Chimni (n 5); *I Jothi Gandhi v Social Welfare Development Office* 2014 SCC OnLine Mad 8861 wherein the petitioner was denied retirement benefits because his employer claimed that the petitioner's Sri Lankan educational documents did not meet the requisite criteria.

²³³ Chimni (n 7); Rajan and Valatheeswaran (n 229).

²³⁴ Chowdhory (n 64).

sanitation and inadequate toilet facilities in camps lead to dirty septic tanks, overflowing drains, common bouts of typhoid, malaria and diarrhoea.²³⁵

Government hospitals are located at a distance and Camp-Refugees notably face discrimination, even if they can reach them,²³⁶ and even then there are no mental health facilities available to them.²³⁷ Finally, camp facilities are unevenly distributed such that some have all amenities whereas others have none.²³⁸ Women are especially vulnerable to sexual assault, loss of material possessions, are tormented by the inability to feed their children, and disproportionately burdened with recreating a familial environment in camps.²³⁹

The most significant want for Camp-Refugees is of addressing their lack of mobility, since they cannot move outside the camps freely.²⁴⁰ Camp-Refugees concede that although the government has undertaken generous measures, they do not have “normal” lives like citizens.²⁴¹ For Camp-Refugees, normalcy would manifest in transport facilities, identity documents or resources to move outside the camps.²⁴² As mentioned above, Indian courts have recognised the government’s unfettered right to restrict refugee movement by echoing the legal positions taken in *Hans Muller* and *Louis de Raedt*. Further, Camp-Refugees have often been suspected of having ties with the LTTE,²⁴³ and been detained in special LTTE camps,²⁴⁴ opening them up to increased interactions with the police, prisons and penalties.²⁴⁵ Picking up from Bentz

²³⁵ *ibid.*

²³⁶ *ibid.*

²³⁷ Neeraja Sanmuhathan ‘Tamil Women in the Home Away from Home: The Impact of War Trauma on Psychological Wellbeing’ in Niro Kandasamy and others (ed) *A Sense of Viidu: The (Re)creation of Home by the Sri Lankan Tamil Diaspora in Australia* (Palgrave Macmillan 2020); Miriam George, ‘Sri Lankan Tamil Refugee Experiences: A Qualitative Analysis’ [2013] 6 International Journal of Culture and Mental Health 170.

²³⁸ Chimni (n 5).

²³⁹ Niro Kandasamy, ‘Memory and War: Tamil Women’s Experiences of Sri Lanka’s Civil War’ [2019] 42 Ethnic and Racial Studies 2661; Asha Hans, ‘Sri Lankan Tamil Refugee Women in India’ [1997] 16 Refuge: Canada’s Journal on Refugees 3; Judy Mayotte, *Disposable People? The Plight of Refugees* (Orbis Books 1993).

²⁴⁰ 1946 Act, s 3 (2) (e).

²⁴¹ Chimni (n 5).

²⁴² Chimni (n 5); Chowdhory (n 64).

²⁴³ As in Part II (b).

²⁴⁴ The Tamil Nadu government created special camps to detain LTTE supporters and cadres as in 1946 Act, s 3 (2)(e); *Arulinbathevar* (n 115); *Premavathy* (n 121); *Yogeswari v State of TN* 2003-1-LW(CrI) 352; *Gnanaprakasam v Govt of TN* 2014 SCC OnLine Mad 9001 : AIR 2015 Mad 65; *Manoj v State of TN* 1991 SCC OnLine Mad 605 : 1992 Cri LJ 2053; TNN, ‘7 Refugees Freed from Chengalpet Special Camp’ (*The Times of India*, 29 August 2012) <<https://timesofindia.indiatimes.com/city/chennai/7-refugees-freed-from-Chengalpet-special-camp/articleshow/15909626.cms>> accessed 28 July 2021.

²⁴⁵ *Kalavathy* (n 121); *State v V. Jayachandra*, (1997) 10 SCC 70; *T. Udhayakala v Special Deputy Collector, Mandapam Refugee Camp*, (2018) 2 MLJ (CrI) 129; Sreekumar Kodyath and Sheethal Veetil, ‘Invisible People: Suspected LTTE Members in the Special Refugee Camps of Tamil Nadu’ [2017] 36 Refugee Survey Quarterly 126; Baulah Shekhar and Vijaya

and Goreau-Ponceaud's discussion, mobility, freedom, and normalcy are features that the urban poor, Dalits, and Adivasis enjoy on paper whereas Camp-Refugees do not.²⁴⁶

Additionally, Camp-Refugees enjoy little to no rights compared to Indian citizens. Notable exceptions are Articles 14 and 21 which apply to all persons irrespective of citizenship.²⁴⁷ For instance, Camp-Refugees are not entitled to civil and political rights like voting,²⁴⁸ holding office,²⁴⁹ freedom of speech,²⁵⁰ or equal access to public employment.²⁵¹ Even for socio-economic aspects like housing or food, they remain at the government's mercy, or vulnerable to withdrawal of benefits on account of resource crunches.²⁵²

For instance, in *Gnanaprakasam*,²⁵³ the petitioner was a Camp-Refugee invoking Article 21²⁵⁴ because his children's engineering admission had been rejected. The court responded by saying that educational or other concessions for refugees were at the discretion of the State, which could not be claimed as a matter of right. Further, the court explicitly stated that Camp-Refugees should not try and claim equality of rights with citizens.²⁵⁵

This discussion finds that rights and citizenship are increasingly becoming disaggregated in India. Although ethnic belongingness promises access to some rights through support from the State and the community, the continued significance of formal citizenship lies over the Camp-Refugees since they cannot realise any rights in India. Thus, only formal Indian citizenship seems to promise the secure presence of, and rights for, Camp-Refugees.

Somasundaram 'The Sri Lankan Refugee Crimes and Crisis: Experience and Lessons Learnt from South India' [2019] 2 *Journal of Victimology and Victim Justice*.

²⁴⁶ This discussion does not discount or minimise the hardships that the mentioned groups have experienced in realizing their rights in India, and their socio-political exclusions from the mainstream, and their erasure from public life; the intent is merely to indicate that formal citizenship can help in moving courts for realising rights, and that there is a mismatch of rights with formal citizenship status. For instance, marginalised groups have found limited spaces in mainstream politics through the campaign on the rights to food and to work by claiming these rights by the fact of their citizenship as in Reetika Khera, *Democratic Politics and Legal Rights: Employment guarantee and food security in India*, IEG Working Paper No 327 (2013). See generally, Malischewski (n 13); Nicolas Jaoul and Alpa Shah, *Beyond citizenship: Adivasi and Dalit political pathways in India* [2016] 76 *Focaal: Journal of Global and Historical Anthropology* 3.

²⁴⁷ Constitution of India 1950, art 14, art 21; *Louis De Raedt* (n 120).

²⁴⁸ Representation of the People Act 1951, s 62.

²⁴⁹ Constitution of India 1950, art 58 (1)(a), art 66 (2); art 124 (3); art 217 (2); art 157.

²⁵⁰ Constitution of India 1950, art 19.

²⁵¹ Constitution of India 1950, art 16.

²⁵² Miriam George, 'Sri Lankan Tamil Refugee Experiences: A Qualitative Analysis' [2013] 6 *International Journal of Culture and Mental Health* 170.

²⁵³ *Gnanaprakasam* (n 244).

²⁵⁴ Constitution of India 1950, art 21.

²⁵⁵ *Gnanaprakasam* (n 244).

IV. THE WAY FORWARD FOR INDIAN CITIZENSHIP LAW AND SRI LANKAN TAMIL REFUGEES' CITIZENSHIP

A. Pathways to Indian citizenship for Sri Lankan Tamil refugees

At the outset, this section explores pathways to citizenship in the present scenario wherein Indian citizenship law continues to remain in a state of flux. The contemporary instability in citizenship law has to do with the backlash against the 2019 Act, the SC's decision on the future of the NRC and the FTs, and the potential of legal recognition for stateless persons and refugees in India. Thus, this paper recommends these pathways in the interim period for Camp-Refugees till the government undertakes a holistic overhaul of citizenship law.²⁵⁶

There is no universal route to Indian citizenship for all Camp-Refugees. This section provides pathways which may be explored to cater to the specificities of each group; first, Jaffna Tamils and Estate Tamils,²⁵⁷ and second, camp children.²⁵⁸ In citizenship determination for Camp-Refugees, factors like their nationality, possession of Sri Lankan citizenship and parents' place of birth are relevant.

First, Jaffna Tamils and Estate Tamils were not born in India and cannot claim birthright citizenship.²⁵⁹ Second, most of the members of each group cannot seek citizenship by descent since their parents were Sri Lankan citizens.²⁶⁰ Third, from the date of the enactment of the 2004 Amendment, January 1, 2004, they cannot naturalise or register themselves as citizens because they are considered illegal migrants.²⁶¹ Fourth, they may apply as refugees fleeing religious persecution under the LTV Guidelines at the discretion of the State.²⁶²

²⁵⁶ Further recommendations are discussed *infra* in Part IV (c).

²⁵⁷ First, it is imperative to note the similarities and differences between Estate Tamils and Jaffna Tamils, wherein the most significant difference is that the former are stateless, and the latter are refugees in India. This is because several Jaffna Tamils hold Sri Lankan citizenship on paper, but are refugees in India in light of the religious and linguistic persecution they faced. However, Estate Tamils are divided; some are stateless, and others are Sri Lankan citizens. Despite this difference between refugeehood and statelessness, Indian citizenship requirements for both groups are similar as in Chowdhury (n 64); Shastri (n 69); discussed in detail in part II (b).

²⁵⁸ Since the 'repatriates' already hold Indian citizenship, this paper shall not discuss them.

²⁵⁹ 1955 Act, s 3.

²⁶⁰ 1955 Act, s 4.

²⁶¹ 1955 Act, s 5, s 6; Kakarala and others (n 8); this group includes those who married Indian nationals.

²⁶² Long-Term Visa Guidelines, s 5; for Jaffna Tamils, the persecution is the danger of the civil war, whereas for Estate Tamils, the persecution includes the Ceylon Citizenship Act, 1948 and the civil war.

In considering children born in camps who are presently stateless, it is imperative to note that their claims to birthright citizenship depends on their date of birth.²⁶³ First, those born on or after January 26, 1950, and before July 1, 1987, are Indian citizens.²⁶⁴ Second, those born after July 1, 1987, but before January 1, 2004 are Indian citizens if either parent was an Indian citizen at the time of their birth.²⁶⁵ Similarly, registration of minors as citizens is contingent on their parents being Indian citizens.²⁶⁶ Given that most parents of children born in camps are refugees or stateless persons, it is unlikely that many children will be able to seek citizenship under this route.²⁶⁷

Third, children born after the commencement of the 2004 Amendment must show that neither parent is an illegal immigrant at the time of their birth to claim citizenship.²⁶⁸ Similarly, camp children seeking citizenship through naturalisation or registration must show that they are not illegal migrants.²⁶⁹ As discussed above, Indian law conflates refugees with illegal migrants or foreigners, due to which Camp-Refugees continue to be categorised as foreigners or illegal migrants.²⁷⁰ Since the parents are illegal migrants, the children of these Camp-Refugees will be denied Indian citizenship by birth.²⁷¹ Further, if the children continue to live as illegal migrants in India, they will be disqualified from Indian citizenship by naturalisation or registration.²⁷²

Thus, the *jus sanguinis*-based category of illegal migrants acts as a disqualification from Indian citizenship across the board for Camp-Refugees.²⁷³ In this way, citizenship determination based on *jus sanguinis* results in statelessness, particularly multigenerational statelessness.²⁷⁴

²⁶³ The 1955 Act, unlike the 1961 Convention, does not provide that individuals born in India who would otherwise be stateless are Indian citizens as in 1961 Convention, art 1. Further, neither the 1955 Act nor the 2019 Act provide that a foundling found in a state shall be deemed born in that territory as in 1961 Convention, art 2 as in Kakarala and others (n 8).

²⁶⁴ 1955 Act, s 3 (1) (a); further, see *infra* Part IV (b).

²⁶⁵ 1955 Act, s 3 (1) (b).

²⁶⁶ Citizenship Rules 2009, r 2 (c), r 3, sch I Form I (7).

²⁶⁷ Kakarala and others (n 8); Chandrachud (n 27).

²⁶⁸ 1955 Act, s 3 (1)(c)(ii).

²⁶⁹ 1955 Act, s 5, s 6.

²⁷⁰ Acharya (n 111).

²⁷¹ 1955 Act, s 3 (1)(b), 3 (1)(c).

²⁷² Kakarala and others (n 8); United Nations High Commissioner for Refugees, *The State of the World's refugees: A Humanitarian Agenda* (1997).

²⁷³ Kakarala and others (n 8).

²⁷⁴ Batchelor (n 189).

B. Role of courts in extending Indian citizenship for Sri Lankan Tamil refugees

Rulings by Indian courts on citizenship issues of Camp-Refugees and stateless persons are a mixed bag. However, the role of courts is of paramount importance in charting paths to inclusive citizenship generally, and specifically for Camp-Refugees because the State has unfettered discretion in dealing with these groups under present law.²⁷⁵

First, in *Sasikumar*,²⁷⁶ the Madras High Court (“HC”) held that a Sri Lankan Tamil refugee born in India was a citizen under the 1955 Act since they were born in India on March 10, 1987.²⁷⁷ In a similar vein, the noteworthy *Namgyal Dolkar* decision held that children of Tibetan refugees born in India after January 26, 1950, and before July 1, 1987, are Indian citizens by birth.²⁷⁸

Although these decisions seem like a stride forward for stateless persons’ citizenship in India by the court’s reading, a close reading of Section 3 reveals that the petitioners in *Sasikumar* and *Namgyal Dolkar* were eligible for citizenship by the simple fact of their birth in India. The courts in both cases were tasked with interpreting textbook illustrations of Section 3(1)(a), under which all persons irrespective of all other factors (like the citizenship status of their parents, religion of the applicant) are Indian citizens if they are born in India’s territory after January 26, 1950, and before July 1, 1987.²⁷⁹ Section 3 only complicates requirements for persons born after July 1, 1987, by looking into one

²⁷⁵ As in Part III (a).

²⁷⁶ *M Sasikumar v State of TN* (2009) 5 Mad LJ 167.

²⁷⁷ 1955 Act, s 3 (1) (a).

²⁷⁸ *Namgyal Dolkar v Govt of India, Ministry of External Affairs* 2010 SCC OnLine Del 4548 : (2010)

12 DRJ 749; this stance has been followed by other HCs as well as in Tibetan Review, ‘Third High Court in fourth case upholds Tibetans’ Indian citizenship status’ (15 March 2017) <<https://www.tibetanreview.net/third-high-court-in-fourth-case-upholds-tibetans-indian-citizenship-status/>>; *Namgyal Dolkar* also received executive recognition in 2017 when the government allowed applications from Tibetan refugees born in India after January 26, 1950, and before July 1, 1987, for Indian citizenship as in *Phuntsok Wangyal v Ministry of External Affairs* 2016 SCC OnLine Del 5344 and *Tenzin Passang v Union of India* 2017 SCC OnLine Del 12865 : (2017) 240 DLT 649; however, despite allowance for applications from Tibetan refugees, the bureaucratic procedure was quite technical. Tibetan applicants had to abide by certain conditions, including a prohibition on returning to original refugee settlements and renouncing certain benefits in writing. These conditions discouraged many Tibetans from applying because they wished to visit refugee settlements or could not afford to relinquish governmental benefits. For instance, one refugee had to support her parents financially and could not afford to live outside the refugee settlement. These executive impediments show that court rulings by themselves are not sufficient for refugees to attain citizenship as in Abhinav Seetharaman, ‘Tibetan refugees in India: The challenges of applying for Indian citizenship’ [2020] 54 *Revue d’Etudes Tibétaines* <http://himalaya.socanth.cam.ac.uk/collections/journals/ret/pdf/ret_54_05.pdf> accessed 28 July 2021.

²⁷⁹ 1955 Act, s 3

or both parents' citizenship status.²⁸⁰ Thus far, courts have not provided meaningful relief for stateless persons seeking Indian citizenship.

Second, in *Felix Kaye*,²⁸¹ the Delhi HC declared that the technical status of a person being an illegal migrant does not bar the Indian government from considering their application for citizenship. For the HC, even though a person does not have valid travel documents at the time of entering India or such documents have expired, such person is eligible to apply for citizenship. Similarly, in *Kiran Gupta*,²⁸² and *National Human Rights Commission ("NHRC")*,²⁸³ the courts held that stateless persons have the right to apply for Indian citizenship which should be considered by the government. The striking aspect in *Kiran Gupta* and *NHRC* is the courts' cognisance of the petitioner's statelessness, and attempt to prompt the government to consider their applications for citizenship.

Third, in *Ulaganathan*,²⁸⁴ the Madras HC made two key findings. First, the HC said that keeping refugees in campsites in a prolonged state of statelessness is a contravention of Article 21 of the Indian Constitution. This ruling is in sharp contrast with the line of judgments that allowed the state unquestioned discretion in keeping refugees in camps.²⁸⁵

Second, the court applied *Felix Kaye* specifically in the context of Sri Lankan Tamils. In support of *Felix Kaye*'s ratio, the court stated that there are compelling reasons for relaxing documentation requirements for refugees.²⁸⁶ The court reasoned that a person on the run for their life could not legitimately be expected to adhere to technical provisions of the law. Further, in the court's opinion, if such person has integrated themselves sufficiently in local society, they should be allowed to apply for formal citizenship.²⁸⁷

However, there is an important caveat to the *Ulaganathan* decision, wherein the petitioner was a descendant of Estate Tamils,²⁸⁸ a point the judgment paid special attention to.²⁸⁹ The court based its benevolent finding on the fact that the petitioners' forefathers hailed from Tamil Nadu itself. Thus, while *Ulaganathan*'s application may be reserved for Estate Tamils wishing to apply

²⁸⁰ 1955 Act, s 3 (1)(b), s 3 (1)(c).

²⁸¹ *Felix Kaye v Foreigners Regional Registration Office* 2018 SCC OnLine Del 8212.

²⁸² *Kiran Gupta v State Election Commission* 2020 SCC OnLine Pat 1641.

²⁸³ *National Human Rights Commission v State of Arunachal Pradesh*, (1996) 1 SCC 742 : AIR 1996 SC 1234 ("NHRC").

²⁸⁴ *P Ulaganathan v Govt. of India* 2019 SCC OnLine Mad 8870 : AIR 2019 Mad 246

²⁸⁵ As discussed in Part III (a).

²⁸⁶ *Ulaganathan* (n 284).

²⁸⁷ *ibid.*

²⁸⁸ As in Part II (b).

²⁸⁹ *Ulaganathan* (n 284).

for citizenship, it seems to echo the logic of ethnic belongingness and descent like recent amendments to citizenship laws.²⁹⁰

The positive takeaway that emerges from these rulings is that courts have taken cognisance of statelessness in India, and have tried to nudge the government to proactively consider granting citizenship for such persons.²⁹¹ Further, invoking Article 21 in regard to stateless persons' rights can be a route towards reading in better rights for such groups. In the interim period, courts can crack down on executive actions that prolong statelessness, and cast a positive obligation on the government to reduce statelessness by granting citizenship.

However, the downside to the judgments discussed above is that they have made little headway in meaningfully lifting stateless persons and Camp-Refugees from their plight, and guide them onto a path for acquiring citizenship since they continue to place the decision in the hands of executive discretion. In particular, the Madras HC invoked the idea that courts cannot step beyond the "*lakshmanrekha*"²⁹² and grant citizenship since that was the domain of the government alone.²⁹³

Crucially, courts have also missed opportunities to deliberate on the impact of the determination of whether an applicant or their parents is an illegal migrant on alleviating or exacerbating statelessness. For this purpose, courts can build on *Felix Kaye's* holding that individuals who are on the run for their lives or for similar genuine reasons cannot be expected to provide perfect documentation to apply for Indian citizenship. With this idea in mind, courts can help break down the documentation-heavy citizenship determination process that exists today.

C. The future of Indian citizenship law for stateless persons

It is evident that the abovementioned solutions provide only partial relief for Camp-Refugees specifically, and stateless persons in India generally. In light of this void, this paper proposes a number of general suggestions for the future of Indian citizenship law that the government must give serious consideration. The need for India to take cognisance of its stateless population, including Camp-Refugees cannot be overstated. In recent years, citizenship, or the lack of it, has increasingly become a political weapon.²⁹⁴ When this threat

²⁹⁰ As in Part III.

²⁹¹ Centre for Public Interest Law and others, 'Excerpt: Legal Recognition of Status of Statelessness in India' (*Parichay*, 18 November 2020) <<https://parichayblog.org/2020/11/18/excerpt-legal-recognition-of-status-of-statelessness-in-india/>> accessed 28 July 2021.

²⁹² In modern Indian parlance, Lakshman Rekha is a bright-line rule or test.

²⁹³ *Ulaganathan* (n 284).

²⁹⁴ *Sarker* (n 125).

is combined with the general precarity of being stateless, one can realise the rights deprivation and insecurity that stateless persons in India experience on a daily basis. Following the 1954 Convention and 1961 Convention, India must shoulder the responsibility to reduce and prevent statelessness in its territory.²⁹⁵

At the outset, the government must take cognisance of stateless persons, and compile comprehensive data on the number of stateless persons in India,²⁹⁶ which will not only help the government understand the extent and gravity of the situation, but also facilitate legal professionals, academicians and humanitarian organisations who are willing to offer assistance.²⁹⁷

Second, the legislators must remove the bar on citizenship by registration and naturalisation for persons who may be categorised as illegal migrants.²⁹⁸ This will allow Camp-Refugees, who are otherwise eligible to acquire citizenship through these modes, to overcome the barrier of being an ‘illegal migrant’. Similar success has been noticed through Sri Lanka’s 2003 Grant of Citizenship Act, which perfectly combined legal change with political willingness. This law either granted automatic Sri Lankan citizenship to Estate Tamils or simplified procedures to help them acquire citizenship.²⁹⁹

Third, the legislator must lift the partial bar on citizenship by birth for persons whose parent or parents may be illegal migrants.³⁰⁰ This paper believes that the law must specifically provide that individuals who are born in India

²⁹⁵ *ibid.*

²⁹⁶ Kakarala and others (n 8); in 2014 and 2015, the government admitted that there were 102467 stateless persons and 101896 stateless persons respectively from Sri Lanka in India, whereas in 2021, the government stated that the new figure was 92978 Sri Lankan Tamil refugees as in Lok Sabha Unstarred Question 894 (2014) <<http://164.100.24.220/loksabhaquestions/annex/7/AU894.pdf>>; Lok Sabha Unstarred Question 1360 <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2021-pdfs/LS-09022021/1360.pdf>> accessed 28 July 2021.

²⁹⁷ Sunethra Sathyanarayanan, *Creation of Statelessness in India: an Analysis of the Crisis and the way Forward (The Peninsula, 27 August 2020)* <<https://www.thepeninsula.org.in/2020/08/27/creation-of-statelessness-in-india-an-analysis-of-the-crisis-and-the-way-forward/>> accessed 28 July 2021.

²⁹⁸ Centre for Public Interest Law: Jindal Global Law School, *Securing citizenship: India’s legal obligations towards precarious citizens and stateless persons (2020)*; 1954 Convention, art 32 provides that contracting parties should facilitate the assimilation and naturalisation of stateless persons and to expedite naturalisation proceedings; UNHCR, *Draft articles on the Protection of Stateless Persons and the Facilities for their Naturalisation* (2017).

²⁹⁹ Estate Tamils who had no citizenship documents could make a “general declaration” countersigned by a justice of the peace which would act as proof of citizenship. alternatively, those Estate Tamils with Indian passports could make a “special declaration” to renounce Indian citizenship which was countersigned by the Commissioner for the Registration of Persons of Indian Origin in Colombo and thereby acquire Sri Lankan citizenship since India does not permit dual citizenship as in UNHCR 2015 (n 88).

³⁰⁰ Centre for Public Interest Law: Jindal Global Law School (n 298); 1961 Convention, art 1 provides that contracting states shall grant citizenship to persons born in their territory who would otherwise be stateless.

ought to be citizens if they would otherwise be rendered stateless.³⁰¹ This change will allow camp children born in India to acquire *jus soli* citizenship, which will in turn prevent multigenerational statelessness.

Fourth, India must ratify the 1951 Convention, 1954 Convention, and the 1961 Convention, and also recognise and provide for stateless persons and refugees under domestic law.³⁰² Such a move will provide stronger rights (like the rights to reside or work) and safeguards for refugees and stateless persons, and streamline the process for them to acquire Indian citizenship.³⁰³ In the meantime, the government must approve of applications from these groups under the LTV Guidelines irrespective of, *inter alia*, religion.³⁰⁴

Fifth, the government must move away from its current stance of documentation-heavy determination of citizenship and contingent rights.³⁰⁵ While this change is being effected through amendments, the government must conduct nationwide camps for providing documentation to communities and regions where they may be sparse, and raise awareness of the need for such documentation.³⁰⁶ Further, the State must provide legal aid to stateless persons and refugees who are appearing before courts or FTs in lieu of immigration law cases.³⁰⁷

V. CONCLUSION

This paper has attempted to study the currents of Indian citizenship law by analysing various politico-legal developments in India and around the world, particularly in the aftermath of World War II. In this regard, it has drawn upon Arendt's writings on citizenship, ethnicity and rights, and scrutinised the applicability of her idea of the 'right to have rights' for stateless Sri Lankan Tamil refugees in India.

³⁰¹ UNHCR, *Good Practices in Nationality Laws for the Prevention and Reduction of Statelessness: Handbook for Parliamentarians No. 29* (2018).

³⁰² Kakarala and others (n 8); Centre for Public Interest Law: Jindal Global Law School (n 298); Asha Bangar, 'Statelessness in India', *Statelessness Working Paper Series No 2* (2017).

³⁰³ UNHCR, *Establishing Statelessness: Determination Procedure for the Protection of Stateless Persons: Good Practice Papers Action 6* (2020).

³⁰⁴ 1951 Convention, art 1.

³⁰⁵ The UNHCR recommends reduction of documentation for stateless persons as in UNHCR 2018 (n 301); Mohsin Alam Bhat, 'Stateless and Hyperlegalized' (*The Baffler* 3 January 2020) <<https://thebaffler.com/logical-revolts/stateless-and-hyperlegalized-alam>> accessed 28 July 2021.

³⁰⁶ Centre for Public Interest Law: Jindal Global Law School (n 298); 1945 Convention, art 25 provides that stateless persons shall have access to administrative access in acquiring documents or certification.

³⁰⁷ UNHCR 2020 (n 303); 1954 Convention, art 16 provides for stateless persons' right to access courts.

Indian citizenship law has increasingly shrouded itself in *jus sanguinis* citizenship, which determines insiders and outsiders based on shared ethnic identity. However, *jus sanguinis* as enshrined in amendments to the 1955 Act, and most recently in the 2019 Act, has a powerful potential to exacerbate statelessness, or of preventing India from reducing the incidence of stateless within its territory. One such effect that has been felt immediately with the operation of the 2019 Act is fear among Sri Lankan Tamil refugees that they will continue to live as stateless persons in India indefinitely or face deportation, and beget their lack of citizenship to their future generations.

Caught in a limbo between being insiders based on shared ethnicity with Tamil Nadu, but being outsiders through the lack of formal citizenship, Sri Lankan Tamils in Indian refugee camps have experienced a formidable extent of Arendt's 'right to have rights'. Their experience is a searing reminder of the continued importance of formal citizenship in accessing rights.

Indian citizenship debates have been cognisant of the link between *jus sanguinis*, statelessness and a deterioration into an ethnonationalist state like European nations post World War II. Most prominently, Ajit Prasad Jain said before the Constituent Assembly that "citizenship constitutes the rock foundation of our constitution".

In light of the paramount importance of formal citizenship in ascertaining belongingness, security and rights, this paper has suggested for a forward-looking and inclusive citizenship law for India that is based on *jus soli* as opposed to *jus sanguinis*. Such an approach stands to benefit the stateless persons that India is currently housing, including Sri Lankan Tamils.

To extinguish Sri Lankan Tamils' lack of citizenship, this paper has put forth interim pathways to Indian citizenship under prevailing law, and attempted to cast a stronger obligation on courts to make sharper analyses of the shifts in citizenship law, particularly the requirement of documentation and the repercussions of the introduction of the category of illegal migrant. In the long-term, however, this paper strongly believes in the need for a structural overhaul of citizenship law towards *jus soli*, a simplified naturalisation process, and a rejection of the documentation-heavy determination of citizenship and rights like the NRC process.